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Case No: CL-2012-000028

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 07/10/2019

Before :

THE HONOURABLE MR JUSTICE TEARE

- -

Between :

(1) SUEZ FORTUNE INVESTMENTS LTD **(2) PIRAEUS BANK AE**	**Claimants**
- and -	
(1) TALBOT UNDERWRITING LTD **(2) HISCOX DEDICATED CORPORATE MEMBER LTD** **(3) QBE CORPORATE LTD** **(4) CHAUCER CORPORATE CAPITAL (NO.2) LTD** **(5) MARKEL CAPITAL LTD** **(6) CATLIN SYNDICATE LTD** **(7) APRILGRANGE LTD** **(8) BRIT UW LTD** **(9) NOVAE CORPORATE UNDERWRITING LTD** **(10) GAI INDEMNITY LTD**	**Defendants**

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"BRILLANTE VIRTUOSO"
Peter MacDonald-Eggers QC, Tim Jenns and Richard Sarll (instructed by **Clyde & Co LLP**) for the **Second Claimant**
Jonathan Gaisman QC, Richard Waller QC, Nichola Warrender and Keir Howie (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 18-21, 25-28 February, 4-7, 11-14, 18-20, 25-28 March, 2-4, 8-11, April, 2,3, 7-9, 13-17, 20-23 May, 15-18 and 22-25 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. Shortly before midnight on 5 July 2011 the laden motor tanker BRILLANTE VIRTUOSO was drifting in the Gulf of Aden. She was just within the territorial waters of Yemen and in an area of water where, or close to which, there was in 2011 a risk of attack by Somali pirates. Although drifting, the vessel was in the course of a voyage from Kerch in the Ukraine to China with a cargo of fuel oil. Her master had received instructions by email to embark an unarmed security team of three at Aden to assist the master and crew as the vessel proceeded through the Internationally Recommended Transit Corridor "IRTC" in the Gulf of Aden and then on towards India.

2. The second officer, an able seaman and an additional ordinary seaman on watch observed, initially by radar, and afterwards with the aid of binoculars, a small boat approaching the vessel. There were seven persons on board the small boat, their faces were covered and they were seen to be carrying arms. By the time of the trial, it was common ground that the persons in the small boat were current or former members of the Yemeni Coast Guard or Navy. There is cogent evidence that, when the small boat was off the starboard quarter of the vessel, those on board the small boat said they were "security". The master permitted the armed men in the small boat to board the vessel by means of the pilot ladder.

3. Once on board the armed men required the crew to assemble in the day room. The crew did so; but two armed men took the master to the bridge and another two armed men took the chief engineer to the engine control room.

4. At about 0024 on 6 July one of the armed men told the master to "move to Somalia". At about 0058 the chief engineer started the main engine. The vessel then proceeded, initially in hand steering by the master and then on auto pilot, not on an ESE course

which would be the course required to reach Somalia, but on a SW course towards Djibouti.

5. Just before 0200 there were gun shots on the bridge.

6. At about 0218 an armed man asked the master on the bridge where the safe was and shortly afterwards there were further gun shots.

7. By about 0228 the main engine was stopped; there is a dispute as to precisely when and also as to whether the main engine was stopped by the chief engineer or whether it stopped by reason of an engine problem.

8. Very shortly thereafter, at about 0245, a fire broke out in the purifier room which was a space within the engine room on the third deck. It is common ground that the fire was started by the detonation of an improvised explosive incendiary device (an "IEID") which was brought on board the vessel by the armed men. The fire spread from the purifier room to other parts of the engine room.

9. At 0303 the chief officer, on VHF channel 16, informed the USS PHILIPPINE SEA, one of the naval vessels forming part of the international effort to combat piracy in the area, that the vessel was under attack and that seven pirates were on board. At 0306 the vessel operated the Ship Security Alert System ("SSAS") which informed various authorities (and the vessel's managers) that there had been a piracy incident. The armed men had in fact left the vessel; presumably by means of the small boat in which they had arrived.

10. At 0416 the master, officers and crew, apart from the chief engineer, abandoned ship by means of the starboard lifeboat and boarded the USS PHILIPPINE SEA. A photograph of the vessel at 0543 indicated a large fire in the engine room. The chief engineer remained on board the vessel but at 0744 was taken to the USS PHILIPPINE SEA.

11. A salvage tug and an anti-pollution vessel from Poseidon Salvage, an Aden based salvage company, arrived off the casualty by about 0723. A monitor on the tug cooled parts of the vessel. By 1030 on 6 July 2011 the fire appeared to be dying out.

12. By 1230, notwithstanding the presence of the local salvors, there had been a resurgence of the fire. The fire diminished again in the late afternoon before resurging overnight. By the afternoon of 7 July 2011 it had spread throughout the accommodation and had reached the wheelhouse. By 8 July 2011 the fire was out. The local salvors remained in attendance.

13. On 26 July the casualty was taken in tow to the Persian Gulf by Five Oceans Salvage, an international salvor based in Greece who had secured the LOF (Lloyd's Open Form) contract on 6 July to salve the vessel and cargo, with Poseidon as its sub-contractor. On 21 August the casualty arrived off Sharjah and was inspected. The casualty was then taken to Khor Fakkan where she arrived on 30 August. The cargo was discharged into another vessel by means of an STS (ship to ship) operation which was commenced on 4 September and completed on 27 September.

14. The vessel had been badly damaged by the fire and was later scrapped.

15. These were singular events. There is no known instance either before or after the events which befell BRILLANTE VIRTUOSO of Yemeni armed men boarding a merchant vessel in the Gulf of Aden and requiring her to be taken to Somalia. The events have given rise to a claim on the vessel's war risks policy by Suez Fortune Investments Limited, the vessel's Owner, and by Piraeus Bank AE, the vessel's mortgagee. The vessel's insured value was US$55 million plus US$22 million for disbursements and increased value. Thus the claim is for the sum of US$77 million on the basis that the vessel was a constructive total loss by reason of the damage caused by the fire.

16. In January 2015 Flaux J. determined that the vessel was, as claimed by the Owner and Bank but denied by the Underwriters, a constructive total loss; see [2015] EWHC 42 (Comm).

17. In March 2015 the Underwriters alleged that the fire had been deliberately started with the consent of the Owner, that is, the loss had been caused by the wilful misconduct of the Owner within the meaning of section 55(2)(a) of the Marine Insurance Act 1906.

18. In 2016 the Owner's claim was struck out after Flaux J. had found that Mr. Iliopoulos, the sole or principal beneficial owner of Suez Fortune, had refused, in breach of a court order, to provide his solicitors with an electronic archive of documents and had lied to the court in an attempt to prevent the claim from being struck out; see [2016] EWHC 1085 (Comm).

19. Thus the claim is now continued by the Bank. However, the Bank also had a mortgagee interest insurance policy and the underwriters of that policy have paid out and thereby claim to be subrogated to the Bank's claim. The Bank retains an interest in the claim, being the difference between the sum said to be payable under the war risks policy, some US$77 million, and the sum paid out by the mortgagee interest underwriters, some US$64 million. The dispute in this case is therefore largely between one set of underwriters and another set of underwriters. The war risk underwriters say that the vessel was "scuttled" in the sense that the fire was deliberately started with the agreement of the Owner. The mortgagee interest underwriters, and the Bank, say that it was not.

20. The war risk underwriters' case is that the Owner, in effect Mr. Iliopoulos, with the assistance of the master and chief engineer, arranged for a "fake" attack by pirates and for a fire to be deliberately started on board the vessel. It is said that the local salvor who attended the vessel was party to the conspiracy. The Underwriters say that if they establish such misconduct by the Owner that will bar any claim under the policy by the Bank because the Bank cannot in those circumstances establish a loss by an insured peril.

21. The principal dispute of fact is whether or not BRILLANTE VIRTUOSO was scuttled. The Bank denies that it was. But the Bank maintains that even if the vessel was scuttled it can still recover because it is a co-assured under the policy and does not merely have a claim derived from that of the Owner. The Bank argues that the wilful misconduct of the Owner, if proved, does not prevent it from being able to establish that the cause of the loss was one or more of the insured perils, for example, piracy or persons acting maliciously.

22. Although counsel kept to the trial timetable the trial took many days (in fact 52 days). Long trials where scuttling is alleged are not unusual. Writing in 1985 Tom Bingham, as the author chose to be called, noted that in four such cases tried since 1960 none had lasted less than 40 days; see *The Judge as Juror* reprinted in *The Business of Judging* at p.12. Since 1985 there have been six such trials which have lasted between 14 and 87 days.

23. The Commercial Court encourages trials to be conducted with the minimum of expenditure of cost and time required for a fair and just trial. But trials where "scuttling" is alleged tend to last many days for a number of reasons. First, there is rarely direct evidence of fraud. If a finding of fraud is made it is usually an inference drawn from a large number of matters connected with the event which befell the ship, the events leading up to the casualty, the events after the casualty and the conduct of the owner's business as a shipowner. Accordingly the scope of enquiry, and hence of disclosure, is wide. For the same reason there are many issues to be opened to the judge at the commencement of the trial. Second, the loss of the ship, whether actual or constructive, means that the technical enquiry into the cause of loss is difficult. If the ship has been sunk surveys are either impossible or of limited scope. If the ship has been damaged by fire that very damage impedes the discovery of the cause. Rather than serving to limit the number of technical issues a paucity of evidence tends to expand the number of such issues. Third, the conduct alleged against the owner and, as is usually the case, the master and chief engineer, is a crime. An adverse finding will involve damage to the reputation of the Owner and to the employment prospects of the master and chief engineer. For that reason, their cross-examination cannot, in fairness to them, be rushed or limited. For the same reason the cross-examination of those with relevant evidence to give, whether factual or expert, can be expected to be thorough. Fourth, by reason of the nature of the enquiry the owner (or in this case the Bank) will usually seek to establish a plausible explanation, consistent with the evidence, not only for the loss of his vessel but also for those matters which might otherwise be regarded as suspicious. That can involve much technical investigation and therefore much expert evidence. Fifth, events often occur during the course of the preparation for trial which redefine the focus of the enquiry. In the present case, there were at least two such events. First, after a "whistle-blower" had said that there had been deliberate damage in the engine room to fuel the fire the photographs of the damaged purifier room were examined again. That examination revealed a broken drain cock to a diesel oil service tank in the purifier room. That led to an investigation into when, how and why that damage occurred. The Underwriters said that it was deliberate, whilst the Bank said that it was plausible to suggest that it had been caused by a Boiling Liquid Expanding Vapour Explosion (a "BLEVE"). The investigation involved not only the marine engineering experts but also the fire experts. Thus further reports were required from them after the discovery of the broken drain cock. Second, a large number of photographs of the vessel taken during the fire were provided to the Bank (by Five Oceans Salvage) just four months before the trial began. That led to further reports by the fire experts and to what had been common ground being disputed. Events of this nature, which are not uncommon in alleged scuttling cases, inevitably lead to lengthy cross-examination of the experts.

24. As one of the fire experts commented during his cross-examination, where there is a further round of reports caused by discoveries of new matters or documents, there is a case for a further experts' meeting to establish new common ground and to identify

what remains in dispute. In future cases, when parties agree to a further round of reports or the court is asked to approve a further round of reports it would be sensible to consider whether a further experts' meeting might also be appropriate. It usually will be.

25. The opening skeleton arguments on each side were of some 250 pages and oral openings took 6 days. There were some 36 days of evidence. Although the Court expressed its view that the closing submissions ought not to exceed 500 pages, the closing arguments extended to 642 pages on the part of the Bank (with 2,263 footnoted references) and to 786 pages on the part of the Underwriters (with 5,152 footnoted references). Counsel on each side took 4 days to make their closing submissions. This judgment, though long, is much shorter than counsels' written closing submissions. I have endeavoured to read and consider all of the points made. However, if I were to refer to and comment upon each and every point made by counsel this judgment would be of an intolerable length. The fact that particular points have not been mentioned does not mean that they have not been considered. What I have sought to do is to express my conclusions on the major or fundamental issues which have been debated by the parties and the reasons which have led me to my decision. I have thus endeavoured to explain "why" I have reached my decision, to identify and record those matters which were "critical" to my decision and to describe "the building blocks of the reasoned judicial process" which led to my decision including in particular the evidence which has been accepted or rejected as unreliable; see *Simetra Global Assets Limits and another v Ikon Finance Limited and others* [2019] EWCA Civ 1413 at paragraphs 39-46 per Males LJ.

26. The disclosed documents, statements and experts' reports were available at the trial in electronic form. That is of immense assistance to the efficiency of the trial. Documents can be located much more quickly than if counsel, the witness and the judge have to turn up a hard copy in one of tens, perhaps hundreds, of lever arch files. However, where a maritime casualty is the subject of investigation I hope that I can still be permitted, in this digital age, to suggest that the judge will be assisted by hard copies of certain key documents from day 1 of the trial.

    i) There ought to be available a hard copy of the relevant Admiralty Chart (together with a hard copy of the working chart, should it have survived). That enables the judge to lay off course lines and measure distances both during the evidence and when considering the evidence after it has been given. None of that can be done on a digital copy of part of a chart.

    ii) There ought to be available a hard (and legible) copy of the vessel's general arrangement plan. In cases of this nature where the location and actions of the master or chief engineer on board the vessel are in issue a general arrangement plan enables the evidence to be followed with less scope for confusion. Similarly, where the progress of a fire on board is in issue reference to the general arrangement plan assists the court to follow the evidence. A partial copy of the general arrangement plan on a page in an expert's report is not as helpful because it has to be located and the judge will often need to refresh his or her understanding of the layout of the vessel by reference to more of the general arrangement plan than features in the expert's report.

iii) The interrogation of the VDR (the Voyage Data Recorder, see below at paragraph 29) will have produced information about the voyage which will be studied many times during the trial. In the present case that was true of the VDR audio record, the schedule of the vessel's position, heading, course and speed over the ground at the material time, together with the plotted track of the vessel based on such data, and the measured distances of the vessel from Aden. Hard copies of such documents should be available at the start of the trial. They will be studied and marked so many times during the trial and used so extensively in the writing of the judgment that a hard copy rather than a soft electronic copy is required.

iv) In addition, consideration should be given to the "core bundle" of "really important documents" in the case (see The Commercial Court Guide Appendix 7 paragraph 2) being wholly or partly in hard copy form. This requires much thought and exchange of proposals before the trial. In the present case there were, I think, at least three such documents, or categories of documents, which could have been identified before the start of the trial as meriting a hard copy. First, there was the "naval log" (emanating from the naval forces protecting merchant ships from piracy, see below at paragraph 217) which recorded certain events or reports contemporaneously. It was of real evidential value and the subject of frequent reference during the trial. Second, there were the photographs. When several photographs have to be compared and noted hard copies are, I think, essential. Third, there was the correspondence concerning the engagement of the security team between 1 and 5 July 2011 which was the subject of detailed submissions.

v) Whether other documents such as the statements of those who are to give oral evidence are in hard copy should be the subject of discussion with the judge at the pre-trial review.

vi) The final matter to consider when the documents in the case are in electronic form is the ability of the judge to locate relevant documents to which he or she has been referred during the trial. The form in which documents are stored electronically does of course permit the user to note and categorise classes of relevant documents for later ease of reference. In a long trial with many issues, when the judge is seeking to follow and understand the evidence, that is not always possible. Leading Counsel has a team of people behind him or her to assist in locating relevant documents. The judge does not and does not have the time to spend perusing the electronic file in the hope of locating a document to which reference has been made. Reference to the transcript can reveal the document (and provide an immediate electronic link to it) but that requires time to peruse the transcripts. A possible solution to this problem is to ensure that the chronology is fully referenced and that there is on key issues an index which collates key references; see The Commercial Court Guide paragraph J6.4. A good (and most helpful) example of such a document in this case was the index of photographs showing the time and date of the photographs together with references to the experts' comments on them.

The vessel and the voyage

27. BRILLANTE VIRTUOSO was a motor tanker built in 1992 in South Korea and registered in Liberia. She was 274 m. in length and 47.84 m. in beam. She had a summer draft of 22.8 m. and a maximum sea speed of 12.5 knots. Her cargo tanks were forward of her accommodation and engine room.

28. The vessel was owned by Suez Fortune Investments Limited, a company beneficially owned by Mr. Iliopoulos. The vessel was managed by Central Mare, a company said to be independent of the Owner, though World Wide Green Tankers ("WWGT"), a company affiliated with the Owner, also undertook commercial management.

29. The vessel carried a Voyage Data Recorder (a "VDR"), a device intended to record voyage data electronically and to survive the loss of the vessel. The investigation of maritime casualties has been transformed by the use on board vessels of VDRs. They have been used in collision cases and in grounding cases, see *Nautical Challenge Ltd. v Evergreen Marine (UK) Ltd.* [2017] 1 Lloyd's Reports 666, [2017] EWHC 453 (Admlty) at paragraph 2 and *Alize 1954 v Allianz* [2019] EWHC 481 (Admlty) at paragraphs 4 and 34. This is perhaps the first case in which a VDR has provided key evidence in an alleged scuttling case.

30. The VDR captured the vessel's heading, course made good and speed over the ground. This information has enabled the track of the vessel to be reconstructed. Unfortunately, the VDR must have been an early one of its type because it did not record engine movements. There was on board an engine logger which would have recorded engine movements but that has not survived.

31. In the present case the VDR audio record of what was said and could be heard on the bridge of the vessel has been studied with great care. The parties have not been able to agree a complete transcript of the audio record but much of the audio record has been agreed. However, care must be exercised in drawing conclusions from the agreed audio record not only because some of what was said could not be understood (and some might have been beyond the reach of the microphones) but also because the Underwriters have submitted that some things were said as a charade. It was common ground (although not I think the subject of any evidence) that the Owner and master were aware that the VDR recorded what was said on the bridge.

32. The vessel had been purchased by the Owner in August 2008 for the sum of US$46 million. The timing was most unfortunate for in late 2008 there occurred the world-wide financial crisis. The freight market collapsed and the vessel's value fell dramatically. At the time of the incident which has given rise to this claim her value was about US$13.5 million. The purchase had been financed by the Bank. As a result of the collapse of the market and the consequent difficulty in repaying the loan (which must have been common to many shipowners at the time) the Bank agreed to a refinancing, first in 2009 and again in 2010. In addition to a mortgage on the vessel the Bank had the benefit of a general assignment and Mr. Iliopoulos' personal guarantee.

33. Mr. Iliopoulos, through his group of companies, owned several other vessels. Three of them were also the subject of the same refinancing. They were referred to as the Loan Group.

34. The sum available under the 2010 refinancing was some US$70 million, of which US$63 million was drawn down for the purposes of the refinancing and for buying another vessel, CLELIAMAR.

35. By June 2011 the Owner had been late in paying certain sums to the Bank and notices of default had been issued by the Bank. The total indebtedness was some US$62 million repayable over a period of time ending in 2018.

36. The master, officers and crew of the vessel were from the Philippines. The master, Mr. Gonzaga, and the chief engineer, Mr. Tabares, had served together on another tanker owned by Mr. Iliopoulos. The master, after serving on BRILLANTE VIRTUOSO, has continued to serve on vessels owned by Mr. Iliopoulos. The chief engineer, from October 2007 until 2011 had only served on vessels owned by Mr. Iliopoulos.

37. At the time of the incident which has given rise to this claim the vessel was performing a charterparty for Solal Shipping SA, carrying a cargo of fuel oil from the Ukraine to China. The lump sum freight was US$3,210,000 with US$500,000 payable in advance upon the vessel passing the Suez Canal.

38. The vessel left the loading port of Kerch on 23 June 2011.

39. On 26-27 June 2011 the vessel was off Chios Island, Greece. Stores, charts, spare parts and bunkers were taken on board and a technician boarded the vessel and worked on various items of machinery.

40. The vessel passed through the Suez Canal on 30 June 2011 and entered the Red Sea.

41. On 3 July 2011 the vessel stemmed further bunkers at Jeddah and proceeded on her voyage towards Bab el Mandeb at the southern end of the Red Sea.

42. Somali pirate attacks on commercial shipping had emerged as a significant phenomenon in 2008 and were starting to decline by the second half of 2011. Somali piracy was a unique and distinctive form of piracy. Its modus operandi was characterised by high speed armed attacks using skiffs and a "business model" based around holding hijacked vessels and crews for ransom. Somali pirates mostly preyed on busy shipping lanes and did not focus their activity on the approaches to Yemeni harbours or anchorages (such as the approaches to Al Mukallah or Aden). By mid-2011, Somali attacks took place more frequently in Bab el Mandeb and the Indian Ocean, rather than in the Gulf of Aden; and, outside Bab el Mandeb, they did not normally take place in territorial waters.

43. The Red Sea, the Gulf of Aden and much of the Arabian Sea were known at the time as the High Risk Area ("the HRA") for attacks by Somali pirates. In response to such attacks the shipping industry had produced a guide to shipowners and masters recommending certain steps designed to avoid such attacks. The guidance was set out in a document known as Best Management Practice ("BMP"). In 2011 it was in its third edition ("BMP 3"). The guidance stated that the master retained discretion as to the appropriate steps to be taken. There was also an Admiralty chart, entitled Anti-Piracy Planning Chart (not a navigational chart) which specifically dealt with the risks

of piracy in the HRA. It marked the limits of the HRA and set out much advice as to how to manage the risk of a piracy attack.

44. There was no dispute that BMP 3 was on board the vessel. There was no evidence that the Anti-Piracy Planning Chart was on board the vessel (none of the navigating officers referred to it and I was told that no chart log recording the charts on board had been disclosed) but both experts on BMP 3 agreed that most or many vessels carried it. On the basis of that expert evidence counsel for the Bank submitted that it was likely that the chart was on board the vessel. However, if it had been on board it seems to me likely that the master would have referred to it in his evidence when dealing with the BMP 3 issue. He did not make reference to it and I therefore consider it more likely than not that the chart was not on board.

45. Arrangements were made for an unarmed security team to board the vessel off Aden on 6 July, prior to the vessel proceeding through the IRTC. The purpose of an unarmed security team, as explained by one of the BMP 3 experts in the case, was to advise the master as to the appropriate steps to be taken to guard against attacks by pirates. The incident which has given rise to the present claim occurred before the security team boarded the vessel.

The war risks policy

46. The policy covered the vessel for certain specified risks for the period from 1 January to 31 December 2011. The War and Strikes Clauses, as amended by the Violent Theft, Piracy and Barratry Extension, were incorporated. They identified the insured perils as:

> "Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the Vessel caused by: …….
>
> 1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat ….
>
> 1.5 any terrorist or any person acting maliciously or from a political motive ….
>
> 1.7 violent theft by persons from outside the Vessel
>
> 1.8 piracy
>
> 1.9 barratry of Master Officers or Crew …."

47. The policy also provided cover against

> "loss or damage caused by Vandalism, Sabotage and Malicious Mischief"

48. Certain other clauses, relied upon by the Underwriters as further defences to this claim, should also be noted. The first of these additional defences concerned two

provisions which made reference to BMP, the first entitled "subjectivity" and the other labelled an "express warranty".

> "Subjectivity
>
> Whilst vessel are transiting/port call within the Gulf of Aden and/or Indian Ocean the follow clause will apply:
>
> Subject vessel/owner registered with Maritime Security Centre Horn of Africa (MSCHOA) ……..and to follow Recommended Best Practice.
>
> Express Warranties
>
> Whilst vessel are transiting /port call within the Gulf of Aden and/or Indian Ocean the follow clauses will apply:
>
> …….
>
> Talbot Gulf of Aden/Indian Ocean Warranties to apply as attached.
>
> ……."

49. The Talbot Warranties included the following:

> "Warranted JW2009002 to apply."

50. JW 2009/002 provided, so far as material:

> "For members' information, EUNAVFOR strongly recommends that, before entering the Gulf of Aden and before passing the coast of Somalia
>
> ……
>
> Owners/masters should apply the Best Management Practices (BMP attached)."

51. It is common ground that the "Subjectivity" clause was intended to refer to BMP 3. JW 2009/002 in fact referred only to Best Management Practices (BMP attached) and there was a dispute to whether it must have been intended by the parties to refer to BMP 3.

52. The second additional defence concerned the navigational limits of the coverage provided by the policy.

> "Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 2, the vessel or craft insured hereunder shall not enter sail for or deviate towards the territorial waters any of the Countries or places, or any other waters described in the current List of Areas of Perceived

> Enhanced Risk (listed areas) as may be published from time to time in London by the Joint War Committee."

53. The listed areas included Yemen and hence Aden.

54. So far as the Bank was concerned its interest in the policy was noted in several places. It is common ground the Bank was a co-assured under the policy. The policy provided that the interests covered included

> "the interest of Mortgagee banks as per schedule attached, subject to Loss Payable Clauses and/or Notices of Assignment as per Hull Insurance"

55. There was in evidence a Notice of Assignment in favour of the Bank dated 24 November 2010 and also a Loss Payable Clause which provided for claims in respect of actual or constructive total losses to be paid to the Bank. However, clause 5 of the Institute Time Clauses Hulls provided that

> "No assignment of or interest in this insurance or in any moneys which may be or become payable thereunder is to be binding on or recognised by the Underwriters unless a dated notice of such assignment or interest signed by the Assured ……is endorsed on the Policy ……."

56. The Institute War and Strikes Clauses provided by clause 4.3 that the insurance excluded

> "Any claim for any sum recoverable under any other insurance on the Vessel or which would be recoverable under such insurance but for the existence of this insurance."

57. The Bank's case is that the loss of the vessel was caused by piracy, and/or by a person acting maliciously or by malicious mischief and/or by vandalism or sabotage and/or by barratry (on the assumption that the Owner was not complicit) and/or by capture, seizure, arrest, restraint or detainment.

58. In addition to defending the claim on the grounds that the loss was caused by the wilful misconduct of the Owner, the Underwriters have also relied upon (i) a failure to follow BMP 3, (ii) the navigational limits of the policy which exclude Yemen (and the non-applicability and/or avoidance of an agreement permitting the vessel to call at Aden with no additional premium) and (iii) upon a breach of the implied warranty of legality. Further, the Underwriters say that the Bank's claim for sums in excess of the sums owed to it by the Owner should be struck out as an abuse of process in circumstances where the Owner's claim has been struck out. Finally the Underwriters say that, to the extent of the Bank's recovery under the Mortgagee Interest Policy, its claim under the war risk policy is excluded. At one stage it was contended that the assignment and loss payable clause were not effective but that is no longer pursued.

Burden and standard of proof

59. The burden of proving, on the balance of probabilities, a loss by a named peril lies upon the Bank.

60. The burden of proving, on the balance of probabilities, wilful misconduct or scuttling lies upon the Underwriters. In *Kairos Shipping and another v Enka 7 Co. LLC and others (The Atlantik Confidence)* [2016] 2 Lloyd's Reports 525 at paragraph 7 I relied upon the summary of the relevant principles by Aikens J. in *Brownsville Holdings Ltd v Adamjee Insurance Co. (The Milasan)* [2000] 2 Lloyd's Reports 458 at paragraph 28. That summary was not challenged by counsel in the present case. It is as follows:

> "(4) if a defendant insurer is to succeed on an allegation that a vessel was deliberately cast away with the connivance of the owner, then the insurer must prove both aspects on a balance of probabilities. However as such allegations amount to an accusation of fraudulent and criminal conduct on the part of the owner, then the standard of proof that the insurer must attain to satisfy the Court that its allegations are proved must be commensurate with the seriousness of the charge laid. Effectively the standard will fall not far short of the rigorous criminal standard;
>
> (5) although there is no "presumption of innocence" of the owners, due weight must be given to the consideration that scuttling a ship would be fraudulent and criminal behaviour by the Owners;
>
> (6) when deciding whether the allegation of scuttling with the connivance of the owners is proved, the Court must consider all the relevant facts and take the story as a whole. By the very nature of these cases it is usually not possible for insurers to obtain any direct evidence that a vessel was wilfully cast away by her owners, so that the Court is entitled to consider all the relevant indirect or circumstantial evidence in reaching a decision;
>
> (7) it is unlikely that all relevant facts will be uncovered in the course of investigations. Therefore it will not be fatal to the insurers' case that "parts of the canvas remain unlighted or blank" (see *Michalos and Sons v Prudential Insurance (The Zinovia)* [1984] 2 Lloyd's Rep 264 at p.273 per Bingham J.);
>
> (8) ultimately the issue for the Court is whether the facts proved against the owners are sufficiently unambiguous to conclude that they were complicit in the casting away of the vessel;
>
> (9) in such circumstances the fact that an owner was previously of good reputation and respectable will not save him from an adverse judgment;

> (10) the insurers do not have to prove a motive if the facts are sufficiently unambiguously against the owners. But if there is a motive for dishonesty then it may assist in determining whether there has been dishonesty in fact."

61. In *The Atlantik Confidence* I noted at paragraph 8 that the fact that an underwriter is unable to give a full and complete account of the alleged scuttling

> "need not be fatal to [the underwriter's] case so long as, after examining all of the evidence, the court is able to infer that the vessel was scuttled on the instructions of [the owner]. In deciding whether the court is able to draw such inference the court must keep well in mind that it is possible, especially where the evidence is limited, that the case may be one where [the underwriter] is unable to establish its case with the result that the cause of the loss remains in doubt and the court is unable to make a finding as to the cause of the loss; see *The Popi M* [1985] 2 Lloyd's Reports 1 at pp.3-6."

62. I also endeavoured to explain how underwriters (or in that case Cargo Interests) discharge the burden of proof where scuttling is alleged.

> "9. The court will only be able to draw such inference when the case is established on the balance of probabilities. Shipowners do not generally resort to scuttling and an allegation that a shipowner has done so is a grave charge to make. Thus, as Aikens J. said in *The Milasan*, "effectively the standard of proof will fall not far short of the criminal standard". Precisely what that means and how the court determines whether the charge of scuttling has been proved on the balance of probabilities has been elucidated in the cases, in particular by the Court of Appeal in *National Justice Compania Naviera SA v Prudential Assurance (The Ikarian Reefer)* [1995] 1 Lloyd's Rep. 455. Thus, if [the underwriter] is unable to exclude "a substantial as opposed to a fanciful or remote possibility that the loss was accidental" the court will be unable to draw the inference. But "the mere existence of an opposing possibility does not prevent the balance from tilting heavily and sufficiently far in favour of the insurers" (see p.459 rhc). To the same effect is the following later passage: "there must be a real or plausible explanation which is supported by the evidence, or at the least is not inconsistent with it……..It imposes too high a burden on the underwriters to say that such witnesses must be telling the truth unless the underwriters prove their accounts are impossible" (see p. 484 lhc). In *Strive Shipping v Hellenic Mutual War Risks Association (The Grecia Express)* [2002] 2 Lloyd's Rep 88 at pp. 97-99 Colman J. concluded that it must

> be "highly improbable" that the vessel was lost accidentally and that there must be derived from the whole of the evidence "a high level of confidence that the allegation is true." As Aikens J. said in *The Milasan*, the facts proved against the owner must be "sufficiently unambiguous" to establish that the owner was complicit in the casting away of his vessel.
>
> 10. It is inevitable that when the court narrates the evidence and comments on it the court concentrates upon parts only of the evidence. This is inevitable and there can be no objection to doing so, so long as the court's ultimate findings are based upon a consideration of the evidence as a whole; see *The Filiatra Legacy* [1991] 2 Lloyd's Reports 337 at pp.365-6."

63. Although it was not suggested that what I said in *The Atlantik Confidence* was either wrong or incomplete it is appropriate to add the guidance in *McGregor v Prudential* [1998] 1 Lloyd's Reports 112 at pp.114-115 that "even strong suspicion of the plaintiff's guilt is insufficient" and that the finding of guilt can only be made where that is "the only probable conclusion". In *The Captain Panagos DP* [1989] 1 Lloyd's Reports 33 at p.43 Neill LJ said that "an inference of the owner's guilt can properly be drawn if the probabilities point clearly and irresistibly towards his complicity."

64. The above and other authorities enabled Counsel for the Bank to submit that the cogency of the evidence "must eliminate any other plausible explanation based on the innocence of the person alleged to have been fraudulent so that the only conclusion or inference remaining is one of guilt. By contrast, if there is a plausible explanation which indicates the innocence of the person impugned of fraudulent or criminal conduct, no finding of such misconduct can or should be made." Similarly, it was submitted that "in practical terms……the Court will not be satisfied that a shipowner has been guilty of wilful misconduct if the evidence before and accepted by the Court is equally consistent with a plausible, innocent explanation." I accept those submissions so long as it is understood, as stated by Stuart-Smith LJ in *The Ikarian Reefer*, that the plausible explanation must be substantial as opposed to remote or fanciful and supported by the evidence or at least not inconsistent with it.

65. In deciding whether the charge of scuttling has been made out the cases emphasise, as Aikens J. did in *The Milasan*, that the relevant facts and the story must be taken as a whole. In this regard I said the following in *The Atlantik Confidence* at paragraph 11:

> "in all cases, but especially in those cases where scuttling is alleged, the assessment of the reliability of a witness depends, not only upon a consideration of the extent to which his evidence is consistent with what is not in dispute, is internally consistent and is consistent with what the witness has said on other occasions but also upon a consideration of the extent to which his evidence is consistent with the probabilities. That involves placing the evidence in the context of the case as a whole. As was said in *The Ikarian Reefer* at p.484 lhc para. (4) the evidence of those impugned "has to be tested in the light of the probabilities and the evidence as a whole"."

66. It is the evidence taken as whole, described by Lord Devlin in *The Judge* at p.63 as "the tableau….the text with illustrations", which enables the court to decide where the truth lies.

67. It has long been recognised that multiple improbabilities are unlikely to be true. In *The Atlantik Confidence* at paragraphs 296-7 and 299 I said:

> "296 ……..Whilst the improbable can happen it is difficult to accept that three improbable events (an accidental fire, an accidental flooding of the engine room caused by the fire and an accidental flooding of two double bottom tanks on the portside caused by the fire) may have occurred in rapid succession to each other. This reasoning is frequently used in alleged scuttling cases. Thus in *The Ioanna* (1922) 12 Lloyd's List Reports 54 at p.58 Greer J. said:
>
> > "Now an improbability does not prove that the thing did not happen, but one improbability throws possibly some doubt upon it, and one requires stricter proof where the event is improbable than where it is a probable or likely event. Still one improbability would not be sufficient to justify me in coming to the conclusion that the event did not happen. But when there are two improbabilities the likelihood of it happening is still more remote, and when there are three it is more remote still."
>
> 297. Similarly, in *The Ikarian Reefer* Stuart Smith LJ said at p.484 rhc:
>
> > "Where the owners' explanation requires a series of steps to happen in sequence, each of which is improbable or highly 9improbable, the explanations may become incredible, especially if some or all of the steps have to take place within a tight time-scale and involve one or more remarkable coincidences."
>
> ……..
>
> 299. Further, there were several events which, individually, might not justify a finding of a deliberate loss but, when looked at collectively, suggest a deliberate loss. This is, again, a form of reasoning long used in alleged scuttling cases. In *The Olympia* (1924) 19 Lloyd's List Reports 255 at p.257 the Earl of Birkenhead said:
>
> > "As I conceive it, the duty of a Court of Law, investigating such matters, is that it must examine the story taken as a whole. It may be that the result of such an examination will make it plain that there exist six or seven or eight circumstances of cumulative suspicion, any one of which, taken alone, would not justify the Court in fixing so grave

> and criminal a stigma upon plaintiffs as that of fraudulently stranding a vessel. We have therefore to inquire in this, as in other cases of the same kind: Do circumstances exist, individually, perhaps, not of decisive consequence, but in the cumulative effect establishing beyond reasonable doubt that the vessel was dishonestly stranded?"

68. Counsel for the Bank submitted that the above approach to a sequence of improbable events does not apply in the present case because the court has "to decide upon the identity of the person who caused the deliberate damage to the vessel (such deliberate damage being common ground) rather than having to choose between deliberate damage on the one hand and accidental damage on the other hand (as in *The Atlantik Confidence*)." I am unable to accept that submission. The above approach to a sequence of improbable events applies whenever the court is asked to make a finding as to what happened. It is not restricted to scuttling cases and it is not restricted to particular types of issues in a scuttling case. It is as applicable when deciding whether it was the Owner who authorised the deliberate damage as it is when deciding whether the damage was deliberate and whether certain persons (for example the master and chief engineer) were party to the alleged conspiracy.

69. Counsel for the Underwriters submitted that what I said in *The Atlantik Confidence* required elaboration having regard to the nature of the issue in the present case. In the present case it was accepted on both sides that the vessel had been damaged by a deliberately created fire. The question was as to the identity of the person behind those who started the fire and as to their motives. The case of the Underwriters was that Mr. Iliopoulos planned to scuttle the vessel and was behind the armed men who boarded the vessel and set fire to it. The Bank said that it was plausible to suggest that the motives of the armed men were to hijack the vessel and, in league with Somali pirates, obtain a ransom for the release of the vessel**.** Counsel for the Underwriters suggested that the issue in the present case was analogous to the example given by Lord Hoffman in *Re B* [2009] AC 11 at paragraph 15 of a child abused by one of two persons:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question

> for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.……"

70. Upon the basis that the issue in the present case was analogous to that example it was submitted that it was sufficient for the Underwriters to show that it was more probable than not that Mr. Iliopoulos was behind the deliberate fire. I was not persuaded that the example posed by Lord Hoffman and the circumstances of the present case are analogous. Lord Hoffman's example is a simple and clear illustration of the point he was making. The facts of the present case are more complicated and involve a number of participants. I consider that I should follow the approach explained and described in the scuttling cases to which I have referred.

Witnesses of fact

71. In alleged scuttling cases the Owner normally gives evidence. In this case Mr. Iliopoulos did not do so. There was no bar upon the Bank calling him but the Bank did not do so. I was told that Mr. Iliopoulos had been advised by his counsel that whilst there is an ongoing investigation by the City of London police he should not give evidence in this trial. As a result the court does not have that evidence from the Owner which it usually does in cases of this type. Counsel for the Bank submitted that Mr. Iliopoulos and his family were rich, with substantial independent resources and means of support. That appears to be the case. Between 2004 and 2008 he acquired no less than 8 tankers, including the BRILLANTE VIRTUOSO. In addition to financial support from the Bank Mr. Iliopoulos had a long standing relationship with the National Bank of Greece and Proton Bank. Further, he benefitted from funding from "related third parties", all or a substantial part of which was likely to have come from affiliated and family entities. He was understood by the Bank to be the beneficial owner of the Seajets fast passenger ferry business in Greece. Seajets presently has 17 high speed vessels and 3 passenger vessels and in 2018 was named "Passenger Line of the Year" at the Lloyd's List Greek shipping awards. It was submitted, and I accept, that an adverse finding in this case would cause Mr. Iliopoulos substantial damage to his reputation which would have serious financial consequences.

72. However, although Mr. Iliopoulos did not give evidence at this stage of the trial he did give evidence at an earlier stage in this action when the Underwriters had applied to strike out his claim on the grounds of a failure by Mr. Iliopoulos to comply with a court order regarding disclosure. Flaux J. made certain findings about his evidence and his conduct. In particular Flaux J. held that his evidence seeking to explain why an electronic archive of documents had not been provided to his solicitors as ordered by the court was "a fabricated story designed to provide the owners with an excuse for not handing over the archive to Hill Dickinson". Indeed, Mr. Iliopoulos was held to have been responsible for a "charade, maintained through collusion" between Mr. Iliopoulos and two associates. There was even a "charade, acted out for [Hill Dickinson's] benefit" to persuade the solicitors of the truth of Mr. Iliopoulos' explanation for not handing over the archive. There was a dispute as to whether these findings were relevant to the issue which this court must resolve. I accept that such findings are not evidence that Mr. Iliopoulos scuttled the vessel. They do however show that Mr. Iliopoulos is capable of deliberate and planned dishonesty in connection with this very case and in particular in connection with an attempt to have the Owner's claim determined without the assistance of relevant documents**.** It seems

to me that such conduct must be a relevant matter to be taken into account. The question whether any adverse inference can be drawn from his conduct is a matter to which I will have to return in this judgment.

73. The Bank did however call the master and chief engineer to give oral evidence. Each was from the Philippines and so from a different culture and gave evidence in a language which was not his first language. Each was alleged to have been party to the alleged conspiracy to scuttle the vessel. Each denied the allegation. The parties have made submissions about the demeanour of the master and chief engineer when giving evidence. In this regard the following further passage from *The Atlantik Confidence* at paragraph 11 is apposite.

> "…….a fact-finding judge can gain little from the demeanour of a witness when the witness is foreign, comes from a different culture and does not give evidence in his first language or does so through an interpreter; see *The Business of Judging* by Tom Bingham at p.11. In *The Ikarian Reefer* at p.484 lhc para. (4) Stuart-Smith LJ said that "most experienced judges recognise that it is not easy to tell whether a witness is telling the truth, particularly if the evidence is given through an interpreter." ……"

74. In view of the many comments made by counsel on both sides as to the demeanour of the Filipino master and chief engineer it is appropriate to note the explanation given by Tom Bingham in *The Business of Judging* at p.11 as to why reliance on demeanour is difficult:

> "If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult ? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that ? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not ? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm. "

75. My comments upon the demeanour of the master and chief engineer will therefore be limited. But I will comment upon those aspects of the content of their evidence which are relevant to their credibility.

The master

76. The master, Captain Gonzaga, gave evidence over a period of four to five days. He is alleged to have been party to the conspiracy to scuttle the vessel by allowing intruders to board the vessel pretending to be pirates and then to set fire to the vessel. He denied

the allegation. In cases of this type it is inevitable that the cross-examination of the master will take a substantial period of time. The master gave his evidence by video link, initially from the Philippines and then from Singapore. He did so between 6 pm and midnight, his time. The video link was not initially ideal because it depended on a wi-fi connection in the Philippines which was not as efficient as it ought to have been. The picture quality was often poor. The master spoke English but his diction and/or accent meant that it was often difficult to be sure that one had understood the entirety of his answer. Counsel therefore spent time, very properly, checking that his answer had been correctly understood. In order to get a better video link the master was moved to Singapore. The link was better, but from time to time the screen froze.

77. The events about which the master was asked took place over 7 years ago. There was therefore an inevitable limit to the amount of detail he could reasonably be expected to remember. However, on his account of the events he had suffered a dramatic and terrifying ordeal, the main aspects of which he could be expected to have some real recollection, notwithstanding that the passage of time may have impaired the reliability of some of what he believed he could recall.

78. The master was remarkably patient during his long cross-examination. He never lost his composure, save perhaps when describing the ordeal he feared were he to be kept in Somalia by pirates. He sometimes appeared to consider his answer to a question for a very long time. But he was not giving evidence in his own language and he comes from a different culture. In those circumstances, as I have already noted, it would be unsafe, and probably impossible, to glean anything from his demeanour.

79. A feature of his evidence, however, was a failure to answer difficult questions. For example, he maintained that he believed the intruders to be the "authorities" because they wore uniform and "authorities" with arms had boarded his vessel in West Africa and other places. When his evidence as to this belief was probed he tended to repeat his belief and the reasons for it without answering the question put. That suggested that he was unwilling to answer the question perhaps because he had no credible answer to give.

80. Another feature of his evidence was a tendency, on occasion, to give answers which were surprising and lacked reality. For example, when asked whether he was concerned at the approach of a small boat he said he was not because it might have been a boat selling fish. He was asked whether the fact that those approaching in the small boat not only carried arms (which he accepted would heighten his concern) but also wore masks was a reason for yet more concern. The master said he did not think so. When asked why, he said that the masks might protect against dust. When it was pointed out that the boat was at sea, he said that the masks might be protection against infection. He later suggested that the men might be wearing masks to avoid a bad smell. These answers suggested that, having appreciated where counsel's questions were going, he was prepared to say whatever was necessary to avoid making admissions which might later prove to be damaging. Counsel for the Bank suggested, without any support from the master, that he "most likely had in mind protection from fumes/dust emanating from cargoes, or from a ship that did not yet have any port clearance, including clearance from quarantine." I did not consider that likely at all. Rather, the master was grasping at anything he could think of.

81. On a most important part of the case, namely, whether he thought the armed men who boarded the vessel were the "authorities" or "security" he has been inconsistent. In his Aden and Manila statements (made in July and September 2011) he said that he was told that the men were the authorities. Following disclosure of the VDR audio record he had to recognise in his 2015 and 2018 statements that he had been told that they were security. Yet in his oral evidence in 2019 he said that he thought that the men were the authorities. He said that was why he had allowed them to board. But in his 2018 statement he had said that it was only when he had been told the men were security that he allowed the pilot ladder to be lowered. His unheralded oral evidence was striking and suggested, at best, that the master had no reliable recollection of who he thought the men were and, at worst, that he was prepared to say that which he thought best explained his conduct in allowing the men to board regardless of whether it was the truth.

82. The master also had an unrealistic ability, when shown contemporaneous documents which were inconsistent with his evidence, to remember surprising details about conversations more than 7 years after they occurred.

83. The contemporaneous documents suggested that he was capable of dishonesty in his dealings with the charterers of the vessel. He was asked about the vessel's call at Jeddah, before the casualty, when bunkers were taken on board. There was clear evidence in the form of contemporaneous emails that whilst reporting the quantity of bunkers ROB to his owners he was, at the same time, reporting lesser quantities to the charterers. His explanation was that there had been an error in the figures provided to him by the engineers who sounded the bunker tanks. However, this did not explain why he had given different figures to his owners than he had to the charterers. He denied that he was deliberately giving false information to the charterers but the contemporaneous documents suggested that he was. He had a similar difficulty with the figures he gave to his owners and to the charterers for the quantity of bunkers consumed in a day. They were different and the circumstances suggested that he was seeking to mislead the charterers into thinking that bunkers were being used to heat the cargo. Again, his explanation that he was merely passing on figures provided to him by the engineers made no sense because it did not explain why he was giving the owners and charterers different figures.

84. The charterers had given instructions that the vessel should not bunker without them being informed. Yet, although the master was instructed to bunker at Jeddah there appears to have been a delay in informing the charterers of that instruction. When the charterers were informed they sent a surveyor but the master accepted that he had prevented the surveyor from boarding. His explanations for doing so, for example, that the surveyor had arrived after bunkering had been completed, were difficult to reconcile with the contemporaneous documents. His answers to such difficulties suggested that, as with the documents concerning the differing ROB and consumption figures, he was prepared to say whatever enabled him not to accept the propositions put to him based upon the contemporaneous documents.

85. For these reasons I concluded that I should be very cautious before accepting his evidence and that the safe course was to accept his evidence only where it was not disputed, was in accordance with the probabilities or was supported by the contemporaneous documents. Of course, neither the features of his evidence which I have described nor his apparent dishonesty in his dealings with the charterers prove

that he was party to the alleged conspiracy to scuttle the vessel. That is a conclusion which can only be reached after considering the whole of the evidence.

86. Towards the end of his cross-examination (dealing with the BMP 3 issue) he made some admissions which were naturally relied upon by the Underwriters. I gained the impression that by this time he was tired (unsurprisingly, given that his evidence had lasted several days and took place at a late hour). Caution was therefore also required before relying upon such admissions.

The chief engineer

87. Mr. Tabares was the chief engineer on the vessel. He gave evidence for between two and three days. Although he was not, perhaps, as calm as the master when answering questions and was particularly troubled by being accused of taking part in a conspiracy to damage the vessel by fire, demeanour was not a useful indicator of his quality as a witness because, like the master, he is from a different culture and was not giving evidence in his first language.

88. However, a feature of his evidence was that he gave inconsistent accounts of particular matters. He made 5 statements from 2011-2018 and they were not consistent. Similarly his oral evidence was inconsistent in several respects with his written statements. In particular, there was inconsistency in his evidence as to whether he slowed and stopped the main engine in the early hours of 6 July or whether it stopped itself. There was also inconsistency in his evidence as to whether there was a fire in way of the CO2 room or not. Similarly there was inconsistency in his evidence as to whether the cargo was at risk of explosion or not. These differences could be the result of the effect of the passage of time since 2011 on his recollection but the differences were so striking that I was left with the impression that at best his recollection of what had happened had been lost several years ago. But at worst they suggested that his evidence was dictated by what he thought assisted the "story" he wished to tell.

89. On one aspect of the case he was consistent, namely, that he was told by able seaman Marquez that the armed men announced that they were the authorities. Although the VDR audio record showed that the able seaman had been told by the armed men that they were "security" the chief engineer persisted in his evidence. His insistence that he was told that they were authorities showed a marked determination to stick to the "story" he wished to tell.

90. Further, and like the master, there were some questions which he found difficulty in answering. There was evidence in the form of a contemporaneous log that he had informed an officer from USS PHILIPPINE SEA that he had sabotaged the vessel's main engine. He had great difficulty in answering the question whether he had given that account at the time. He kept insisting that the statement to which he was referred was not his statement. This insistence suggested that he feared that accepting that he had told the US Navy that he had sabotaged the main engine, when he had not, would be damaging. If he did fear that, he was right to do so. The account he gave to the US Navy was not true. The main engine had not been sabotaged. Neither party suggested that it had been sabotaged. The fact that on the very day of the fire he had lied to the US Navy about his actions suggested that extreme caution was required before accepting his evidence.

91. I therefore considered that I should only accept his evidence when it was not disputed, was supported by the contemporaneous documents or was consistent with the probabilities.

92. Thus both the evidence of the master and of the chief engineer must be compared with the probabilities. In doing so I have in mind the note of caution expressed by Tom Bingham in *The Business of Judging* at p.14:

> "An English judge may have, or think that he has, a shrewd idea how a Lloyd's broker, or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ship's engineer, or a Jugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibly assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

93. In the course of assessing the evidence in this case I have had to consider how a Filipino master or chief engineer might react when confronted by pirates and how a Yemeni coastguard might react when the master or chief engineer does not follow his instructions. There are of course limitations to the extent to which an English judge can put himself in the position of those persons. But this is the type of exercise which a judge, particularly a commercial court judge dealing with disputes arising in many different countries, must frequently seek to perform; cf *Filatona and Oleg Deripaska v Navigator and Vladimir Chernukin* [2019] EWHC 173 Comm at paragraphs 11-12. So long as the judge does so with care the exercise is unobjectionable. As Tom Bingham said in *The Business of Judging* at p.15:

> "It is, I think, a common occurrence for a judge to find, after using his imagination to place himself in the position of the witness and in the context of the case as whole, that an account given in evidence is one that he simply cannot swallow. While this is not a very scientific test nor is it in my view, if carefully and imaginatively applied, any the worse for that."

Mr. Paikopoulos

94. Mr. Paikopoulos is a ship surveyor and has been so since 1973. He has frequently been instructed by Mr. Iliopoulos or his father since 1973 but has also worked for other shipowners. His office is in the same building as the office of Suez Fortune and there is evidence, unsurprisingly, of a close relationship between Mr. Paikopoulos and the Iliopoulos family, though Mr. Paikopoulos was reluctant to agree that he was a friend of Mr. Iliopoulos and his family. It was not alleged by the Underwriters that he was part of the conspiracy to damage BRILLANTE VIRTUOSO by fire.

95. Mr. Paikopoulos was instructed by Mr. Iliopoulos to survey BRILLANTE VIRTUOSO after the events of July 5/6 2011. He did so. Although he expressed views in his reports concerning the cause of the casualty I did not understand his evidence to be relied upon in that regard. Rather, he was called to give evidence concerning suggestions that Mr. Iliopoulos had made threats to members of the crew in Aden on 6 July. He said that such evidence could not be true.

96. However, I was unable to regard Mr. Paikopoulos as a reliable witness, for several reasons.

97. First, he gave evidence that he agreed that he would be "remunerated on a conditional basis, upon a successful outcome" but was unable to explain what sum or sums were agreed to be paid upon a conditional basis. Either he was keen to hide what had been agreed or he was unable to say what had been agreed because nothing specific had been agreed. If the latter were the case then he must have had a very close relationship with Mr. Iliopoulos indeed. An email from Mr. Iliopoulos dated 23 December 2011 made clear that "the successful outcome" was success in making good the Owner's claim that the vessel was a CTL. To be rewarded on a conditional basis clearly implied that Mr. Paikopoulos would receive a success fee. Yet the most he would accept was that Mr. Iliopoulos might present him with a "basket of wines" in addition to his daily rate. This evidence lacked reality and, I find, was not true.

98. Second, as a witness he appeared keen to see where a question was going and to answer a question which had not yet been asked. That suggested that he was anxious to make a particular point rather than simply answer the questions put to him.

99. Third, there were also indications in his reports that he changed his account of the events to suit a particular case. In particular in his first report he suggested that the vessel's main engine had never been started. In his later report he said that the main engine had started but then stopped. He said that this change was due to the mistaken omission from his first report of a particular sentence. But the change in the second report mirrored a similar change in the evidence of the chief engineer. The suggested omission was therefore a striking coincidence. His explanation was unlikely to be true.

100. Fourth, it is apparent from his report of 19 July 2011 that he met with the crew in Aden. Apparently based upon his conversations with the crew he said that "the crew assumed they ["the seven heavily armed pirates"] were from the Yemeni Authorities". It is unlikely that this is what he was told by the crew; for the VDR audio record shows that the crew were told by the armed men that they were "security" and that is what they reported to the USS PHLIPPINE SEA. Thus his report was, at best, an inaccurate summary of what the crew told him. At worst he suppressed the crew's evidence that they were told that the armed men were security.

Mr. Leotsakos

101. He is a retired official from the Bank who had some responsibility for overseeing the Owner's loan. He had two "back office" teams reporting to him which were not involved in decision making with respect to any loan. The person to whom he reported, Maria Youryi, and the person to whom she reported, Ioannis Kyriakopoulos, did not give evidence. It is likely that it was they who took decisions with respect to

particular loans. Mr. Leotsakos speaks and understands some English but, understandably, gave his evidence through an interpreter. Although there were times when he appeared mindful of the Bank's case by answering questions which had not yet been asked but soon would be, I did not gain the impression that he was seeking to do anything other than answer questions honestly. However, he was giving evidence about dealings between the Bank and the Owner some 8-9 years ago. In those circumstances the most reliable evidence must be the contemporaneous documents and the probabilities, particularly in circumstances where it was those above him who took the important decisions, rather than him. Although correspondence between the Bank and the Owner was disclosed there was little in the way of internal memoranda regarding consideration of the Owner's failure to pay sums on the due date, for example the "balloon payment" of US$4,652,000 which was not paid on 28 February 2011. Mr. Leotsakos said that it was not the Bank's practice to produce such memoranda. I found that surprising but no suggestion was made to him that the Bank had failed to produce relevant memoranda.

Mr. Plakakis

102. Mr. Plakakis was called by the Underwriters. He had worked in Aden running a bunkering business which came to an end in 2010. His work brought him into contact with Mr. Vergos of Poseidon Salvage and the two discussed going into business together, buying a vessel for use in a bunkering business. He was in Aden in 2011 and gave evidence that Mr. Vergos told him that Mr. Iliopoulos had told him about "a job to destroy a vessel for the purposes of an insurance claim" and that on the night of 5 July 2011 he heard Mr. Vergos tell the crew of his salvage tug, VOUKEFALAS, that they were not going to sleep that night. "You are up for a job".

103. In 2014 he approached the police with evidence of a conspiracy to damage BRILLANTE VIRTUOSO. In 2017 he was asked by the police to make a statement setting out his evidence and did so. He made that statement under a pseudonym in order to protect his identity. He feared that he might come to harm if his real identity were known. The Underwriters learnt of his evidence and wished to call him as a witness in this case. They knew his real name and applied for an order allowing his real name to be used. I granted that application on the grounds that his identity was already known to those who, it was said, might harm him but that his whereabouts were not known and it was that which would continue to protect him; see [2018] EWHC 2929 (Comm). He therefore gave evidence by video link from an undisclosed location in this country. He said he did not wish to give evidence in this action and did so only because a witness summons had been served upon him.

104. He gave evidence for two to three days. Notwithstanding the fact that he did not give his evidence voluntarily he often answered the questions put to him at considerable length. He gave the impression that he had much to say and wished to say it, frequently adding to what was in his 2017 statement. So much did he have to say that it was sometimes difficult to discern his answer to the question which had been put. In his case that did not suggest to me that he had no answer to give. On the contrary he appeared to be unshaken in his evidence that there had been a conspiracy to damage BRILLANTE VIRTUOSO.

105. However, in evaluating his evidence a number of matters must be borne in mind. First, Mr. Plakakis made very serious allegations against several people. His written

account which was before the court was made in 2017, some 6 years after the events in question. That itself is a cause for concern as to the reliability of his evidence (notwithstanding the point made by counsel for the Underwriters that "the existence of a fraudulent conspiracy to destroy an oil tanker by staging a piracy attack is not the sort of thing one forgets"). Although he said that he had made an earlier statement in 2014 that earlier statement was not before the court and so it could not be compared with his 2017 statement. Second, much of his evidence was based upon what he had been told by Mr. Vergos who, he accepted, was a liar and whom he did not trust. That is a further cause for concern as to the reliability of his evidence (although I accept, as counsel for the Underwriters point out, that some of his evidence, for example, what he heard Mr. Vergos say to the crew on 5 July was direct evidence). Third, he implicated persons in the alleged conspiracy who were not said by the Underwriters to be party to the conspiracy. Those allegations (as to which the Underwriters were "neutral", a stance explained by "a desire not to repeat inessential allegations about third parties in Greece without the protection of a court order") were therefore not the subject of investigation in this trial. That is a reason for exercising caution with regard to his evidence. Fourth, his understanding of the conspiracy was that its purpose was not only to defraud the vessel's underwriters but also to enable Poseidon Salvage to make a claim for salvage based upon a danger to the casualty which the Owner had created. But in the event the LOF salvage contract was awarded to Five Oceans Salvage with Poseidon as a sub-contractor. That suggests that his evidence may be unreliable.

106. There is a further matter to be mentioned. On the Wednesday of the week before Mr. Plakakis was due to give evidence I heard an application by a non-party for an order based upon public interest immunity grounds that Mr. Plakakis should not be required to answer certain questions. I heard the application in private and granted it. Although I was unable to provide the parties with a copy of my ruling I provided the parties with as much information as I could. My written note to the parties dated 15 March 2019 (the day after the application had been heard on Day 15 of the trial) was as follows:

> "Yesterday afternoon I heard an application for an order, based upon public interest immunity grounds, that the witness Mr. Plakakis will not be required to answer certain questions. That application was heard in the absence of the parties to this action because it was feared that knowledge of the application would reveal the very information which was sought to be protected on public interest grounds. A private *inter partes* hearing on the basis of a confidentiality club was not considered appropriate in the light of the decision of the Court of Appeal in *Competition and Markets Authority v Concordia International* [2018] EWCA 1881 and [2018] Bus LR 2452 at paragraph 71. On the facts relating to this application there was a further reason why such a procedure was not appropriate. I am not able to state that reason in this note.
>
> Upon the basis of the evidence put before me and the submissions of leading counsel I was satisfied that there is

> information known to the witness which would be damaging to the public interest if it were revealed.
>
> I therefore made an order that, subject to any further order, the witness need not answer certain questions in cross-examination. The basis of my ruling was that, although the question and answer may be relevant, the public interest in disclosure of the answer was outweighed by the public interest in maintaining the confidentiality of the information. I provided the applicant with a written judgment setting out my reasons. That is a private judgment which I cannot provide to the parties.
>
> As the trial judge I will keep the balancing of the competing public interests under review; see *R v Davis* [1993] 1 WLR 613 at p.618 per Taylor LCJ and *Taylor v Anderton* [1995] 1 WLR 447 at p.462 per Sir Thomas Bingham. In the event of any dispute I will rule on the matter in the light of such submissions as the parties are able to make.
>
> I recognise that the parties are in an unusual and difficult position, not being privy to the basis upon which the order has been made. All my judicial instincts suggest that this situation is unfair and inappropriate but I have been persuaded that, in accordance with the law and practice regarding public interest immunity, I am bound to make the order which has been sought."

107. As a result of the order I had made I was required to inform Mr. Plakakis during his cross-examination that he need not answer certain questions. Those questions concerned, in particular, the information given or statement made in 2014. I have no doubt that the order I had made placed counsel for the Bank in a very difficult position. He was, very properly, anxious not to trespass into areas covered by public interest immunity, yet did not know the reasons for or the limits of the order made by the court. His closing submissions suggested that there were matters other than the 2014 information or statement about which he would have wished to ask Mr. Plakakis but felt unable to do so. That does not surprise me. In the circumstances the restrictions on the scope of cross examination are a further reason for exercising caution with regard to the evidence of Mr. Plakakis.

108. Counsel for the Underwriters submitted that Mr. Plakakis' evidence was "obviously truthful", that he had no motive to give dishonest evidence and that certain parts of his evidence were supported by contemporaneous documents. Further, in respect of several important allegations Mr. Plakakis and another "whistleblower", Mr. Theodorou, gave the same account even though the last time they met was 2012 and it was unrealistic to suggest that they had jointly conspired to tell an untrue story implicating Mr. Iliopoulos and Mr. Vergos. The common ground was striking. They both said that the attack on the vessel was staged on the instructions of Mr. Iliopoulos with the assistance of Mr. Vergos, that the master and chief engineer were involved, that members of the Yemeni coast guard had been recruited to pretend to be pirates and that the call at Aden to pick up a security team was an alibi for the incident.

109. Counsel for the Underwriters also relied upon Mr. Plakakis' evidence that on 1 July 2011 he deliberately mentioned in an email to a friend that he was "waiting for the Virtuoso in 3-4 days." He said that he did so "to prove that the name of the vessel was already common knowledge and that we knew the time of the BRILLANTE VIRTUOSO job". He said that "the job" was the planned attack on the vessel. Counsel for the Bank suggested that it was the legitimate job of providing security to the vessel which was being discussed on 1 July 2011.

110. This was a most curious email. Mr. Plakakis' friend asked who "the Virtuoso" was and Mr. Plakakis replied that it was "Akosta" who, he said, was the name of a footballer. There are difficulties with both cases. If Mr. Plakakis wished to make a record of the planned attack he could surely have done so in a much clearer manner. But if he was merely referring to the planned provision of security he could surely have said so rather than reply "Akosta".

111. I have considered the parties' submissions, and in particular those forcefully made by counsel by the Underwriters, but remain cautious about relying upon Mr. Plakakis' evidence save where it was supported by other reliable evidence. I was not persuaded that because parts of his evidence could be shown to be so supported it must follow that all of his evidence must be accepted.

Other witnesses

112. Mr. Veale, an insurance investigator gave evidence that Mr. Theodorou, one of the local salvors who boarded the casualty, told him (over six meetings between September 2016 and May 2017), that the fire on the vessel had been planned in advance by Mr. Iliopoulos. There is no reason to doubt Mr. Veale's evidence that Mr. Theodorou told him the matters which Mr. Veale said he did. Mr. Veale gave his evidence in a forthright and compelling manner. No particular reason was advanced during his cross-examination which suggested that this evidence should be doubted. However, whether Mr. Theodorou's statements to Mr. Veale were true is another matter. He did not sign a statement, wanted a large sum of money for his evidence, was not available to be cross-examined and there are problems with his evidence (identified by counsel for the Bank as 13 "inaccuracies or inconsistencies"). Although counsel for the Underwriters emphasised that "the core" of the accounts of both Mr. Theodorou and Mr. Plakakis was strikingly similar and that they told the same "essential story", I consider that what Mr. Theodorou said to Mr. Veale can only be accepted as true to the extent that it is supported by other compelling evidence.

113. A small number of witnesses were called with regard to the Underwriters' defence based upon avoidance of the endorsement to the policy permitting the vessel to call at Aden. They were Mr. Zavos (the Underwriter's solicitor, then at Norton Rose Fulbright, now at Kennedys Law), Mr. Cunningham (a claims manager at the First Defendant) and Mr. MacColl (an underwriter at the First Defendant at the material time). Their evidence concerned (a) the question whether the Underwriters' had knowledge of the right to avoid the endorsement at the time they did an act which was said to be a waiver of the right to avoid and (b) the question what the Underwriters would have said had they been aware of what they said was the vessel's true reason for being off Aden. No suggestion was made that they were giving dishonest evidence and they were plainly giving honest evidence. What was suggested was that

their evidence might not be reliable for a number of reasons. I shall consider that suggestion when addressing the defence based upon avoidance of the endorsement.

Expert evidence

114. There was much expert evidence. The electronic trial bundle lists reports on no less than 14 different areas of expertise. Fortunately, the parties required oral expert evidence on only 8 of those areas of expertise.

Evidence of Piracy and Yemeni criminality

115. These were unusual subjects of expert evidence. But the expert evidence of piracy fulfilled an important purpose before the trial commenced. It enabled the parties to agree that it was unlikely that the armed men who boarded the vessel were Somali pirates, but were, on the balance of probabilities, members of the Yemeni Coast Guard or Navy. The joint memorandum of the piracy experts was a model of what such reports should be; full, informative and helpful. What remained was the question whether the armed men were in fact pirates or were persons who pretended to be pirates at the request of Mr. Iliopoulos. Of course that question is not a matter for any expert. It is a matter for the court to consider on the basis of all the relevant evidence. However, the piracy and Yemeni criminality experts considered the question whether it was "plausible" to suggest that the attack on the vessel was "an attempt by Yemeni crooks to join the Somali piracy bandwagon." The Bank's experts on piracy and Yemeni criminality expressed the view that it was plausible to suggest the armed men were Yemeni pirates who planned to take the vessel to Somalia and there do a deal with Somali pirates which involved sharing a ransom for the vessel and cargo. The Underwriters' experts did not agree that that was plausible. By the end of the cross-examination of the experts on piracy and Yemeni criminality the issue which rose to the surface was whether, given that there was evidence of criminal dealings between Somalis and Yemenis across the Gulf of Aden involving smuggling, drugs and people trafficking, it was plausible or likely that such criminal dealings might extend to joint ventures involving the hijack of vessels for ransom. The four experts approached that question from different vantage points.

Dr. Anja Shortland

116. She was the Bank's piracy expert. She is a Reader in Political Economy at King's College, London. Her particular interest is in how people conduct business in the absence of formal law enforcement and is an expert on Somali piracy, in particular kidnap for ransom. She has published 10 research papers on the subject and was a project team leader on the World Bank's 2013 report "Pirates of Somalia." Her book entitled "Kidnap: Inside the Ransom Business" has been published by the Oxford University Press.

117. Drawing upon that expertise she expressed opinions as to how Somali pirates might have reacted to a "joint enterprise" proposal to ransom an already hijacked ship from a group of Yemeni naval or coast guard personnel. It was common ground that the suggested piracy by Yemeni nationals had not occurred before or after the events which befell BRILLANTE VIRTUOSO and so, as counsel for the Bank accepted, the

matter had not been the subject of academic study or practical experience. Dr. Shortland approached the problem

> "in a rational choice framework and we can compare the prize or the potential gain from engaging in a venture like that to their best alternative occupation – that's what I do – and look at the sanctions in place that would prohibit or discourage such a behaviour."

118. One of the issues to be considered in resolving the issue as to the likely intent of the Yemeni armed intruders was the extent to which they would apprehend risk or danger in seeking to hijack a vessel and then to deal with Somali pirates. Dr. Shortland expressed an opinion as to the extent to which Somali pirates were in fact violent and used this to suggest that the risks of pirates being violent were less than they are commonly thought to be. She has not been to Somalia and I did not find her evidence on this topic to be persuasive. It was, I thought, inconsistent, even muddled. On the one hand she expressed the opinion that there was much "posturing and display – undertaken precisely to avoid bloodshed and damage". On the other hand she eventually accepted that piracy works better when pirates have "a reputation for extreme violence". She also relied upon certain assumptions which could not be supported. For example she said that Somali pirates fired across the bow and so posed no actual danger. Yet the BMP 3 document recognised that the bridge was the focus of attack and suggested measures that could be taken to protect those on the bridge at the time of attack. She had no direct experience of counter-piracy operations.

119. Her evidence as to the dangers of seeking to reach agreements with Somali pirates was also inconsistent and, again, muddled. On the one hand her careful study of Somali piracy had persuaded her that, more often than not, threats of violence by Somali pirates were not carried out. She expressed the opinion that "keeping piracy non-violent was seen as essential to the business". On the other hand she accepted in cross-examination that there were in fact three risks, namely, expropriation of the ship, physical maltreatment up to and including murder and detention and imprisonment. It seemed to me that when assessing the perceived risks to the Yemeni intruders she appeared to assume that the Yemenis would be aware of the conclusions she had drawn from her careful academic assessment of the available data. That did not appear to me to be a realistic approach. She has never visited Yemen.

120. It was suggested that she allowed herself to become an advocate for the Bank's case. There was some support for this suggestion. Thus, having initially expressed the view that "to avoid being expropriated in this illegal transaction, a Yemeni criminal gang would need at least one Somali member to negotiate the deal and invoke his clan's protection" she later changed her view and said that "a Somali member would have been beneficial but would not have been needed". This change of view came about after it had been agreed by other experts that it could not be assumed that one of the intruders, described as "dark skinned", was a Somali. It was also suggested that she expressed opinions on matters on which she had no expertise. For example she expressed the opinion that "from an economic point of view, hijack for ransom offered significantly greater returns than (armed) robbery – and more certain returns than insurance fraud." Dr. Shortland was not an expert on the returns from insurance fraud. She also expressed opinions as to why the Yemeni armed men might have brought an IEID with them.

121. These criticisms were valid to an extent but I was not persuaded that Dr. Shortland deliberately set out to "argue" the Bank's case rather than to give her honest opinion on the question put to her. It seemed to me that the reason for her apparent lapses from her duty as an expert lay in the circumstance that the question with which she was grappling – was it plausible to suggest that the Yemeni intruders intended to take the vessel to Somalia and do a deal with Somali pirates – was one in respect of which there was no historical data and was so much bound up with an assessment of other evidence in the case that she was, almost inevitably, led into straying outside her true expertise. As counsel for the Bank accepted, this was "uncharted territory".

122. For these reasons, whilst her expert evidence (and in particular her contribution to the joint memorandum) proved to be of immense assistance in enabling the Bank to accept that the intruders were probably not Somali pirates, her evidence on the remaining question did not strike me as having the same value. Indeed, it was because of that limitation in the value of her evidence that the Bank sought permission to adduce evidence of "Yemeni criminality".

Professor Jones

123. He was the Bank's expert on Yemeni criminality. The order permitting this unusual evidence identified the issues as: the nature of crime in Yemen and the profile of criminals and criminal gangs in Yemen; the effect of the breakdown and corruption of government organisations, such as the Coast Guard, on criminal activity; the identity of the persons who had the means to carry out the attack (which includes piracy off Yemen); the access of Yemeni government individuals / Yemeni criminals to the weapons and equipment used in the attack.

124. Professor Jones is a political historian. He holds the "Chair Regional Security (Middle East)" in the School of Government and International Affairs in Durham University and has written on the Yemen Civil War 1962-1965 and on political violence in Yemen post 2011. He lectures to the FCO and to the security and intelligence services. Counsel for the Bank described him as "an eminent expert with a deep understanding of Yemeni politics, crime and society", which is true, so long as one also bears in mind his acceptance when cross-examined that he was not an expert in Yemeni criminality generally, apart from terrorism, political violence and patrimony, or in Yemeni maritime criminality in particular.

125. Professor Jones has an undoubted expertise in the politics of Yemen, the state of the institutions in that country and the practice of "patrimony" or "patronage" which supported its government (and the Yemeni tribes). That enabled him to conclude that "this picture of endemic corruption, fragmented command and control, low levels of professional training and discipline, as well as collusion with Somali pirates in terms of arms and people smuggling all suggest those boarding the BV were likely to have been serving, if not former, members of either the YCG or YN." In that conclusion it is accepted that he was correct.

126. However, he went on to conclude that "the concern over corruption within the YCG/YN and links to smuggling operations involving Somali pirates suggests that the order to the crew to "go Somalia" could easily have been part of [a] plan to sell the tanker on to Somali pirates. The fact that the hijacking was so bungled also suggests that the particular "pirates" had relatively little, if any, experience in this nefarious

activity." It was unclear that he had any expertise which enabled him to say that it was plausible or likely that the particular form of criminal activity in which the armed men might engage to supplement their income would be the hijack of ships for ransom with the assistance of Somali pirates. His first report (and his answers when cross-examined) suggested that what enabled him to reach his conclusion was an analysis of (some) of the evidence in the case that suggested that the armed men who boarded the vessel intended to hijack the vessel and take it to Somalia. This of course was not a matter which properly engaged his expertise but required an assessment of all the evidence in the case. Indeed Professor Jones accepted that it was a "fair summation" to suggest that his expertise did not enable him to say that one explanation for the armed men's conduct in boarding the vessel was to be preferred to another explanation. As a result I concluded that his evidence could not give the court any reliable assistance on the question whether it was plausible or likely that those who boarded the vessel did so with the intent of hijacking it for ransom. To be fair to Professor Jones he had accepted in the joint memorandum that "the identification of the intruders' motives is ultimately a factual matter which is not for the experts to resolve."

127. Severe criticisms were made by counsel of Professor Jones as an expert witness. It was suggested to him that he set out deliberately to argue the Bank's case as a "hired gun" and in closing submissions he was described as "spokesman for the Bank's case". This would be an extreme view to take. I consider that much the more likely explanation is that Professor Jones, like Dr. Shortland, was grappling with an issue in respect of which there was no historical data and which was so much bound up with an assessment of other evidence in the case that he was, almost inevitably, led into straying outside his true expertise.

Captain Northwood

128. He was the Underwriters' piracy expert. In 2011 he was a serving Royal Navy officer and had been involved, from late 2006 onwards, with operations to counter Somali pirate activity. From November 2006 until March 2007 he was Chief of Staff to Coalition Task Force 150 based ashore in Bahrain. From October 2008 until June 2009 he was Head of Plans and Operations based in London. Between 2009 and 2011 he was the communications advisor to the First Sea Lord. In July 2011 he was promoted to Captain and was appointed to command a Royal Navy Counter-Piracy Task Group in the Indian Ocean. Between September 2011 and February 2012 he commanded RFA Fort Victoria in and around the Gulf of Aden directly deterring and disrupting Somali pirate operations. He retired from the Royal Navy in January 2013 and has since been involved in the senior management of two maritime security companies providing an armed guarding service to commercial vessels operating in the Indian Ocean High Risk Area.

129. Captain Northwood accepted that his expertise was in the prevention of attack and the disruption of attack by Somali pirates. He also accepted that, although he had studied the economics of and background to piracy (including the "political ramifications" and the part played by the Somali "clans") "in order to understand the problem that we were contending with", he had no expertise in the nature of the agreements entered into by persons operating outside the law. He accepted that he would defer to the opinion of Dr. Shortland in such matters because she was an expert in "criminal

networks". But unlike Dr. Shortland he had actually met and interrogated up to 36 Somali pirates (and had given evidence at their trial in the Seychelles and in Rome).

130. Captain Northwood answered questions fairly, directly, clearly and concisely. When he considered that a question was outside his expertise he said so. Thus, when asked whether an agreement could be reached between those who carried out the attack on BRILLANTE VIRTUOSO and Somali pirates for the purposes of carrying out a ransom transaction he replied that he did not know the answer. "We never saw that kind of incident occur". When asked whether, if terms had already been agreed, there was any reason why that could not occur, he replied that it was "theoretically possible". I thought that such answers were fair and showed a realistic understanding of the limit to which he could assist the court on that particular issue. He was a model expert witness. Thus, where he expressed an opinion based upon his personal experience, such as the risks involved in hijacking, I was persuaded that his opinions merited close attention.

Dr. Lewis

131. Dr. Lewis was the Underwriters' expert on Yemeni criminality. She is a Lecturer in Education, Conflict and International Development in the UCL Institute of Education. Her PhD at York University in 2012 was entitled "Violence and Fragility: A study of violent young offending in Yemen and other conflict affected fragile states." In the course of her studies she had travelled to Yemen conducting her research. She has extended her interests to Somalia and in 2014 wrote "Security, Clans and Tribes: Unstable Governance in Somaliland, Yemen and the Gulf of Aden." She has made regular trips to Somalia and assists in teaching at the University of Hargeisa.

132. Thus, by reason of her expertise in and study of both Yemeni offending and the connections between Yemen and Somalia across the Gulf of Aden she is, alone amongst the experts, able to address the issue in question from both sides, though, as she accepted, she had no expertise in certain of the topics relevant to answering the question in issue.

133. She demonstrated in the witness box that she had a deep and considered view of those aspects of Yemeni and Somali life which she had studied. From time to time she gave long answers. Sometimes that indicates that the witness has in truth no answer to the question put. But that was not the impression I formed from Dr. Lewis. Her long answers were coherent and when she had made her point she stopped. Whilst her cross-examination indicated the limits to her expertise (which she accepted) her cross-examination did not reveal any flaws in her approach to the task of being an expert witness. I found her an impressive expert witness. I concluded that her views about Yemeni society and Somali clans should be accorded close attention. That said, it does not follow that the court must accept her views. The answer to the question, is it plausible or likely that Yemeni coast guards would decide to hijack a vessel for ransom, depends, in part, upon matters upon which Dr. Lewis could not give evidence, for example, the nature and degree of risks in hijacking (though she was able to refer to statistical data as to the number of young Somalis who died as a result of involvement in piracy).

The marine engineering experts

134. Permission was granted for the parties to adduce expert evidence from marine engineers as to "the operation of machinery in the purifier room and engine room, and the credibility of the Chief Engineer's account of events in the engine room on the night of 5/6 July 2011." By referring to the "credibility" of the chief engineer's account of events in the engine room the court permitted expert marine engineers to consider whether the steps which the chief engineer said he took made marine engineering sense. It cannot have been envisaged that the marine engineers were to express an opinion as to whether the chief engineer's account of events as a whole was true.

Mr. Lillie

135. Mr. Lillie was the Bank's expert marine engineer. Perhaps misled by the reference to the "credibility" of the chief engineer in the court's order Mr. Lillie addressed the question whether the chief engineer was a truthful witness in a wide and illegitimate sense. Thus he concluded his report in these terms:

> "I find the suggestion that Mr Tabares was responsible for setting an explosive device in the engine room to be beyond belief. This was a man of long experience who worked for a monthly salary without benefits such as leave pay or pension, and yet he tried his best, as seafarers do, to provide for his family and keep his reputation intact. A chief engineer from the Philippines or elsewhere is only employable in rank if his reputation is undimmed; and I understand from his 22 September 2015 statement [paragraph 215] that Mr Tabares has been so employed between 2011 and September 2015 on four contracts at sea. The Philippines seafaring community being a virtual village, this would not have been possible if any taint attached to his reputation.
>
> I will state here quite categorically, that in my opinion, no chief engineer, indeed no seafarer, would endanger his shipmates by planting an explosive device. While such a device could be defined by 'experts' as moderate or of limited explosive power, or perhaps intended only to cause a fire, how could a ship's engineer know the truth about something so alien? Such a suggestion is, in my opinion as someone with fifty years' experience of ships and ship's staff, simply incredible and unthinkable. "

136. Mr. Lillie also expressed opinions as if he were a fire expert or an expert on scuttling. Thus he said:

> "In my opinion, a complex and highly organised conspiracy to scuttle the vessel, such as that alleged by Defendants, could not have expected to produce a CTL from such a flimsy and almost ludicrous incendiary device as the one described by fire experts Drs. Mitcheson and Craggs in their various witness statements.

> If the device was deliberately set to produce a CTL, then the outcome was fortuitous to say the least.
>
> …….
>
> In my opinion nothing about the Brillante Virtuoso fire fits the pattern of a deliberate attempt to scuttle the vessel. If an engine room fire is to be decisively terminal it needs not only to be strategically placed but also to have a steady and reliable supply of fuel; steady, because an over-supply of fuel can quickly overwhelm and effectively cool a fire and is thus counter-productive. The Brillante Virtuoso fire had neither of these essential elements and it started in the purifier room, which, even with the doors open, was too enclosed to guarantee the fire spreading outward."

137. Although Mr. Lillie had experience of shipboard fires it is surprising that he considered it appropriate to express opinions of this nature. The answer may lie in his instructions. He explained that he had been instructed to consider certain matters by the Bank's solicitors. One of those matters was whether the allegation by the Underwriters that the IEID was placed "in an ideal location for the causing of a highly destructive fire".

138. There may therefore be reasons for Mr. Lillie expressing the opinions he did, so that it would not be fair to criticise him in the trenchant manner that counsel for the Underwriters did when cross-examining Mr. Lillie. But the fact that he strayed far outside his legitimate area of expertise in reaching and expressing the conclusions he did is a reason for exercising considerable caution when evaluating his evidence and considering the extent to which it is reliable. The reason is that he has not confined himself to his own expertise but has instead sought to consider the very questions which the court must address having regard to the evidence in the case as a whole.

139. There is a further reason for exercising caution when reviewing Mr. Lillie's evidence. He tended when cross-examined to be somewhat defensive and to seek to argue a point in the manner of an advocate, that is, to attempt to recover lost ground. In like manner he had sought in his second report to disparage the views of the other expert marine engineer. Further, his opinion that "nothing about the Brillante Virtuoso fire fits the pattern of a deliberate attempt to scuttle the vessel" is the statement of an advocate, not that of an expert giving his opinion on a discrete aspect of a case which requires the assistance of an expert to be understood by the court. The impression I was left with after considering his reports and his oral evidence was that he saw his role, at least in part, as being to argue that this was not a case of scuttling as alleged by the Underwriters.

140. Finally, it is necessary to observe that the unsafety of relying upon opinions expressed by Mr. Lillie has been demonstrated in this very case. The Underwriters' case is that persons on board the vessel damaged items of machinery in the purifier room, including in particular a diesel oil tank drain cock, with a view to accessing additional fuel for the fire. Mr. Lillie presented an opinion that a fire main containing sea water was heated by the fire to such an extent that it exploded (a phenomenon known as a BLEVE), thereby propelling an item of equipment across the purifier room so that

(after avoiding other structures) it struck a bulkhead and fell onto the drain cock thereby damaging it. But very shortly before he was due to give oral evidence Mr. Lillie withdrew his opinion as an explanation for the damage to the drain cock and on Day 35 of the trial the theory was abandoned by the Bank. The fact that Mr. Lillie was able to present an opinion on an important part of the case and then withdraw it, shortly before he was to give evidence, suggested that the court should be wary of relying upon his opinions. One of the reasons why the theory did not work was that the pipe in question was not a fire main containing water. This mistake suggested (at the very least) that he was prepared to put forward a theory without exercising sufficient care over its basic foundations. In his oral evidence he said that it was probably a fuel oil pipe but nevertheless maintained his opinion that it was possible that it could have exploded with damaging consequences to equipment in the purifier room. I was surprised that he was prepared to express a positive view to that effect in the witness box without having addressed in any detail whether the theory worked with fuel oil rather than with sea water. It suggested to me a somewhat cavalier attitude to his duty to the court. Indeed, when the fire experts came to address the theory one had never heard of "a fuel oil BLEVE" and the other was not aware of "any authenticated incident of a BLEVE type incident having occurred that had involved HFO". With regard to other damage in the purifier room, namely, to pipework associated with the fuel conditioning unit, he expressed the view that this was fire damage and in particular damage at the flange connections "where they would have been either brazed or welded". But in cross-examination he accepted that they would not have been brazed or welded. This again suggested that he was prepared to express views without having exercised sufficient care to ensure that they were correct.

141. For all of these reasons I did not regard Mr. Lillie as a helpful expert witness.

Mr. Gibson

142. Mr. Gibson was the Underwriters' expert on marine engineering. He gave his evidence clearly and almost always with readily understandable reasons. His evidence was, in the main, restricted to his expertise by, for example, comparing the account given by the chief engineer with what Mr. Gibson considered to be good engineering practice. On occasion he argued a point with counsel but I was not left with the impression that he was acting as an advocate for the Underwriters. On the contrary, opposing points were from time to time described as fair. Although, on occasion, he put forward a different view from that which he had agreed in the Joint Memorandum there were few such occasions and he gave his reason why his view had altered. There was no substantial reason for the court being unable to rely upon his evidence or for the court having to exercise caution before accepting it. As between the two expert marine engineers I formed the firm view that the opinions of Mr. Gibson were to be preferred to those of Mr. Lillie.

Fire experts

143. The fire experts provided a report, joint report and supplementary report in the normal way. However, in October 2018 FOS provided the Bank with many, many photographs including some which must have been taken by Poseidon because they

were taken at times when FOS was not on site. These photographs added considerably to the evidence as to the progress of the fire and led the Bank's fire expert to re-assess, at length, his views. That re-assessment in turn led to a further lengthy report from the Underwriters' fire expert. This development meant that important aspects of what had been common ground were no longer common ground. That lengthened the fire experts' evidence considerably. Why the further cache of photographs was made available only in October 2018 has not been explained.

Dr. Mitcheson

144. Dr. Mitcheson was the Bank's fire expert. He generally answered questions with care and clarity, and responded to criticism calmly, reasonably and fairly. Those are the characteristics of a helpful expert witness. Indeed, counsel for the Underwriters accepted in their closing submissions that "no criticism was made of the manner in which [his oral] evidence was given."

145. There were however reasons to be cautious when deciding whether to accept his views where they were in issue. First, he made mistakes in his reports. For example, in one of his later reports he expressed the view that it was possible that heavy fuel released from piping damaged by the explosion of the IEID had provided additional fuel for the fire thereby enabling the fire to spread from the purifier room. This was not a tenable opinion in circumstances where in one of his earlier reports he had made clear that the piping had not been damaged by the explosion. Although he himself withdrew his opinion at the start of his evidence in chief it was troubling that he had not checked this matter, or had overlooked it, when writing his later report. Second, he expressed opinions which he could not maintain. For example, in one of his later reports he described a tap (said by Mr. Lillie to have been fitted to the vessel during the course of the vessel's life to a diesel oil line) as accessible to an intruder and so a possible source of the accelerant required by the IEID. However, when asked to examine whether and how an intruder would appreciate that the tap was a diesel oil tap, he accepted that the tap could not fairly be described as accessible. This suggested that he did not always give adequate thought to the opinions he expressed. That suggestion was also supported by a number of errors which he made in his comments upon the cause of damage to the Fuel Conditioning Unit and the Boiler Supply Unit. However, in defence of Dr. Mitcheson this was a complex matter and technical experts from time to time make mistakes of detail.

146. Counsel advanced a more serious criticism of Dr. Mitcheson. He suggested that Dr. Mitcheson's written opinions lacked the required degree of objectivity. Counsel did not suggest that Dr. Mitcheson had deliberately advanced opinions which were designed to assist the Bank or that he had put forward opinions which he did not honestly hold. Rather, the suggestion was that in considering the issues put to him by the solicitors for the Bank, he had concentrated on examining matters from the Bank's perspective and had not also considered matters from the Underwriters' perspective. Thus it was that on several issues in respect of which he had changed his mind the changes of opinion coincided with the Bank's forensic interests.

147. Dr. Mitcheson pointed out, and I accept, that his changes of mind were not always in favour of the Bank's forensic interests. I also accept, as Dr. Mitchseon also said, that he did not intend to advance the Bank's forensic interests. But Dr. Mitcheson also very fairly accepted that it was possible that he had "unconsciously allowed [himself]

to argue the Bank's case in a way that was not fully objective" and had been "over-zealous".

148. In the course of his reports Dr. Mitcheson explained why certain matters which advanced the Bank's case were possible. For example he commented upon the fact that if the explosion had been caused by the intruders to act as a diversion whilst they escaped there would not have been a need for additional fuel to cause a major engine room fire. But it is, I think, legitimate for an expert to be told what the Bank's case is or might be and to comment upon the effect which that case has on matters within his expertise. There were other instances where Dr. Mitcheson sought to explain how certain pieces of evidence could fit in with the Bank's case (what counsel described as "reverse engineering"). Although this sometimes involved what Dr. Mitcheson accepted was speculation I was not persuaded that Dr. Mitcheson was simply advocating a particular case. It seemed to me much more likely that the solicitors instructing him had asked certain questions and that he had responded. It would have been preferable had he made clear what questions he had been asked by the solicitors and had also made clear in his answers what matters were supported by evidence and what were not. I was left, however, with the impression that there had been much discussion between Dr. Mitcheson and the Bank's solicitors as to the matters which the Bank wished to advance. As he himself accepted, he was "working in a team, listening to various arguments." I do not consider this as necessarily improper but it illustrates or emphasises the need for the expert to retain his independence of the party instructing him.

149. Counsel for the Underwriters placed much emphasis upon the differences between the opinions expressed by Dr. Mitcheson in the salvage arbitration between Five Oceans Salvage and the Owners (in which Dr. Mitcheson gave evidence for the Owners) and in this action and upon the differences between the opinions expressed by Dr. Mitcheson in his early and later reports in this action. They were quite striking. Thus, in the salvage arbitration he described the fire at 0730 on 6 July as residual or diminishing (he agreed with counsel that he was in effect saying it was on its way out) but in this action he described it as very active. In his early report and in the joint report he accepted that the fire in the purifier room had resurged in the afternoon of 6 July but in his later reports he said that the resurgence had not been in the purifier room.

150. With regard to the differences between the report in the salvage arbitration and the reports in this case it was unclear whether Dr. Mitcheson himself intended to say anything different. In answer to me he said that he did not think his reports in this case were "particularly at odds" with what he said in his report in the salvage arbitration. But in response to counsel he accepted that "any objective reader is getting a totally different picture." My own view is that the description of a "very active" fire paints a different picture from a description of a fire as residual or diminishing, though such a fire is still "active" because it has not yet gone out. The explanation for what counsel called "the change in tone" was, I think, that Dr. Mitcheson, as a result of his discussions with the Bank's solicitors, sub-consciously used language which, although in his view technically correct, favoured the Bank's case.

151. With regard to the change of opinion as to the location in which the fire resurged, it was apparent during the second day of Dr. Mitcheson's cross-examination that he was constrained to accept that the resurgence had been in the engine room and that it was

likely to have been in the purifier room. He had reasons for advancing the view he did but they did not survive cross-examination. Dr. Mitcheson very fairly accepted that. The view that the resurgence was not in the purifier room was in the Bank's forensic interests but I accept that it was not put forward for that reason. It seems to me that Dr. Mitcheson, as a result of his discussions with the Bank's solicitors, had an appreciation of the Bank's case and that when expressing an opinion as to the location of the resurgence failed to observe or take into account those matters which suggested that his revised opinion was probably in error.

152. In the result I accept that, although Dr. Mitcheson sought in his reports to give his honest and expert opinion, the court should be circumspect before accepting his opinions where they are in issue. Experts have to be aware that litigants are anxious to advance their case through an expert's opinion. They must stand back from the fray and view the matter objectively and disinterestedly. The more they find their opinions coinciding with the forensic interests of those instructing them, the greater the care they must exercise to ensure that the opinions they express are well founded and fully reasoned.

153. Having said that, Dr. Mitcheson's oral evidence was fair and objective and I found it of considerable assistance. As I have already noted it was not criticised by counsel for the Underwriters.

Dr. Craggs

154. Dr. Craggs was the Underwriters' fire expert. No criticism of his approach to the task of giving expert evidence was advanced during his cross-examination. Dr. Craggs answered questions both carefully and with reasons. From time to time (but not always) he accepted that a view contrary to his opinion was possible. His reasoned and measured views caused me to have confidence in the opinions he expressed. However, much of his evidence concerned the interpretation of photographs. There were occasions in his evidence that I was surprised by the confidence with which he explained what could be seen in the photographs. His confidence appeared to be the result of long and repeated study of the photographs, often after they had been magnified. Nevertheless, I was left with the impression that his long and repeated study of the photographs may, on occasion, have left him with an (objectively) unjustifiable level of confidence in his own interpretation of the photographs.

155. Counsel for the Bank in their closing submissions were very critical of Dr. Craggs' evidence, accusing him of "enthusiastically and uncritically" adopting the allegation made by Mr. Theodorou of deliberate damage in the purifier room and of "an unconvincing work of revisionism which paints his evidence in a poor light and raises questions about his objectivity". I was surprised to read these criticisms of his evidence. They stem from the fact that Dr. Craggs revisited the photographs of the purifier room to see if there was evidence of deliberate damage as suggested by Mr. Theodorou. I see nothing sinister or culpable in that. It is true that he had himself inspected the purifier room in 2011 and had not observed any deliberate damage. But then he had not been instructed to look for deliberate damage, apart from gunfire or the use of grenades. Moreover, there is now no dispute that the photographs *do* reveal evidence of damage to the drain cock to the diesel oil tank. I can see nothing in Dr. Craggs' renewed study of the photographs which either paints his evidence in a poor

light or which raises questions about his objectivity. On the contrary his further study has revealed an item of damage which is now, understandably, at the heart of the case.

The salvage experts

156. Permission was given to call salvage experts on the following issue: "Whether the salvors' conduct in fighting the fire was deficient in the manner alleged by the Defendants."

Mr. Herrebout

157. Mr. Herrebout was the Bank's salvage expert. He had dual qualifications both on deck and in the engine room. From 1995 until 2001 he worked within the salvage department of Wijsmuller, at that time a well-known professional salvor. He was however within the commercial division. He does not appear to have been a salvage master though he had been a salvage officer in respect of one casualty (the Ya Mawlaya) and had "daily involvement, including project attendances, in respect of several casualties". From 2005 until 2016 he was the managing director of Mammoet Salvage (responsible for its development into a well-known specialist in salvage and wreck removal) and was involved in "hundreds of salvage and wreck removal operations." Although he does not claim to have acted as a salvage master he has been on board "as part of the salvage team fighting the fire, having ultimate management responsibility in respect of the fire-fighting operation". Thus he had "daily involvement" in respect of many casualties.

158. He had been instructed by the Bank's solicitors to consider the following further issue: "Do you consider in light of your experience of the salvage industry and its practices that Poseidon's failure to take those steps (if proved) is demonstrative of collusion in a fraudulent scheme to cast away the vessel ? Or are they more likely to have an innocent explanation, and if so what ?"

159. A party ought not to expand the issue in respect of which the court has given permission for expert evidence without seeking the further permission of the court. The court seeks to ensure that the issue in respect of which an expert gives evidence is defined in order to ensure that the expert evidence is restricted to that which is reasonable, necessary and proportionate. The court's efforts in that regard will be frustrated if parties widen the issue without seeking the approval of the court.

160. As a result of Mr. Herrebout's instructions his report necessarily speculated as to what might have been the reason for the salvors' failure to take the steps alleged by the Underwriters, for example, a failure to close the doors in the accommodation. He was criticised for that but, as I think counsel accepted, it was not his fault. When suggesting possible explanations he ought to have pointed out that there was no evidence to support them but, given the additional question, one can see why he entered into such speculation. But Mr. Herrebout's views as to whether any failures by the salvors were "demonstrative of collusion in a fraudulent scheme to cast away the vessel" could not assist the court because the answer to that question must depend upon an examination of all the evidence in the case.

161. Mr. Herrebout responded clearly and confidently to the questions put to him about the steps which Poseidon could reasonably be expected to have taken. It is possible that

the nature of his instructions had the result that he tended to view matters in the most favourable light for the salvors. For that reason it was prudent to consider carefully whether his evidence on a particular issue represented no more than his objective view of what a salvor might reasonably be expected to do. On most matters, and in particular the issue identified in the court's order, it did and I do not doubt that that he gave his evidence honestly and in good faith.

Captain Stirling

162. Captain Stirling was the Underwriters' salvage expert. After serving as chief officer with Safmarine and Selco Salvage on salvage tugs, he served as salvage master with IMS, Semco Salvage and Titan Marine. He has much experience of fighting fires on board ship.

163. He also gave his evidence with clarity and confidence. He often supported his views with reasoning which was cogent and persuasive. On just one occasion he strayed into the question of whether certain evidence was reliable and permitted his view as to the reliability of the evidence to affect his answer. Nevertheless, I found him an impressive witness and, by reason of his experience as salvage master, particularly well qualified to address the issue in question.

The BMP experts

164. The discrete defence based on the requirement to follow BMP 3 generated expert evidence on that subject.

Mr. Hussey

165. Mr. Hussey, the Bank's BMP expert, is a former RN Warrant Officer of the Warfare Branch who had a 35 year naval career. He is now a consultant specialising in maritime security. In that capacity he has been involved in anti-piracy operations in the Indian Ocean, West and East Africa, the Middle East and the Far East. He has conducted many piracy specific security surveys and risk assessments.

166. It was apparent from his cross-examination that he had considerable knowledge and practical experience of preparations to protect vessels against piracy. Like several of the Bank's experts he was criticised for being too close to the Bank's litigation interests. There was support for that view in that in his report he had omitted to mention that the armed men in the small boat had their faces covered, a fact which he admitted would cause him concern. However, I formed the view that it would be unfair to criticise him in that regard. He had formed a clear view as to what was apparent from the VDR audio record, namely, that those on the bridge were not concerned at the approach of the boat. That view may be right or wrong but it formed the context in which he expressed his opinion. Whilst he ought to have mentioned and taken into account that the armed men had their faces covered I did not regard his omission to mention that fact (or other matters relating to the approach of the small boat) as indicative of a lack of an objective approach. He had a common sense view about BMP. What mattered, in his opinion, was whether practical steps to combat the risk of piracy had been taken rather than whether or not there had been compliance with the letter of BMP. Similarly, where there were apparent lapses from the conduct recommended by BMP, he pointed out that other regulatory requirements with regard

to anti-piracy action are sometimes in conflict with BMP. He also pointed out that masters had also to take account of ordinary navigational risks and that the appropriate action in that regard might also be in conflict with BMP. I found his views on these matters refreshingly realistic and down to earth. They served to remind that BMP must be placed in context and, at least for practical purposes, not focused upon in isolation. Of course, the focus of attention in this case is the contractual requirement for compliance with BMP. That is different from Mr. Hussey's focus of attention but his views may nevertheless be relevant when deciding whether the contractual requirement for compliance with BMP 3 had been satisfied.

Captain Cleaver

167. Captain Cleaver was the Underwriters' BMP expert. In 2011 he was the holder of a Ship's Security Officer certificate and as the master of VLCCs had practical experience in 2011 of planning voyages through the HRA. Unsurprisingly, given that experience, he had firm views as to the steps taken (or not taken) by the master of BRILLANTE VIRTUOSO in preparation for the transit through the HRA in July 2011. There was no reason to doubt either the honesty or the objectivity of Captain Cleaver's opinions. Counsel for the Bank said that Captain Cleaver had no military experience. That is correct but it was not explained why that mattered. Counsel also said that Captain Cleaver's experience was limited. That is true but his experience did concern four transits through the HRA in 2011. That experience was relevant both as to time and place. It was said, almost as a matter of criticism, that his experience was gained whilst employed on two VLCCs owned by a "global blue chip maritime conglomerate". I did not regard that as a matter of criticism. It was relevant experience. His approach was said to be "purist" or "doctrinaire" and "a counsel of perfection". He certainly considered it important to comply with the requirements of BMP 3. I did not consider it possible to dismiss his opinions on grounds such as this. Rather, his opinion on particular matters, like the opinion of Mr. Hussey on the same matters, had to be carefully assessed and weighed.

Accounting experts

168. Accountancy evidence was relevant to the question whether Mr. Iliopoulos had a motive to scuttle the vessel. Much of the "number-crunching" was agreed by the two experts. There remained a small number of issues in dispute.

Mr. Grantham

169. Mr. Grantham was the Underwriters' accountancy expert. On matters of accountancy he explained matters with confidence and clarity. There was however one matter which caused me concern. He accepted (and had accepted in his reports) that he was not an expert in the tanker market. Nevertheless he made investigations on the internet and on the basis of what he described as his extensive research expressed views about the tanker market and how it was perceived in and after 2011. I found that surprising. He ought to have appreciated that the tanker market was not within his expertise and declined to express any view about the subject. I therefore thought that it was possible that he was prepared to express opinions which were outside his area of expertise but which advanced the Underwriters' case. However, having reflected upon the whole of his answers in cross-examination I concluded that this would be an unfair conclusion.

His willingness to investigate and express opinions about the tanker market was an error of judgment (as was his comment on the evidence of Mr. Bezas that a long term time charter for BRILLANTE VIRTUOSO was under discussion). But in matters of accountancy he expressed his views fairly and objectively.

Mr. Daniel

170. Mr. Daniel was the Bank's accountancy expert. He was also a fair and objective witness, as was shown by those answers which appeared to advance the Underwriters' case and, arguably, damaged the Bank's case.

Cargo loss experts

171. There was an issue between the parties as to whether the crew of BRILLANTE VIRTUOSO had stolen cargo whilst the vessel was taking bunkers in Jeddah on 3 July 2011. This was not an issue at the heart of this case. The Underwriters relied upon the alleged theft as evidence of dishonest conduct by those on board the vessel and invited the court to take that into account when considering their principal allegation of scuttling. I was always doubtful that this allegation, if proved, would have more than peripheral relevance to the main issue in the case and thought that it was most unlikely to be determinative of the main issue. The Bank nevertheless wished to disprove the allegation of theft because, if they did so, it would damage the credibility of able seaman Marquez who had not only made the allegation but had also alleged that threats had been made against him were he to tell the truth about the alleged attack by pirates. Again, in circumstances where the reliance that could be placed on the able seaman's evidence was already limited because he had not been called to give evidence, I was doubtful that the time and cost spent on the expert evidence required to disprove the allegation was justified.

172. Mr. Severn was the Bank's expert on cargo loss. His cross-examination showed that he was very fair in his approach to the problem which he had been asked to address. His written reports, which expressed a view subject to certain caveats, gave the same impression. He appeared to be a model expert witness. Mr. Minton was the Underwriters' expert. He answered questions put to him with care and a degree of precision. His cross-examination showed that he too was fair in his approach to the issue in question and recognised the points which were contrary to his opinion. He too proved himself to be a model expert witness. They were both thoughtful and conscientious expert witnesses.

The narrative

173. It is necessary to give a chronological account of the events before, during and after the fire.

Anti-piracy measures

174. The Owner, master and crew of the vessel were aware of the risk of an attack by pirates. Whilst the detail of some of the steps taken to avoid an attack by pirates can

be left to a discussion of the BMP 3 issue it is helpful to note at this stage some of the anti-piracy measures taken prior to 5 July 2011.

175. Matters of security are the subject of the International Ship and Port Facility Security Code ("ISPS"). Pursuant to the ISPS a Ship's Security Plan ("SSP") was issued for the vessel in August 2010. Section 16 of the SSP dealt with, inter alia, the question of hijacking or hostile boarding and, at section 16.8.8, with piracy. This was reviewed by the master on 16 May 2011 and approved by Central Mare on 24 May 2011. Between 25 and 29 May 2011 it was independently audited by Alpha Marine Services.

176. According to the chief officer the SSP included a copy of BMP 3 and was kept by the master in his office. Second officer Artezuela said that BMP 3 was kept on the bridge. Notwithstanding the discrepancy as to where BMP 3 was kept, there did not appear to be any dispute that a copy of BMP 3 was kept on board. In any event I accept that it was.

177. It also appears that, prior to boarding the vessel, the crew's familiarisation training included anti-piracy training with reference to the SSP and BMP 3. For example the chief officer stated that he attended a 4 day pre-departure orientation seminar in which advice was given about piracy in the Somali area.

178. The Owner's manager, Central Mare, sent material relevant to the risk of piracy and the appropriate action to be taken. Thus on 11 April 2011 Central Mare sent the master advice that the vessel's AIS (Automatic Identification System) should be on whilst transiting the HRA so that naval forces could track her and on 12 April 2011 Central Mare sent advice as to the appropriate security level (II, rather than I). On 6 May Central Mare renewed the vessel's subscription to the Ship Security Reporting System ("SSRS") which ensured that when the vessel's SSAS alarm was activated the appropriate authorities would be informed. Reports of piracy attacks (Piracy Analysis and Warning Weekly, "PAWW") were also sent in May and June 2011, the last being sent on 1 July 2011.

179. With particular regard to the southbound voyage transit through the HRA Central Mare advised the master on 29 June 2011 of appropriate anti-piracy security measures.

180. Steps were taken to "harden" the vessel's security, for example, by the use of razor wire around the deck edge, the rigging of fire hoses, the nomination of the steering gear room as the "citadel" (a place of safety for the crew), and the provision of an extra lookout on the bridge.

181. On 4 July 2011 Central Mare passed on to the master the latest guidance regarding the IRTC.

Cargo theft at Jeddah

182. Since the parties required the question of a cargo theft at Jeddah to be determined, I shall do so. Mr. Severn and Mr. Minton agreed on many matters. Mr. Severn (for the Bank) accepted that the loading and discharge figures at Kerch and Khor Fokkan respectively showed an apparent loss of cargo and an apparent increase in the volume of salt water in the relevant cargo tanks. He accepted that the circumstances in which

the vessel had been loaded showed that his initial suggestion that the saltwater had been loaded with the cargo was unlikely and unrealistic. He further accepted that an accidental loss of cargo and admixture of saltwater could be ruled out. Thus there was evidence that cargo had been stolen and that saltwater had been added to mask the theft. However, he pointed out that the reported findings at Sharjah (to where the vessel had first been towed) suggested that the theft had not occurred by the time of the vessel's arrival at Sharjah and so had not occurred at Jeddah on 3 July as alleged by Mr. Marquez. But Mr. Severn accepted that it was difficult to see when the theft could have occurred between the vessel's stay off Sharjah and her arrival at Khor Fakkan where the STS operation took place and the surveys indicated a cargo loss and an increase in saltwater. He further expressed the opinion that what he described as the "intimate admixture" of the saltwater in the cargo, by which he meant that the saltwater found at Khor Fakkan was not in a separate layer at the bottom of the tank but was mixed with the cargo at all levels, was difficult to explain if the theft had occurred at Jeddah (or indeed later between Sharjah and Khor Fakkan). In response to my suggestion that "the puzzle is to make all of the figures fit together", he replied that "it is banging a square peg into a round hole. It is very difficult." The view that I provisionally formed at the end of his evidence was that his expert evidence had not established that Mr. Marquez' evidence of cargo theft at Jeddah must be untrue.

183. Mr. Minton (for the Underwriters) recognised that the Sharjah figures, taken at face value and when compared with the load port figures, suggested that there had been no theft before Sharjah. But, in circumstances where it was difficult to envisage how the loss of cargo had occurred after Sharjah, he doubted the reliability of the Sharjah figures. With regard to the "intimate admixture" of saltwater his opinion was that the saltwater could only have been introduced by use of the COW machines and that such method of introduction would explain the "intimate admixture" found at Khor Fokkan. The view that I provisionally formed at the end of his evidence was that his expert evidence had not established that Marquez' evidence of cargo theft at Jeddah must be true.

184. In considering whether the Underwriters have established that it is more likely than not that there had been a theft of cargo as alleged by Mr. Marquez I have considered, in particular, his account of the theft, the fact that there was on board the bunker barge (the alleged recipient of the stolen cargo) a surveyor appointed by the charterers who raised no complaint of theft, whether Mr. Minton's suggested method of saltwater introduction, COW washing, is consistent with Mr. Marquez' account, whether it is likely that COW washing would have been used given what Mr. Severn said was the danger in doing so, whether COW washing could account for the intimate admixture of salt water within the cargo, the significance or reliability of the Sharjah results and how plausible a theft after Sharjah is.

185. In view of the peripheral importance of this issue I shall express my conclusion shortly without rehearsing the sometimes elaborate twists and turns of the opposing arguments. My conclusion is that on the balance of probabilities there was a theft of cargo at Jeddah, essentially for these reasons. (i) If the Sharjah readings are reliable the theft must have occurred after Sharjah. But it is very difficult to envisage how the theft took place after the Sharjah readings were taken. It would involve Five Oceans Salvage and the owners of the vessel into which the cargo had been transhipped being complicit in the theft. Further, it would have to be done without the various surveyors

noticing what was going on. After the cargo was stolen seawater would have to be introduced into the relevant tanks. Again, this would have to be done without anyone noticing. In those circumstances it is more probable than not that the Sharjah readings were not correct and therefore they do not stand in the way of a conclusion that there was a theft before Sharjah. (ii) The discharge figures show that saltwater was comingled with the cargo. Although there are dangers in using COW machines to introduce seawater into a tank of fuel oil, as noted by Mr. Severn, I accept Mr. Minton's evidence that that was the only means of introducing seawater into the tanks. Since seawater was introduced, COW machines must have been used to introduce the seawater. I further accept Mr. Minton's evidence that the use of such machines explains the comingling of seawater and cargo found on discharge. (iii) There is no reason to suggest that Mr. Marquez, when he made his allegation of a theft of cargo, was aware of what the loading and discharge figures suggested. It would be an unlikely coincidence that he made an untrue allegation of theft in circumstances where the loading and discharge figures, unknown to him, suggested that such a theft had indeed taken place. Notwithstanding the errors in his recollection of ullages and his failure to identify in terms that the COW machines were used, it is more likely than not that his account of a theft of cargo, followed by the introduction of seawater, was true in general terms. Having said that, I do not consider that this particular episode assists me in determining whether the vessel was scuttled or not.

The arrangements for a security team to board the vessel off Aden

186. A security team had not previously been used by the Owner. The charterparty which the vessel was performing contemplated that the vessel might transit the HRA escorted by a naval vessel, at certain hours, following a fixed route or in a convoy. Although the question of a security team was raised by the charterers on 27 June 2011 the Owner replied the next day saying that a naval convoy was to be used. Nevertheless the Owner made arrangements for a security team. The arrangements appear to have been somewhat hurried. They were not made in time for the vessel's transit of the Red Sea from Suez where the HRA began. Instead they provided for a security team to board the vessel off Aden.

187. The arrangements appear to have been made between 1 and 5 July 2011.

188. There were several relevant emails on 1 July. At 0722 the Owner (through WWGT) asked an agent in Aden, Yemen Shipping, to arrange visas for three named "technicians" to embark the vessel. Just two minutes later at 0724 the Owner (again through WWGT) asked Anyland, a travel agent, to book flights from Athens to Aden on 5 July 2011 for three named "Greek technicians". At 1046 the Owner (through WWGT) was in contact with another agent, Sirah, and noted that the three Greek technicians would arrive in Aden on 5 July. At 1456 the Owner asked Hydrasec (a Greek security company) for a quotation for a security team of (a) 3 armed and (b) 3 unarmed personnel to be embarked at Aden or Djibouti. At 1753 Hydrasec replied with a quotation and said the port of embarkation would be Aden. Negotiations ensued for a contract both in respect of armed and unarmed guards.

189. On 4 July 2011 the Owner (through WWGT) asked Anyland to issue tickets for the three technicians to fly from Athens to Aden both on 5 July and on 6 July 2011. On the same day the Owner (through WWGT) requested the agent, Sirah, in Aden for

information about the issue of visas for "3 Greek persons" joining the vessel in Aden. Sirah replied the same day saying that the visas would be ready on 5 July 2011.

190. On 4 July 2011 the Owner informed Central Mare that they were close to agreeing to have a security team placed on board the vessel at Aden and later asked Central Mare to inform the master. So, on 4 July 2011 Central Mare instructed the vessel to proceed to Aden to embark "a security team".

191. On 5 July 2011 a agreement was concluded between the Owner and Hydrasec for the provision of an unarmed security team. On the same day the Owner informed Sirah of the flight details and asked Sirah to send urgently "OK to board" to the airlines. The flight details were from Athens to Aden via Istanbul and Amman arriving at 0430 on 6 July 2011.

192. On 5 July 2011 the Owner informed the charterers that an unarmed team of security specialists would board the vessel in Aden. It was said that the vessel would arrive that night and would remain anchored in the anchorage for a few hours to permit the embarkation of the team. The charterers protested that the vessel was entering the Gulf of Aden without a naval convoy. The owners' manager replied saying that they were responding to the charterers' request for a security team and that, after the team had boarded, the vessel would join the first available convoy.

193. At 1632 BST on 5 July the Owner's insurance broker informed Mr. MacColl of the First Defendant that the vessel was calling "OPL Aden to embark unarmed guards to sail with the vessel to Gale [sic] Sri Lanka". (There is a dispute as to the meaning of OPL; the rival meanings were "off or outside" port limits, as contended by the Bank, or "outer" port limits, as contended by the Underwriters. I will return to this dispute towards the end of this judgment.) The broker said "Vessel is expected to arrive OPL at 21.00 hours tonight in order to remain at anchorage until arrival and embarkation of the security team anticipated AM on the 6th July. Vessel will not make use of pilots, tugs or port facilities." The broker sought confirmation that there would be no additional premium "in view of the above reason for calling". Mr. MacColl confirmed at 1708 BST that there would be no additional premium "this instance not exceeding 48 hours". This was the "Aden Agreement" which was the subject of one of the Underwriters' further defences to the claim.

The vessel's approach to and drifting off Aden

194. As noted above the master was instructed by Central Mare, the Owner's manager, at 1430 on 4 July 2011 to embark a security team at Aden. Second Officer Advincula had prepared the passage plan for the voyage and after being informed by the master that the vessel would proceed to Aden he amended the course lines on the chart and the waypoints in the passage plan. On the chart, in respect of the passage through the Gulf of Aden, he wrote "Be Vigilant Pirated Areas".

195. The master said in his Manila statement dated September 2011 that he had communicated with the agent in Aden at 1400 on 5 July and had no communication with the agent after 1400. That recollection is not consistent with the VDR audio record, as the master accepted in his 2015 statement. For on 5 July 2011 at 1832 the master was in discussion with the agent at Aden and was told to anchor outside port limits. There is no support in the audio record for the master's evidence to Mr.

Rawlings and in his "Manila" statement that there was a discussion with the agent about when the security personnel were expected to arrive. The master said that he was told that the security personnel would arrive "late morning" which he, surprisingly and improbably, said he understood to mean between 0300 and 0600.

196. At 1838 the master was informed by an email from Central Mare that a security team of three unarmed persons would join the vessel at Aden. The master was also given the following advice:

> "Piracy activities and attacks to shipping in the region of Gulf of Aden, Horn of Africa, and along the East Coast of Africa continues. The Administration requires the implementation of all necessary security and anti-piracy measures as provided by your SSP, exercise extreme vigilance, and proceed with caution during your transit on this high piracy risk area. Masters are advised to report immediately any suspicious approaches of vessels and observations of actual or suspected piracy activity witnessed during your transit to Coalition Naval Authorities .....In case of an attack, attempted attack or suspected attack, ships should activate their SSAS, and immediately contact the Coalition Navy via VHF Channel 16 or 08 …….or via email. "

197. At about the same time (between 1836 and 1838) there was a telephone call between the master and, I was told, Central Mare. The master referred to anchoring outside port limits and appears to have been told that the "men", presumably the security, would arrive at 0500 and that the convoy would be at 0830.

198. At 1840 there was a discussion on the bridge in which it was suggested that drifting might be better.

199. Shortly before 2000 there was a discussion on the bridge about the "people who are accompanying us" coming aboard at 0500. It may be that this conversation took place in the context of the officer of the watch changing from Second Officer Advincula to Second Officer Artezuela.

200. At 2012 there was an engine movement and at 2015 "half ahead" was announced. It seems likely that the engine movement at 2012 was to half ahead. At 2019 slow ahead was announced. At 2032 the engines were stopped. The VDR recorded that the speed over the ground began to fall between 2000 and 2030 consistently with these engine movements.

201. At 2043 there was a telephone call between the master and, according to him, the port agent. It was submitted on behalf of the Underwriters that the call was with the Owner, Mr. Iliopoulos. The master addressed the caller as "Sir". He had not done so when talking with the port agent at 1832 (though he had addressed as "Sir" the caller from Central Mare at 1836). He informed the caller that the engines were stopped and that he would not call port control. He also told the caller that the vessel was "north of the position". The Underwriters suggested that this was a reference to a previously agreed position for a staged attack. The master gave several explanations of the "position". First, he said it was a reference to the position of the "IRTC". Second, he

said it was a reference to a position which would avoid small boats. Third, he said it was the position in which he intended to drift. Returning to the call, the master reported that the engine was stopped but that the vessel's speed was "now" 4 knots. He reported that the weather was good and that he would tell the engine room**.**

202. It is difficult to make a finding, at any rate at this stage in the analysis, as to the person with whom the master spoke. There is no reliable evidence as to who it was. Mr. Marquez said in his 2017 witness statement, untested by cross-examination, that the master had told him, after the call, that he had spoken to the Owner. But no such conversation between the master and Mr. Marquez appears on the VDR audio record. I am unable to place any weight on Mr. Marquez' statement (notwithstanding that it is more likely than not that his evidence concerning the theft of cargo in Jeddah is true). Any finding as to who the caller was can only be a matter of inference. I was unimpressed by the submission made by counsel for the Bank that the master's denial of the Underwriters' suggestion had "the ring of truth" (see paragraph 293 of their closing submissions). It was said by Counsel for the Underwriters to be unlikely that the call was with the port agent. First, the master addressed the caller as "Sir". He had not addressed the agent in those terms when they spoke earlier. Second, it is difficult to understand why the port agent would require the master not to call port control when, as the master had informed Central Mare, the agent had earlier advised the master to call port control in order to be advised as to where to anchor**.** But against that a number of points were made; see paragraphs 293-297 of the Bank's closing, in particular, that it was unlikely that the master would choose to speak to the Owner about an agreed position for a staged attack in circumstances where conversations on the bridge were recorded by the VDR. It is not possible at this stage to make a finding as to the person with whom this call took place. I will have to return to this question after having reviewed all of the evidence.

203. The master said in his Manila statement made in September 2011 that the vessel began drifting off Aden at 2100. The vessel's engines had been stopped at 2032 but the VDR shows that her speed over the ground was 3.9 knots at 2100. Unless that was the speed of the current she would appear to have still been making way though the water, not strictly "drifting". Her engines had only been stopped at 2032. She appears, by reference to the plotted positions from the VDR, to have been proceeding in a northerly direction.

204. But at 2107, as recorded by the VDR audio record, the engines were put to half ahead and the helmsman was instructed to steer 155 degrees. At 2110 the engines were put to slow ahead and the helmsman was instructed to steer 160 degrees. The plotted positions from the VDR indicate that the vessel did indeed move in accordance with those instructions. By 2130 her heading was 162 degrees. Also at 2130 there was a reference to "finish with engine" from which it is apparent that the engines were stopped. By 2200 the vessel's speed over the ground was, according to the VDR, less than a knot. So it appears that the vessel was now drifting in a north easterly direction, according to the positions plotted from the VDR. She was just outside the Yemeni 12 mile limit, according to the plot derived from the VDR data. Counsel for the Bank submitted that her position was to the north and east of her "initial drifting location" at 2030 (see paragraph 300(3) of their closing submissions). However, the course track prepared from the VDR data shows the vessel, when she was drifting at less than a knot at 2200, to be south and east of her position at 2030. The course track does not

identify precisely where the vessel was on the track at 2043 but her position at that time must certainly have been to the north (and west) of the position at which she was drifting at 2200. I consider it more likely than not that the master's third explanation for the phrase "north of the position" in the call at 2043, namely, the place where he intended to drift, was correct. For after the call he proceeded in a south easterly direction to a position where he commenced to drift.

205. The master said in his Manila statement that he went to his cabin at about 2130-2200. The VDR audio record appears to confirm that at 2221 he was not on the bridge because someone (presumably the officer of the watch) is recorded as saying that the master had not left him with instructions. He then confirmed that "right now we are just drifting" and added that the master said "we will be joining the convoy at 0830".

206. At 2225 Aden Port Control sought to call "BRILLANTE" several times. It would be a remarkable coincidence that there happened to be off Aden another vessel called BRILLANTE. There is no evidence that there was such a vessel. It is much more likely than not that the port control was calling BRILLANTE VIRTUOSO. The master did not answer the call. I am unable to accept his evidence that he did not do so because it was not his vessel being called. Although the VDR audio record records him as saying in Tagalog at 2226 "that's different, not mine" it is most unlikely that he truly thought that his vessel was not being called. It is more likely than not that the reason he did not return the call was that in the call at 2043 he had been told not to call port control.

207. At 2240 the VDR records the master as asking "are we on double watch right now?" On being told that there was a single watch he replied "It should be a double watch". Ordinary seaman Magno recalls in his 2015 witness statement (with the benefit of the VDR audio record) being called to the bridge at about this time.

208. The above VDR entries for 2225 and 2240 suggest that the master had returned to the bridge. It seems likely that at some stage thereafter he returned to his cabin.

209. By 2250 the vessel had drifted within Yemeni territorial waters in a north north easterly direction as indicated by the VDR reconstruction. At 2258 on 5 July 2011 the master confirmed "safe receipt and understanding" of Central Mare's earlier email advising him that three unarmed persons would board the vessel at Aden. That email had also reminded the master of the risks of piracy and what to do in the event of an actual or suspected pirate attack. The master accepted when cross-examined that the danger of a pirate attack was on everyone's mind on the evening of 5 July.

The boarding of the vessel by the intruders

210. There were in evidence many written statements by members of the crew. Some were written before the VDR audio record had been listened to and/or transcribed. Others were written afterwards. It is apparent from the latter that the crew recognised that the VDR audio record was the best evidence. My narrative of events is based on that record.

211. Between 2338 and 2343 there are recorded conversations on the bridge which suggest that a boat had been observed approaching the vessel. At 2338 a target was observed on the portside. A boat was then seen (probably with the use of binoculars) with

"plenty people". It then headed towards the starboard side of the vessel. One of the seaman on duty on the bridge, Mr. Marquez it seems, was sent down to the deck to "have a look". By 2348 the occupants of the boat could be seen. They were referred to as being in uniform. The master is recorded as asking (presumably from his cabin, as he suggested in his 2015 statement after having listened to the VDR audio record) whether anybody had called and being told that there had not been a call. The master also said "if that's security then they would identify themselves as security…are they wearing uniform ?" He was told they were wearing uniform and that there were observed to be 7 persons. Mr. Marquez noted that "they are bringing guns" and that their faces were "covered". He asked whether the pilot ladder should be dropped and the master replied "no, not yet". It can be inferred from the question that the boat was now alongside.

212. At 2351 there was a report by "walkie talkie" that "they say they are security". (It is likely that this was a report from Mr. Marquez on deck to the second officer Mr. Artezuela on the bridge. In the light of the VDR record Mr. Marquez' evidence in his 2017 statement that he was told that the men were "the authorities" is remarkable but demonstrably unreliable). There is written evidence from Mr. Artezuela that he went out on to the starboard bridge wing and communicated with the boat by loudhailer. It was said by counsel that the VDR microphones would not pick that up, which may well be correct. Ordinary seaman Magno, also on the bridge, confirmed in his written statement (after having listened to the VDR audio record) that Mr. Artezuela went out on to the bridge wing and that those on board the boat shouted by loudhailer that they were security. Mr. Artezuela said in his witness statement (made without the benefit of the VDR audio record) that the men in the boat said they were the "authorities". But they would hardly say one thing to Mr. Magno and a different thing to Mr. Artezuela. There is no witness statement from Mr. Artezuela after having listened to the VDR audio record. I prefer the account given by Mr. Magno after listening to the VDR audio record.

213. At 2353 there was an instruction to "go ahead put the pilot ladder down". In his cross-examination the master accepted that that instruction had been authorised by him, though the instruction recorded may well have been given by the second officer Mr. Artezuela, having taken instructions from the master, to Mr. Marquez.

214. At midnight Second Officer Advincula took over as officer of the watch from Second Officer Artezuela. It seems from the VDR audio record that there was discussion on the bridge about the men being security and the pilot ladder having been lowered. Someone on the bridge, probably Mr. Advincula, asked where the master was and was told he was in the toilet. At 0003 he said that the master could not be reached by radio.

215. Between 0004 and 0009 there were discussions on the bridge which suggested concern. One person said "we're in trouble". Another said "we're dead". The same person thought that those who had boarded might be a different group from security.

216. It is the Underwriters' case that the master, being party to the alleged conspiracy, allowed the armed men to board knowing that they were not the unarmed security team. That is a crucial issue in the case. It can only be determined after reviewing all the evidence in the case.

217. What is clear from the VDR audio record is that the armed men did not announce themselves to be "the authorities" (as stated in almost all of the witness statements made before hearing the VDR audio record) but announced themselves to be "security". The VDR audio record is obviously the best evidence. The next most contemporaneous evidence is what has been described as the naval log. That is a document prepared from "raw Centrix data". The Centrix system is a secure classified system developed by the US Navy which shows date and time stamped information fed into the system from a number of different "chat-rooms". The document used in this case has, it appears, been drawn from that recorded information. A report timed at 0812 on 6 July from USS PHILIPPINE SEA records that "the attackers were dressed like military members and claimed to be from the vessel's agent and were tasked with providing them security for their transit. That was how they were able to get alongside without much alarm." That information can only have come from the crew of the vessel. The full text of the entry refers to the chief engineer and the master from which it can be inferred that the information came from them, which is in accordance with the probabilities. Thus the VDR audio record and the naval log tell the same consistent story. Although there are later statements made by the crew in Aden and Manila in 2011 to the effect that the armed men were thought to be "the authorities" I have no doubt that such evidence is to be rejected. Most of those statements were retracted when the VDR audio record became available in 2015. Counsel for the Bank held fast in their closing submissions to the later statements made in Aden and Manila but, as will be apparent when these statements are discussed below, it is more probable than not that the crew gave such evidence, not because it was true, but because they had been requested to do so. In any event, the VDR record and the near contemporaneous naval log are to be preferred. When they are considered together the suggestion made by counsel for the Bank (at paragraph 328(1)) that it is "entirely possible that the word "authorities" was at one point spoken by Marquez, but it has simply not come through on the recording" can be seen to be implausible.

218. Counsel for the Bank also sought in their closing submissions to make the master's oral evidence (that he understood the armed men to be "the authorities") fit with the evidence from the VDR audio record. They did so by suggesting that the master made an "innocent mistake". It was suggested that he ignored what he was told by Mr. Artezuela, believing that he could not be right in saying the armed men were security and/or paid insufficient attention to what he was being told and/or misheard what he expected to hear, namely, that they were the authorities (see paragraph 324 of their closing submissions; and paragraphs 326-328 for the elaborate justification for the submission). The difficulty with this submission is that the master's oral evidence cannot stand with the statement he made in the light of the VDR. In his 2015 statement he noted the references in the VDR to security and that "there is no mention [in the VDR] at all to the men purporting to be from the 'authorities'. All discussions centre on the men claiming to be from 'security' ". In his 2018 statement he said that "it was only when I was told that it's the security by Second Officer Artezuela that I thought I needed to lower the pilot ladder and gave that order". Yet in his oral evidence he said that Mr. Artezuela "got mistaken in his belief. His belief is security, but my belief is authorities". The fact that he gave evidence contrary to his most recent statements made in the light of the VDR indicates, in my judgment, that he had decided that he had to support the case that he thought the armed men were the authorities notwithstanding (a) his recognition, when he had the benefit of the VDR,

that the armed men claimed to be security and (b) his explanation that it was on account of that that he permitted them to board. I found it impossible to place any weight on his oral evidence in this regard.

The actions of the armed men on board

219. Once on board the armed men ordered the crew to assemble in the dayroom. It appears that they did so. From there the master was taken to the bridge by two intruders and the chief engineer was taken to the engine room by two other intruders. There is evidence that the faces of the intruders were covered, in some cases by a cloth-like scarf and in other cases by a mask. There is evidence that they carried AK-47 assault rifles and pistols.

220. On the bridge, at 0024, the intruders asked the master where the "map" was. The master indicated where the vessel was (presumably by reference to the working chart) and an intruder said "we wish to go here" (presumably indicating where on the chart). The intruder then said "Move to Somalia", three times.

221. The master's evidence was that the engines were on 20 minutes notice. At 0058 an engine telegraph movement sounded on the bridge. Further engine telegraph movements can be heard on the audio VDR record at 0108, 0116 and 0117. The chief engineer gave evidence that he had put the engines to dead slow ahead, slow ahead, half ahead and full ahead. The VDR data shows the vessel's speed beginning to increase from 0110 and reaching 8 knots by 0130.

222. At 0130 an intruder asked "now, we go to Somalia, Yah ?" to which there was a reply of "yes, sir". Within 30 seconds gunshots were fired on the bridge. An intruder said "When you play I shoot you ah?".

223. The vessel proceeded, under the master's steering, in a south westerly direction rather than in a south easterly direction towards Somalia.

224. At 0133 an intruder asked "now in the map, where is Somalia ?" to which the master replied "here sir". Again, the intruder says "When you play I shoot you" to which the master replied "OK sir".

225. At 0144 an intruder said "Waraya" which is Somali for "hey".

226. At 0158 further shots were fired on the bridge. By now the vessel's speed was almost 11 knots.

227. At 0213 an intruder asked "What time to arrive in Somalia?" to which the master replied "it's slow ….long …long". The master was also asked "where we are now?" to which he replied "we are here sir". At 0214 an intruder said "Full speed" and asked "what time we arrive in Somalia?" to which the master replied "about 10 hours more".

228. At 0218 an intruder asked the master where the "safe box" was. Further shots were fired. At 0222 the master was asked "do you have money".

229. Counsel for the Bank submitted that there may have been earlier demands for money before this. Reference was made to a "transnational maritime update" issued by the

US Navy on 14 July 2011. It noted that the armed men ordered the master to give them $100,000 before escorting the chief engineer to the engine room. That is not recorded on the VDR (though the alleged conversation may not have been on the bridge). Furthermore, the naval log recorded that the demand for money was made when the pirates became angry "when the engines would not start". This does not place the demand for money as early as the later report of 14 July but, in any event, is untrue. The engines were only stopped after the demand for money (see below). The best evidence is the VDR log which places the demand at 0222.

230. Although the master in his written statements had said that the safe had been shot open, the surveyors' evidence was that the safe had been opened by a key which was found in the safe door (though one shot had been fired into the safe when it was closed). The master in his oral evidence accepted this and that it was he who had opened the safe. The master had said that the crew's passports were kept in the safe but he also said that when the safe was opened there was only medicine inside. When cross-examined he said the passports were on his table. He said there was a box for that, not "a safety box". It is probable that the passports were, as the master initially said, kept in the safe. That would be a sensible practice. I am unable to accept his evidence when cross-examined that they were kept in a box on his table ready to show to the authorities (notwithstanding counsel's comment that his evidence was given in "an unreflexive and spontaneous manner" (see paragraph 343 of the Bank's closing)). It seems clear on the master's evidence that they were not in the safe when it was opened. The inevitable inference is that they had been removed from the safe earlier. There is no evidence that the master had been expecting a visit from "the authorities" and so that cannot have been the reason for removing them from the safe.

231. The case of the Underwriters is that what is heard on the bridge when the master and intruders were present is in the nature of a charade. The case for the Bank is that the events depicted were real. Thus with regard to the events concerning the safe and the stopping of the engines counsel relied upon the oddity of the events as a badge of truth. "The greater likelihood is that the oddity of the events instead demonstrates their truthfulness" (see paragraph 338 of the Bank's closing). The events depicted were certainly odd. The instruction "move to Somalia", being unspecific as to location or course, is an unlikely command from a Yemeni coastguard (even if he had earlier pointed to a destination on the working chart). Similarly, one of the intruders asks "now on the map where is Somalia ?" It is unlikely that a Yemeni coastguard needed assistance to see where Somalia was on the chart. The firing of shots on the bridge coupled with the statement "When you play I shoot you ah?" suggests an attempt to make things sound or look real. There does not appear to have been any particular reason to discharge a gun on the bridge. The use of a Somali word by a Yemeni coastguard is suggestive of a charade. Similarly, the request for the safe and the question whether there was any money after the intruders had been on board for over two hours are difficult to explain. And throughout all of this the vessel was not proceeding to Somalia as apparently instructed, but in the opposite direction, without complaint. Whether the oddity of these events indicates their truthfulness or whether they were a charade can only be determined after the evidence has been considered as a whole.

232. I note that counsel for the Bank have submitted that the master's explanation of the reason for proceeding away from Somalia, namely, that his cousin had endured

considerable hardship in Somalia and that he did not wish to suffer the same fate, should be accepted. It was suggested that this evidence was "captivating and compelling". It was also suggested that the chief engineer was not feigning when he required a break from cross-examination because he found it upsetting to be asked about the pirates leading him to the engine room. Counsel submitted that "the impression was that these men were telling the truth" (see paragraph 334). Findings in a case such as this cannot be based on an impression. Any conclusion as to whether they were telling the truth can only be based upon all the evidence in the case and, in particular, the probabilities. Further, for the reasons I have summarised earlier, the evidence of the master and chief engineer can only be accepted where it is not in dispute or is consistent with other reliable evidence or with the probabilities.

The stopping of the main engines

233. Although the VDR contained no record of main engine movements and the engine logger has not survived, there is evidence of the main engine movements in the form of the VDR audio record which shows that at 0226, 0227 and 0228 four engine telegraph movements sounded on the bridge. This strongly suggests that the chief engineer slowed and stopped the main engine. The marine engineering expert witnesses agreed that it was likely that the first movement evidenced by the audio VDR record was half ahead. If so then it is likely, as the master accepted, that the second, third and fourth movements were slow ahead, dead slow ahead and stop. Indeed, when pressed on this Mr. Lillie accepted that there was no alternative explanation. Having operated the fuel lever in the engine control room to execute the desired engine movements the chief engineer then informed the bridge what he had done by moving the engine telegraph accordingly. The master accepted when cross-examined that this was likely. Moving the telegraph on the bridge (by the master) to accord with the movement initiated by the chief engineer caused the buzzer to stop sounding, as the expert marine engineers (and, eventually, the chief engineer) agreed. Each buzzer sounded for just a second or two on the bridge, consistent with the master having promptly moved the telegraph.

234. The chief engineer has given conflicting accounts as to the reasons why the main engines stopped a little before 0230 on 6 July 2011.

235. According to the naval log there was a report on 6 July that the "engineer" had "sabotaged the engines of the vessel to prevent them from starting". It is more likely than not that this information came from the chief engineer. Indeed he agreed when cross-examined that the reference to "the engineer" must be a reference to himself. In a "transnational maritime update" dated 6 July 2011 issued by the US Navy it was reported that in interview the chief engineer said that he "attempted to disable the ship by repeatedly starting and stopping the engine to disrupt the airflow and prevent the pirates from gaining command of an operating vessel". Thus there can be no real doubt as to the story which the chief engineer was telling on the morning of 6 July. It was not true. Nobody suggests that the main engines were sabotaged or disabled.

236. Counsel for the Bank relied upon another unclassified document dated 14 July 2011 from the US Navy which said that the chief engineer "was able to bleed the steam actuator compressor which effectively disabled the engines." Counsel said that there was no such device as "a steam actuator compressor" and that that cast doubt on the suggestion of sabotage or disabling. I accept that it casts doubt on the truth of the

suggestion that the chief engineer sabotaged the main engine but the document does not contradict the earlier documents dated 6 July that the chief engineer reported that he sought to sabotage or disable the main engine.

237. The chief engineer's later accounts were different. In a statement made in Aden on 10 July 2011 he said that the main engine turbo charger surged and "I slow down the m/e and stopped". In a further statement dated 14 July 2011 (which appears to be derived from the statement dated 10 July) he said that after the main engine turbo charger surged "I slowed down the main engine and stopped it." In his Manila statement (September 2011) he again said that he slowed and stopped the engine in response to the turbocharger continuing to surge. He specifically recalled reducing the rpm to 60 rpm and then to 44 rpm which it was accepted were the rpm for half ahead and slow ahead. In his 2015 statement he retracted this evidence and said, as he did in his oral evidence, that the main engine stopped itself. The evidence from the VDR strongly suggests that the chief engineer slowed and stopped the main engine by reducing the main engine to half ahead, slow ahead, dead slow and stop. This is consistent with his early statements but not with his 2015 statement or his oral evidence.

238. Counsel for the Bank have minutely analysed the words used by the chief engineer in his early statements and submitted that he has consistently stated that the main engine stopped itself for unknown reasons (see paragraphs 358-363 of the Bank's closing). But the statements cannot be analysed in isolation. They must be considered along with the VDR data. When they are read together they support a finding that the chief engineer deliberately slowed the engines to half ahead, slow ahead and dead slow ahead and then stopped them.

239. Counsel for the Bank also referred to the chief engineer's retraction in his examination in chief of the evidence given in his Manila statement as to fuel lever readings and submitted that "it cannot be assumed that the chief engineer reduced the revs to any given level". Counsel described him as frustrated and exasperated by his cross-examination and that the impression he gave was that he had been similarly exasperated when questioned in Manila (see paragraphs 364-366 of the Bank's closing). Comments on a witness' demeanour are, as I have explained, difficult. What I found more persuasive was that the VDR audio record suggested a slowing and stopping of the engines through 4 conventional engine movements and that the rpm mentioned by the chief engineer in his Manila statement equated to the rpm for half and slow ahead. That is unlikely to be a coincidence.

240. The case advanced on behalf of the Bank which was put to Mr. Gibson (the Underwriters' marine engineering expert) was that the main engine stopped at 0224.5 when the analysis of the vessel's speed over the ground (derived from the VDR) began to fall from over 11 knots. However, the graph shows the speed falling and then levelling off before falling at a much reduced rate until after 0227. This is consistent with a reduction to half ahead, as is agreed by the experts to be likely. (The explanation for the speed beginning to fall before 0226, when the telegraph indicated half ahead, must be that the chief engineer operated the fuel lever before 0226.) After 0228 the speed over the ground falls at a more rapid rate which is consistent with the engines having been slowed and stopped. In my judgment the VDR record of the speed over the ground is inconsistent with the main engine having stopped at 0224.5. If that had happened there would have been an immediate, steep fall in speed.

241. But the chief engineer has consistently said that his actions were because of the turbocharger surging. The expert marine engineers agreed that turbocharging surging does not cause a main engine to stop. It might indicate an underlying malfunction (such as the failure of a scavenge non-return valve or a governor malfunction) but if it did there should have been previous indications. There had been, as the marine engineering experts agreed, no prior history of main engine problems apart from intermittent turbocharger surging and the main engine had run normally for over an hour before it stopped. Further, it was agreed that the right thing to do when there is turbocharger surging is to make a slight adjustment of revs up or down, though ultimately, if that did not work the engine would have to be stopped. A typical or obvious response would be to keep the main engine running, rather than slow it down.

242. Given the expert evidence of the marine engineers I consider it unlikely that the chief engineer, when taking the action he did, was attempting to resolve a surging problem. The four engine movements indicated by the VDR audio record were not "slight adjustments" of the revs in response to surging by the turbo charger. I note that counsel for the Bank suggest that there was "nothing inherently wrong with large increments" and derive support from Mr. Lillie. I am not sure that Mr. Lillie did support this suggestion in terms. In any event the agreed position of the experts is that slight adjustments were appropriate.

243. The primary case advanced in the Bank's closing submissions (at paragraphs 391-401) was that the chief engineer so reduced the main engine speed that the engine stalled. This possibility had been mentioned by Mr. Lillie in one of his later reports when he suggested that the chief engineer may have "inadvertently slowed the engine to a point where it stalled". However, there was much sense in Mr. Gibson's evidence that in circumstances where the chief engineer was required to keep the engine running, "to slow the Vessel right down and possibly risk stalling the engine makes no sense at all". An inadvertent stalling was not mentioned expressly during the oral evidence of the marine engineering experts. It is possible that Mr. Lillie had it in mind when he said that the chief engineer "continued trying it. And then perhaps it got out of hand from him. I don't know." But the VDR audio record shows that the chef engineer must have signalled 4 engine movements to the bridge. That is very difficult to fit with "adjustments" getting out of hand. I prefer and accept the view of Mr. Gibson that inadvertent stalling is not realistic. The chief engineer has never suggested that he had inadvertently stalled the main engine.

244. The secondary case advanced in the Bank's closing submissions (at paragraphs 402-410) was that a malfunction occurred whilst the chief engineer was attempting to cure the turbocharger surging by reducing the revs. Mr. Gibson fairly accepted that such things are possible but added that "there would be indications beforehand of the poor running of the engine." There were no such indications. Thus the suggestion of a malfunction was no more than a possibility unsupported by evidence. Reliance was placed on what was said to be an alarm which sounded on the bridge at 0225 just before the first engine movement. However, it was not clearly an alarm; the Underwriters referred to it as an "unidentified sound". If there had been a main engine alarm it would have sounded in the engine room and the chief engineer had no recollection of such an alarm. If there had been one, just before the first engine movement, it is likely that he would have remembered it, given the effect which, on his account, the stopping of the engines had had on the armed men.

245. Counsel for the Bank sought in their closing submissions (at paragraphs 372-378) to suggest that there was an issue as to the maintenance of the vessel. Since this was in the section dealing with the stopping of the engines the implication was that this was relevant to the cause of the engines stopping. Reliance was placed on a general comment by a marine adviser in connection with the STS operation but he said nothing specifically about main engine problems. Reference was also made to cooling system problems in May 2011 and to evidence of ongoing maintenance. But counsel recognised that they were seeking to paint a picture different from that which the expert marine engineers had agreed, namely, that the vessel's main engine had no prior history of engine problems, other than turbocharger surging. It seems to me that that agreed position in reality makes it impossible for counsel to suggest that poor maintenance may have been an explanation for the stopping of the main engines.

246. My conclusion, as clearly indicated by the VDR audio record and the chief engineer's early statements (excluding that recorded in the naval log), is that the chief engineer deliberately slowed and stopped the main engine.

247. At 0228 an "intruder" on the bridge asked why the engines had stopped and the master replied that he did not know. A series of questions was asked: "Why stop?", "where is Somalia?". The Underwriters say that this was a further charade, noting that the questions were asked after the final engine movement and not after any of the previous engine movements. The Bank say (see paragraph 445 of its closing) that "the angry outburst ….has the aura of reality". The audio record was played in court. Whilst the intruder's voice appears to be shouting it is impossible to tell merely from listening to the recording whether this was a genuine series of questions or a charade. Shortly afterwards, before 0229, a phone rang on the bridge. The master assumed this was the chief engineer and the chief engineer thought that was possible though he had no recollection of ringing the bridge. It is unlikely to have been anyone else. There does not appear to be any audio record of what was said. The Underwriters say this call was "part of a co-ordinated process between the master and chief engineer to stop the vessel and prepare to set off the explosive device." Whatever was said by the chief engineer on the phone would not be recorded on the bridge and there is no audio record of what the master said. The Bank suggests that there could in this call have been an instruction from the intruder on the bridge to the intruders in the engine room "to make an attempt to restart the main engine, failing which a fire should be started". But such an instruction would have been recorded and it was not. In any event this suggestion ignores the probability that it was the chief engineer who called.

248. The chief engineer said that he tried and failed to restart the main engine. There was no corroboration of this evidence and it was not accepted by the Underwriters. Although Mr. Lillie suggested reasons which might explain both the turbocharger surging and a failure to re-start the main engine he accepted that there was no evidence in support of his suggestion. The marine engineering experts agreed that there was no evidence of a history of the main engine failing to re-start after stopping and that on the chief engineer's account there was no given reason for the failure of the main engine to re-start. Since there was no corroboration of the chief engineer's evidence that he tried and failed to restart the main engine I am unable, in the light of his unreliability as a witness, to accept his evidence that he tried and failed to restart the main engine.

249. I was not persuaded by Mr. Lillie's evidence that the evidence "points to a serious fault" with the main engine. His evidence tended to assume that the engine had stopped of its own accord and that the chief engineer had tried and failed to restart it. I have found that neither event occurred.

250. At about the same time as the speed over the ground began to fall at 0224.5 the vessel's course made good began to change to starboard from about 245 degrees, reaching about 90 degrees at about 0245. When plotted this shows the vessel turning almost a complete circle by 0310. In his 2011 statements the master makes no reference to this dramatic change in course. In his 2015 statement, after the VDR had been studied, he noted the turn. He said that he did not turn the vessel and suggested that "the vessel turned hard to starboard …because the vessel's speed dropped off: the autopilot struggles to hold the vessel's course at slower speeds." But by 0230 the vessel's speed was still in excess of 9 knots, yet the course made good was changing to starboard. By 0230 it was about 300 degrees and was continuing to turn. The master's explanation is unlikely to be correct. As Mr. Gibson said, this was "not loss of steerage due to lack of way". The autopilot would have "no problem keeping the course at speeds of ….6 knots or above." Mr. Gibson's experience of such matters came from sea trials "doing specifically this, doing turns and seeing how the engines perform, seeing at what point you lose steerage." His view accords with my understanding of these matters (derived from collision cases). It seems to me much more likely than not that the substantial change of heading was the result of helm action by the master. There is no other realistic explanation. Equally unlikely is the master's evidence that the "pirates did not notice the ship turning at the time". Given that they were members of the Yemeni coast guard or navy those on the bridge surely cannot have missed it.

251. Thus there is evidence of a deliberate slowing and stopping of the engines by the chief engineer and of a deliberate starboard helm manoeuvre by the master to turn the vessel round. However, whether such deliberate actions were part of and/or indicative of the suggested conspiracy can only be determined after all of the evidence has been considered.

The chief engineer's escape

252. The chief engineer gave evidence that, at a time when the armed men were watching him at gun-point, he left the engine control room to open another air bottle and went down onto the lower deck (the third deck), initially on the starboard side of the main engine and then round to the portside of the main engine to ease up the fuel oil pump rack. He said one of the pirates accompanied him and covered him with his gun. He said the pirate was half way up the stairs to the second deck but could still see the chief engineer. The other pirate was on the second deck. They were talking to each other.

253. The chief engineer said that he had an opportunity to escape, though on the account he gave in evidence it is not clear why; for the chief engineer accepted that the pirate on the stairs could still shoot him. The chief engineer said that he signalled to the pirates that he was going to take a look around the purifier room and that one of the pirates acknowledged the signal. He said he then went into the purifier room by the forward door. He said the pirate on the stairs could see him go into the purifier room and could

follow him in. He then said that he left the purifier room by the aft door and hid between the sewage tank and the sewage treatment unit.

254. There is a dispute as to whether in fact the chief engineer sought to escape from the armed men. Counsel for the Bank have submitted (see paragraphs 419-440) that his account is credible. The case of the Underwriters is that he did not seek to escape and instead acted in collaboration with the armed men. Whether that case can be proved depends upon an assessment of the evidence as a whole. At present the most that I can say is that the chief engineer's account of escaping from the intruders and then hiding from them between the sewage tank and the sewage treatment unit is improbable. First, the chief engineer was at risk of being seen coming out of the aft door of the purifier room. He said he could not be seen. But the photograph of this part of the third deck from the second deck suggests that he could be seen coming out of the aft door of the purifier room. He suggested that there were spare parts and/or trunking which would hide him. But if he walked (even if moved, as he said, "very fast") into the suggested hiding place from the purifier room it seems to me to be likely that he could be seen. In order to see him the armed men would have had to move to the starboard side of the second deck. It is not inevitable that they would do so but the chief engineer would have to take the risk that they did not. Second, it seems to me to have been a very dangerous place for a person, who feared being shot by the intruders, to hide. Counsel for the Bank could only say that the hiding place gave a "certain amount of cover." (The chief engineer had said in his 2015 statement that he could see the mouths of the pirates moving. If so then it is likely that they could see him. But he denied in his oral evidence that he could see the mouths of the pirates and yet could not explain why he had said that in 2015.) If the armed men had looked for him they would have found him. They would wish to find him because, on his account, they wanted him to restart the main engine. The chief engineer was unable to explain why they had not found him. If they had found him there was no escape from them. Third, if he had been intent on escaping he could have descended to the turbine deck (where he would not be visible) and made his way to the "citadel" in the steering gear room via the emergency escape trunk. Counsel for the Bank said that this would have been more dangerous. But I was not persuaded that this was so. It involves the chief engineer disappearing from view, but just as he signalled to the armed men that he wished to enter the purifier room (and so disappear from view) so he could signal that he wished to go to the turbine deck (and so disappear from view). The advantage of the latter is that he could reach the citadel. That would be safer than his hiding place behind the sewage tank.

The start of the fire

255. The chief engineer said that the intruders shouted for him and within a few seconds there was an explosion. He thought there was a grenade. His evidence was that the grenade was thrown into the purifier room by the intruders to cause him to emerge from his hiding place in order that they might get him to restart the engine. This explanation of the intruders' actions makes no sense. If they wished the main engine to be restarted, setting off a grenade in the purifier room adjacent to the main engine is a very odd way of achieving their aim.

256. It is common ground (based upon the agreed conclusions of explosive experts) that there was no grenade but that an IEID was activated in the purifier room which ignited a fire which spread from the purifier room. The IEID comprised about 0.2 kg

of high explosive, a power source (a battery), a switch system (probably a timer) and a container of accelerant (which it is common ground had not been brought on board by the armed men but was sourced on board).

257. The Underwriters say that the purpose of activating the IEID was to damage the vessel by fire. The Bank suggests that the armed men's intention in causing a large conflagration was "to secure their get-away or even to vent their frustration".

258. On the VDR audio record an alarm (possibly a 4 second continuous beep) sounds at 0241 and a continuous alarm (possibly with a bell sound being heard intermittently as well) sounds at 0248. The Underwriters say that each is a fire alarm. The Bank say that the latter is a fire alarm. Their respective marine engineer experts have listened to the audio record but could not agree as to when the fire alarm sounded as opposed to the general alarm. In the circumstances it is not possible to be more precise than to find that the fire alarm sounded at about 0245.

259. Thus, on the Bank's case, the decision to start a fire, source the accelerant and activate the IEID must have been made between 0228 (when the main engine was stopped) and about 0245, in less than 20 minutes. This appears to be a very short time in which to take and execute such a decision.

260. At 0244 the VDR records a question being asked "are you OK?" The Bank initially attributed this to an officer but now accepts (because the question was asked in English, not Tagalog) that it was not. The reasonable inference is that it was asked by an armed man of the master. The question was asked at about the time when the master said that his hands were tied by one of the armed men. That appears to be true because the chief officer confirmed that when he was able, a little later, to reach the bridge he found the master with his hands tied. The Bank suggests that this was an armed man "who was capable of sympathy". The Underwriters say that it reveals that what had happened before was a charade and that "the mask had slipped".

261. It is common ground that as a result of the fire flames and hot gases vented from the forward door of the purifier room to the forward section of the third deck and up to the engine control room on the second deck. For that to happen it is agreed that there must have been additional fuel. The Fire Experts' Joint Memorandum records that Dr. Craggs thought it unlikely that additional fuel would have been present fortuitously and that the additional fuel had been introduced deliberately. Dr Mitcheson agreed that it was more likely than not that additional fuel was added deliberately (though he would not rule out fire development and spread via materials which were fortuitously present).

262. The Bank's case in closing submissions (see paragraph 459) was that the accelerant and the additional fuel were likely to have been diesel oil sourced from the purifier room. It was said that it was obtained from the diesel oil service tank by means of a quarter turn tap on a retrofitted oil line, alternatively by means of the drain cock on the tank. If the quarter turn tap was used oil could be run into a suitable container (such as a plastic bottle). If the drain cock were used the Bank's case is that a diverter or hose would have to be used to permit diesel to flow into a container and so side step the tundish below the drain cock. Although the fire experts agreed in their Joint Memorandum that the most attractive source of additional fuel was diesel oil, the Underwriters, as I understood from their counsel's oral closing submission, do not

have a case as what the accelerant and additional fuel were. Diesel oil was said not to be the best accelerant or additional fuel. Petrol would have been better but there was no evidence of that. What they did maintain was that the retrofitted line was not a diesel oil line (it was an air line) and there was no evidence of the ready availability of a diverter or hose from which to siphon the oil from the drain cock. (A siphon may have typically been used for this purpose but there was no evidence that one was attached or available close by.) The Underwriters further said that it was improbable that the armed men, who were strangers to the vessel, could have found either the drain cock or the quarter turn tap, in the short time between the stopping of the main engine and the start of the fire. The Bank's case is that sourcing the required fuel was "capable of being purely improvisational" (see paragraph 460) and that either source of fuel would have been "obvious" to the armed men (see paragraph 491).

263. Why the IEID was activated, who sourced the accelerant and additional fuel, and where that came from are matters which can only be resolved, if at all, after considering all of the evidence in the case. The mere fact that the chief engineer's account of the main engine stoppage cannot be accepted and that his suggested "escape" is improbable does not mean that he was involved in the placing of the IEID or in the provision of accelerant or additional fuel. Those are merely parts of the entirety of the evidence which must be considered.

The abandonment of the ship

264. It appears that the armed men left the vessel, though there is no clear evidence as to precisely when or how. They presumably left by means of the same boat in which they had arrived. At 0303 the chief officer announced on VHF channel 16 that the vessel was under attack and that seven pirates were on board. USS PHILIPPINE SEA responded. Shortly before 0306 an SSAS alert was activated by the vessel. It had not been activated before. At 0308 the chief officer informed USS PHILIPPINE SEA that the vessel was on fire.

265. The VDR recorded a discussion by those on the bridge, presumably the master, chief officer and other members of the crew. One, probably the master, said "we're in trouble ..they fired their guns". Another said "they're not Somalians." Another said "they took my laptop". One, probably the master said, "that guy kept aiming his gun at me, and kept asking for money".

266. The naval log recorded a report at 0315 that 7 pirates had boarded, that the crew were on the bridge (save for the chief engineer) and that the bridge was secure from pirates. This information was that provided by the chief officer by VHF. At 0325 the USS PHILIPPINE SEA began to approach the vessel and launched its helicopter. At 0326 the vessel reported "we are on fire…we need assistance". At 0328 the vessel reported that the fire was in the engine room.

267. It is common ground that there was no fire-fighting by the crew. Whilst it is not suggested that they ought to have released CO2 into the engine room (since the chief engineer had not been found) no doors or vents were closed.

268. A decision was taken to abandon the vessel. There is evidence that the abandonment was not hurried and that the master and crew went to their cabins to collect their belongings. As I have already noted the crew's passports were available for them to

take. Notwithstanding that there was time to collect belongings the master did not take with him any of the ship's documents such as the chart or the deck log.

269. By 0412 or 0416 the vessel had reported that the crew were abandoning the vessel and were in the lifeboat. At 0414 the helicopter reported hearing explosions from aft or above the engine room. The source of these explosions was unclear. The source may have been drums in the cross alleyway as suggested by one crew member.

270. At 0457 the chief engineer was observed by the helicopter to be on deck.

271. A photograph of the vessel at 0543 from the USS PHILIPPINE SEA shows black smoke from the funnel louvres indicating a fire in the engine room. Dr. Craggs' comment on this photograph in his final report is that it evidences

> "copious amounts of thick dark smoke emanating from a location or locations aft of the Accommodation, the location(s) almost certainly including the funnel vents. Although it is not possible to determine any others with certainty, it is agreed that we cannot rule out some smoke emanating from a source or sources at main deck level. There is clearly a large fire in the Engine Room at this time."

272. There was no evidence in the photograph of a fire in the accommodation.

273. The chief engineer was picked up by the US Navy at 0722 and was on board USS PHILIPPINE SEA by 0744. He had therefore been alone on board the vessel for some two and half hours. It is common ground that the chief engineer took no steps to fight the fire. He did not release CO2 into the engine room or close off the air supply to the engine room. On his own account he went into the accommodation up to C deck to collect some personal belongings.

The arrival of Poseidon

274. Poseidon Salvage was able to respond to the need for assistance with a promptness of which leading international professional salvors would be proud, though the precise details are obscure. Mr. Vergos gave evidence in the salvage arbitration that he became aware of the need for assistance at about 0330 and that a salvage tug and an anti-pollution vessel (together with a salvage team of 14) were mobilised and on their way to the casualty by 0400. The salvage experts agreed that this was "an unusually rapid response time". Captain Stirling thought this "almost impossible", a view with which I, based upon my experience of salvage cases, can readily sympathise. It is possible that there is some exaggeration in Mr. Vergos' account and indeed it is the Bank's case that the salvage vessels departed for the casualty at about 0500. In circumstances where there can be no real doubt that the craft were on site by shortly after 0723 (see below) and where the experts considered that the voyage out would have taken about 2.5 hours to reach the casualty, Poseidon may not have left until nearer 0450. That would still have been a very prompt response but I note that Captain Stirling accepts that

> "if Poseidon were contacted at around 03:30 and did not leave until around 04:53 – then this would not have been unusual and

> would have allowed them enough time in which to prepare….."

275. But quite when Poseidon were informed of the casualty is not clear. Mr. Vergos claimed in his salvage statement that he learnt of the casualty at about 0330 but he also said that he was informed that the vessel had been abandoned, which event did not occur until about 0412. He said that that he was informed by the vessel's local agents and directly from the Owner's office in Greece. There is no other evidence of a communication from the local agents and the Owners' email communication was later, at 0421, when they instructed Poseidon by email to proceed immediately to the vessel (which was said to be "in distress") and offer their best services. This unparticularised description of the casualty as "in distress" suggests that the person sending it must have known that Poseidon already knew of the nature of the casualty. So the Owner's office may well have contacted Mr. Vergos before 0421. However, in view of the unreliability of Mr. Vergos' evidence (something which is common ground) his suggested time of 0330 can only be accepted if it is supported by other reliable evidence. As I have noted, his departure time of 0400 is not accepted by the Bank to be correct and is before the vessel was abandoned. No clear assistance as to times is provided by the written evidence of Mr. Pappas of FOS. In his salvage statement he said that after he had been informed of the casualty by Mr. Iliopoulos "at around 0300 or 0400" Greek time (which I was told was the same as local time in Aden) he had called Mr. Vergos "within an hour or so". When he spoke to him he learnt that Mr. Vergos was already aware of the casualty from Mr. Iliopoulos and was in the process of mobilising his tug, anti-pollution craft and salvage team. Whilst Mr. Pappas' account is unclear as to precise times it is clear as to the activity of Mr. Iliopoulos in the early hours of 6 July. Not only did he telephone Mr. Pappas but he also telephoned Mr. Vergos. How Mr. Iliopoulos learnt of the vessel's predicament is unclear. The SSAS alert was sent to Central Mare and so the manager may have informed the Owner. However, that would not have indicated that the vessel was on fire.

276. Based upon the evidence of Mr. Pappas (which neither party challenged) it is probable that Mr. Iliopoulos telephoned Mr. Vergos before 0421. If it was close to 0421 and Mr. Vergos left Aden on board Poseidon at about 0453 that would have been about half an hour after the call from Mr. Iliopoulos, which is the time interval mentioned by Mr. Vergos. But such a response time is improbable. The time interval is likely to have been greater. Whatever the time interval was, Poseidon's response was impressively prompt.

277. Mr. Plakakis gave evidence that on 5 July 2011 Mr. Vergos told his crew to listen to the VHF as the signal of the attack would be heard on the radio, that a call for help was indeed heard on VHF, mentioning pirates, that Mr. Vergos sounded the alarm and that the salvage tug and anti-pollution craft left for the BRILLANTE VIRTUOSO. If this evidence is accepted the Bank's case that there was a genuine attack by pirates could not, I think, survive. It is true that there was a call on VHF channel 16 at 0303 announcing that the vessel was under attack from seven pirates. That is apparent from the VDR audio record. Mr. Plakakis' recollection of the call ("Help, help, help, help BRILLANTE VIRTUOSO, Pirates") does not match the VDR audio record, though the call implicitly sought help from USS PHILIPPINE SEA. To that extent there is support for part of Mr. Plakakis' evidence, namely, that there was a VHF call. (I was

told by counsel that a VHF call from the vessel could be heard in Aden and there was some evidence to support that.) There is no support for the other elements in Mr. Plakakis' recollection of the events of 5/6 July 2011. Given the need for caution when dealing with his evidence I do not consider that it would be safe to rely upon his recollection that Mr. Vergos was waiting to hear the signal of the attack on VHF.

278. Mr. Vergos does not mention hearing the VHF call at 0303 which referred to an attack by pirates. It is also known from the VDR audio record that there were further calls at 0308 and at 0326 announcing that the vessel was on fire. Mr. Vergos made no reference to hearing these either. The court's finding as to whether Mr. Vergos was indeed waiting for a signal by VHF or a call from Mr. Iliopoulos must await consideration of all of the evidence in the case.

279. Situation Report No.1 from Five Oceans Salvage (who signed an LOF salvage contract with Mr. Iliopoulos at about 0700 on 6 July) reported that their sub-contractors' tug VOUKEFALAS and anti-pollution vessel POSEIDON IV were on location at about 0700. A photograph timed at 0723 shows the salvage craft at the vessel's position. The log from USS PHILIPPINE SEA noted that by 0745 "tugs" were alongside the vessel "assessing the situation".

The progress of the fire

280. A photograph timed at 0723 on 6 July 2011 indicated smoke forward of the accommodation. It is agreed that this came from the pump room. The pump room was forward of the engine room and the fire must have spread by conduction through the bulkhead. The photographs also showed smoke from aft of the accommodation. There was a dispute between the fire experts as to whether it showed, in addition to smoke from the louvres in the chimney casing, smoke rising up from the alleyway between the accommodation and the engine room casing. Dr. Mitcheson thought that it did but Dr. Craggs thought that it did not. Dr. Craggs thought that the smoke forward of the engine casing had come from aft of the funnel where smoke was emerging from a door. Neither expert's view is without difficulty. Dr. Mitcheson's view faces the difficulty that the smoke in question does not appear to be connected to a plume of smoke coming up from the alleyway. Dr. Craggs' view faces the difficulty that he could not explain how, in conditions of no wind, the smoke from aft made its way forward around the funnel casing. I am inclined to think that the difficulty facing Dr. Craggs' view is the more difficult to overcome. I therefore accept that it is possible that at 0723 there was smoke rising up from the alleyway between the engine room casing and the accommodation.

281. At 0727 a further photograph was taken by the USS PHILIPPINE SEA. Dr, Craggs commented in his final report that it evidences:

> "that the quantity of smoke emanating from aft of the Accommodation has reduced considerably and there is dark smoke emanating from the Pump Room exhaust vent in front of the Accommodation on the port side. Of the smoke emanating from aft, a significant quantity appears to be on the starboard side…."

282. In their joint memorandum the fire experts agreed, with regard to this photograph, that the fire in the engine room was "clearly diminishing/has diminished". There was however a dispute between the fire experts as to the significance of the smoke from the pump room and what it indicated as to the state of the fire in the engine room. Dr. Mitcheson said that the latter was still "very active" or "very much active". I accept the evidence of Dr. Craggs that the more cogent indicator of the state of the fire in the engine room is the reduced quantity of smoke aft rather than the smoke emanating from the pump room vent. It shows that the fire was probably in decline. When Dr. Mitcheson commented upon this photograph in the salvage proceedings he said that he was of the view that the fire "had clearly and evidently decayed significantly". This appears to have been a fair assessment notwithstanding that the engine room fire had so heated the bulkhead with the pump room that it had caused burning in the pump room.

283. Amongst the photographs provided by FOS in October 2018 was one timed at 0739. Dr. Craggs commented on this as follows:

> "Smoke is emanating from aft and from the Pump Room vent, although the latter now appears to be less dark and more grey in appearance than in the previous photographs."

284. Mr. Vergos said in his salvage statement that there was a substantial fire in the accommodation when he arrived. There is no evidence of this and Mr. Vergos does not explain what it is he saw which enabled him to conclude that there was a substantial fire in the accommodation. The unsigned salvage report which may have been prepared no earlier than 22 July reports flames from the accommodation at 0700. But flames are not evidenced in the photographs. Dr. Mitcheson said when cross-examined that "there was no sign in the photograph that I had that seemed to be contemporaneous with the arrival of the salvage tug that there was a large fire raging or present within the accommodation block." The fire experts agreed that there can be a fire in the accommodation without there being overt signs of it. But the fact remains that there is no evidence of a substantial fire when Poseidon arrived on site. Given that the photographs reveal no evidence of a fire in the accommodation it is more likely than not that Mr. Vergos' statement and the unsigned salvage report are untrue in that respect.

285. Mr. Vergos said that his salvage team first boarded the vessel at 0715. The first photograph taken on board the vessel is timed at 0739 so that it would appear that the salvage team lost little time in boarding the casualty.

286. Boundary cooling by the salvage tug had commenced by 0822 and at 0840 it was reported in the naval log that "the tugs" were attempting to cool the vessel. Photographs confirm that. Initially the tug was cooling the port side, aft. Later, it moved to the starboard side, aft and later still, back to the portside aft.

287. The photograph timed at 0840 shows that the smoke from the pump room had, in Dr. Mitcheson's phrase, "subsided to a whisper". Dr. Craggs had difficulty in seeing even a whisper. But what is clear is that the smoke from the pump room had very considerably diminished.

288. The smoke from aft continued to reduce also. Dr. Mitcheson said, in relation to a photograph timed at 0859, that there was "a continued diminution in the level of smoke associated with the engine room and funnel casings".

289. Dr. Mitcheson considered that in a photograph taken at 0901 smoke can be seen coming from the accommodation. Dr Craggs disagreed that the "mistiness" is smoke. He said that it is spray caused by the tug's monitor. There is a similar dispute as to a photograph taken at 0902. Doing my best to examine the photographs Dr. Craggs' view is open to the criticism that the spray from the monitor appears to be somewhat aft of the "smoke" seen by Dr. Mitcheson. A better point is perhaps that the "smoke" cannot be seen in a photograph taken at about the same time. This would suggest that what Dr. Mitcheson saw was not smoke. On the other hand, the location of the "smoke" is in the same position in which smoke can, or can arguably be seen, later in the morning at 1230 (see below). My conclusion is that it is possible that there was smoke from the accommodation but that I cannot make a finding that there was. If there was, any fire in the accommodation at this time must have been very minor in nature. Dr. Mitcheson accepted that the smoke observed by him was "minor" and suggestive of "a very small fire".

290. From 0900 until 0937 some smoke can be still seen rising from the funnel.

291. There is then a series of photographs between 0958 and 1028. During this time the smoke from the funnel appears to have diminished yet further. There is, in addition, smoke from the tug and spray from the tug's monitor. The fire experts are in dispute as to what areas of "mistiness" on the photographs indicate. Dr. Craggs' preferred view is that the fire was out by 1030 and that only tug smoke or spray from the monitor can be seen. But in his oral evidence he accepted that it was possible that what can (just) be seen is smoke from the vessel and in his written evidence he said that whilst most combustible material in way of the fire had been consumed it was possible that there were "some smouldering residues of, for example, wooden boxes in the Stores". Dr. Mitcheson's view is that the engine room fire was still "active". However, the evidence of "smoke" from the funnel cannot be described as compelling. In his oral evidence Dr. Mitcheson referred to the evidence of smoke as being "subtle", "not conspicuous" and to there being a "hint of smoke".

292. I do not consider that I can safely find that the fire was out. But even if the fire were not out and the photographs indicate smoke from a residual fire, the contrast between the early photographs and these later photographs indicate that the fire in the engine room must have consumed almost all of the available fuel and so must have been almost out. In the joint memorandum Dr. Mitcheson was of the view that the fire had "greatly diminished". Indeed, when cross-examined he accepted that the fire was "very nearly out", that it had run out of fuel, in the sense of oil, and that it was "going towards final extinction" and would probably go out that morning. My finding therefore is that by the time of the last photograph in this sequence at 1028 the fire had almost gone out and that it would shortly go out. The salvage experts agreed that the cooling carried out by the salvors was unlikely to have had any significant beneficial effect on fighting the fire. As is often the case the fire was burning itself out because it had consumed the fuel in its path.

293. Dr. Mitcheson suggested that in one of these photographs smoke could be observed which had come from the pump room exhaust. This would be surprising given that the

smoke had been, at best, a "whisper" earlier that morning. I accept Dr. Craggs' evidence that the smoke was under the port bridge wing which was some 26 feet from the pump room exhaust and that it was not credible to suggest that in conditions of no wind it had moved that distance horizontally. Dr. Mitcheson said that he had "sympathy" with that view. It seems more likely than not that the smoke emanated from the tug which was back on the portside of the vessel. It is true that the smoke was at a distance from the tug but the explanation for that may be that, after the smoke had been emitted, the tug had moved aft on the vessel.

294. There was also a debate about what could be seen rising from vents at the top of the breather pipes for the incinerator tanks, on the portside of the funnel casing. It had the appearance of smoke but the phenomenon was not visible in another photograph taken seconds later. Dr. Craggs suggested that it may have been vapour given off as a result of the material in the tank having been heated. Counsel for the Bank submitted that "there remain unexplained aspects to the fire" and that "the fire at 1030 appears rather more active" (see paragraph 566 of their closing submissions). I accept that what is shown in the photograph has not been clearly identified. However, there appears to be force and sense in the submission by counsel for the Underwriters that this does not detract from the agreement between the fire experts that the fire had run out of oil and was clearly going out. The point was not, I think, relied upon by Dr. Mitcheson to suggest that, contrary to what he had accepted, the fire was not on its way out.

295. It is also necessary to note at this stage in the narrative the evidence as to the whereabouts of the master and chief engineer. By 1000, according to the naval log, the master, chief engineer and an electrician were on their way back to the vessel "to assess the situation". When cross-examined the master was asked whether he boarded BRILLANTE VIRTUOSO that morning. He replied "yeah" but added that the master of the tug did not allow them to board the vessel "because still fire risk….still smoke ….it's dangerous." I do not think that the fair conclusion to draw from his reply is that he agreed that he re-boarded and then changed his mind. Rather, he noted the question and then gave his answer that he did not re-board. However, I find this evidence (and that of the chief engineer to the same effect) difficult to accept. The salvage team had boarded the vessel earlier and since then the fire had continued to decay and was on its way out. The means to board the vessel was a pilot ladder on the starboard side towards the stern and a pilot ladder on the portside much further forward towards the bow. It is more likely than not that it was not dangerous to board the vessel. There does not appear to have been any convincing reason for the master and chief engineer not to re-board the casualty.

296. At 1105 the salvage tug reported to USS PHILIPPINE SEA that the fire was "under control" and the naval vessel reported that the smoke had "subsided considerably" and that they believed "the fire may be extinguished".

297. The next photographs, 5 in number, cover a short period from 1231 until 1239. They show that that there was, at the least, an escalation in the fire. Dr. Mitcheson expressed the view that "the residual fire appears to have grown such that a substantial and active fire is depicted in images that were captured between about 12:31 and 12:39". Dr. Craggs agreed that the photographs showed a substantial and active fire. Further, in his opinion, which I accept, the final photograph in this sequence at 1239 shows that the quantity of smoke emanating from the Vessel had increased considerably suggesting that the fire was developing fairly rapidly.

298. Dr. Mitcheson is also of the view that grey smoke can be seen on the starboard side of the accommodation indicating that "a smouldering fire had been established in the accommodation some considerable time earlier and that it had increased in size." Dr. Craggs is not as clear about this as Dr. Mitcheson but accepts that it is possible that the smoke was coming from the accommodation. In the light of his disagreement with Dr. Mitcheson as to what can be seen at 0900, Dr. Craggs did not accept that the later photograph showed anything other than that at about 1230 there was fire in the accommodation. I have accepted that it is possible that that there was smoke emanating from the accommodation at 0900. It is therefore possible that by 1230 a very minor fire in the accommodation at 0900 had increased in size somewhat, but not much, as a result of the heat generated by the now substantial and active fire in the engine room. If the (possible) very minor fire in the accommodation had gone out it may have been reignited by the now substantial fire in the engine room.

299. By 1319 it was reported by USS PHILIPPINE SEA that the "3 crew" who were going to re-board the vessel had not done so "because of smoke and heat". On the other hand Five Ocean's Situation Report No.1 (sent at 1443 local time) had reported that "salvage team and part crew are on board". The report did not identify in terms the craft on which the salvage team and part crew were on board and the paragraph in which the report is contained refers both to the VOUKEFALAS and to the casualty. But the report concerns the casualty and it is more likely than not that the report was intended to state that the salvage team and part crew were on board the casualty than that they were on board the tug.

300. The report in the naval log at 1319 can only have originated from the Poseidon salvage tug. I have difficulty in relying upon this report because the Poseidon salvage tug had also reported to FOS that the salvage team and part crew were "on board". Since the master and chief engineer had returned to the casualty to assess the situation (and on the master's evidence to recover the ship's documents), since the fire was in the process of dying out and since there was a means of boarding the vessel I consider it more likely than not that the master and chief engineer did so. It was put to the chief engineer that he assisted in the work necessary to cause the fire to resurge. He denied that allegation. I can only determine whether the allegation has been made out after I have reviewed all of the evidence in the case.

301. The next photographs cover the period from 1530 until 1703. Those timed at 1530 confirm that there was at that time a substantial fire.

302. In their joint memorandum, when they had access to two photographs timed at 1530 (but not to the photographs taken between 1200 and 1230), the fire experts agreed that the location in which the resurgence of fire had occurred was the purifier room. However, after the further photographs had been disclosed by FOS in October 2018, Dr. Mitcheson changed his opinion and said that the location of resurgence was not the purifier room, though he could not say where in the engine room the resurgence had taken place. It is unnecessary to recount the reasons put forward by Dr. Mitcheson for this change of opinion. They did not stand up to cross-examination and Dr. Mitcheson eventually accepted that the resurgence was likely to have occurred in the purifier room "on the basis of the availability of fuel". Diesel oil was the only likely contender for the necessary additional fuel and that was in the purifier room**.** As Dr. Craggs explained "the only logical place" was the purifier room given the availability of fuel.

303. However, counsel for the Bank did not accept that the resurgence occurred in the purifier room and cross-examined Dr. Craggs as to his opinion that the resurgence took place in the purifier room. Essentially, the point put was that the absence of smoke above the cross-alley suggested there was no fire in the purifier room. If there had been such a fire smoke would have exited into the cross-alley via the engine room skylight and the mushroom vent. Thus it was submitted that by a "process of elimination" a fire in the purifier room could be ruled out (see paragraph 588 of the Bank's closing). Dr. Craggs did not accept this because the skylight may have been acting as an air inlet (as hot gases exited though the funnel) and the mushroom vent may have been closed (because the mechanism for forcing air through it was likely at some stage to have been damaged by the fire). Thus the absence of smoke did not necessarily indicate that there was no fire in the purifier room.

304. Counsel for the Bank submitted that a problem for Dr. Craggs' opinion was that that there was evidence of smoke rising from the alleyway at 0723 during the early fire which suggested that at that stage the skylight was not acting as an air inlet and that the mushroom vent cannot have been closed (see paragraphs 609 and 617 of the Bank's closing). But there were also difficulties with the argument advanced by counsel for the Bank. First, as Dr. Mitcheson accepted, there was not a "decent photograph" of the alleyway at the later time. Second, there was, on both parties' case, a fire in the engine room at the later time and so the argument advanced by the Bank based upon the skylight, "proves too much", as submitted by counsel for the Underwriters. Third, Dr. Mitcheson accepted that the closure of the mushroom vent was possible and therefore could explain the absence of smoke. Fourthly, and most importantly, both Dr. Craggs and Dr. Mitcheson said that the reason for believing that the fire had resurged in the purifier room was that that was where there was an available source of fuel, namely diesel oil.

305. Counsel for the Bank pursued this point in their closing submissions at paragraphs 588-617. What is noteworthy about this section of the closing submissions is that apart from Dr. Mitcheson's evidence that smoke cannot be seen to be rising from the cross-alley and certain of his answers in re-examination, very little reliance is placed on the opinion of Dr. Mitcheson as expressed when cross-examined. Counsel are of course entitled to rely upon evidence from Dr. Craggs when cross-examined and upon the evidence of Captain Stirling, the Underwriters' salvage expert, when cross-examined, but where counsel's detailed argument, spanning many paragraphs, as to the location of the resurgence is not to be found in the evidence from the Bank's own fire expert, the court is entitled to entertain doubt as to the argument put forward by counsel.

306. Counsel for the Bank also submitted (at paragraph 618 of their closing submissions) that the resurgence cannot have been in the purifier room because the initial fire had consumed all the available combustible material such that there was no scope for a reignited fire, if located there, to spread from there and grow to the extent shown in the photographs. But counsel for the Underwriters pointed out that the flames and hot gases from the fire could have caused the fire to spread in the absence of combustible material by means of conduction or convection. There was, for example, as stated by Dr. Mitcheson, an airlock access in the forward port corner which opened out into the base of the accommodation stairwell which would allow flames and hot gases to enter the accommodation. Dr. Mitcheson mentioned other possible routes as well. I

understood counsel for the Bank to accept that this was so in his oral reply. (Indeed the same mechanisms had been put forward in the Bank's closing at paragraphs 581 and 585.)

307. What I found compelling from the oral evidence of both fire experts was their common ground in concluding that the resurgence occurred in the purifier room because that was where the required additional fuel (diesel oil) was. This conclusion is challenged by counsel for the Bank in their closing submissions at paragraphs 626-630 but both fire experts thought the presence of diesel oil in the purifier room to be a significant and (as I thought when listening to their evidence) decisive point. There was no other possible source of fuel which dissuaded them from the view they expressed. Although counsel for the Bank sought to suggest that there were significant sources of inflammable materials in the engine room outside of the purifier room (see paragraphs 556-560 of the Bank's closing) none of these possibilities weighed with the fire experts.

308. It is, I think, a comment on the weakness of the Bank's case in this context that the suggestion made in their counsel's closing submissions at paragraph 630 was that "the possibility exists that the engineering staff may have been squirreling away fuel in the aft spaces of the Engine Room in sufficient amounts as to cause the resurgent fire, even though concrete evidence is no longer present". The Bank called the chief engineer but did not elicit evidence from him to support this suggestion. It was not investigated with the marine engineering experts or with the fire experts. No particulars of the suggestion were given, as to where the oil was stored, why it was stored, or why it survived the initial fire but was then released to cause the resurgence of the fire. This "possibility" cannot be regarded as a plausible, realistic or substantial possibility. It was supported by no evidence.

309. I find that the resurgence of the fire occurred in the purifier room. I do so because this was the common view of the fire experts for the same reason, namely, that the only source of additional fuel, diesel oil, was in the purifier room. I found this evidence not only to be much stronger than the argument advanced by counsel for the Bank that a resurgent fire in the purifier room can be ruled out by a process of elimination, but also to be compelling.

310. An important issue to be resolved is the cause of the resurgence of the fire which occurred in the purifier room before 1230 and was continuing at 1530. The question is whether it occurred naturally or because of human intervention. (The term "resurgence" was used throughout the trial. It was not intended to suggest, at least by counsel for the Underwriters, that the first fire had not gone out but was used as a convenient label to describe what was seen at 1230, without prejudging the question whether the first fire had gone out and that what was seen at 1230 was a separate fire.) This important issue can only be resolved after more of the evidence has been considered. For the moment it is only necessary to note two matters. First, there is a surprising absence of photographs between 1030 and 1230 during which time the fire must have resurged. The absence is surprising because it is to be expected that a salvage company would take photographs of important events throughout the course of the salvage service. The resurgence of the fire must have been such an event. Second, a photograph taken on 21 July 2011 reveals that the drain cock to the diesel oil tank in the purifier room was damaged. There is now (in reality) no dispute that such damage was deliberate. If it was damaged deliberately after 1030 and before

1230 it would allow diesel fuel to flow into the purifier room and cause the fire to resurge. I will return to this matter later in this judgment.

311. A photograph at 1620 shows the vessel under tow at a time when substantial amounts of smoke were coming from aft. Mr. Vergos said in his salvage statement that he arranged for the towage "with the fire effectively under control". That cannot have been the truth. However, the last photograph in the sequence at 1703 still shows smoke but it is diminishing. Dr. Mitcheson said that by this time the smoke "had largely subsided" but added that "the fire had not extinguished but continued to spread through the accommodation." Dr. Craggs considered that the towage may have led to a change in ventilation and hence a change in the appearance of the smoke, although he accepted that the speed of towage was no more than 1 knot.

312. Situation Report No.2 from Five Oceans Salvage (sent at 1659 local time) reported that the salvage tug was towing the casualty away from the coast in order to drop anchor well outside territorial waters. The "fire situation" was said to be "under control".

313. There is then a gap in the photographic record until the morning of 7 July.

314. Mr. Vergos said in his salvage statement that at 0030 on 7 July there was an explosion which appeared to come from the engine room the effect of which was to reignite the fire in the accommodation. The same statement is to be found in the unsigned report of the salvage services. The fire experts are agreed that there was no evidence of an explosion. I am unable to accept Mr. Vergos' evidence.

315. A photograph timed at 0858 on 7 July showed evidence of a fire in the accommodation. It seems clear that, as stated by Dr. Mitcheson, the fire had continued to spread through the accommodation overnight. Dr. Craggs accepted when cross-examined that the fire had "grown in the engine room" and in his written reports had accepted that the photographs taken on the morning of 7 July showed smoke emanating from the accommodation.

316. Situation Report No.3 sent at 1003 local time on 7 July reported that the casualty was now at anchor some 16 miles from the shore. It was also reported that "during the night some flames reignited in the accommodation" but that the situation was reported as being "under control".

317. A photograph timed at 1430 showed that the wheelhouse had by then been involved in the fire.

318. By 8 July the fire was out but water cooling continued.

319. On 19 July the CORAL SEA FOS arrived and, after being detained in Aden, on 26 July commenced to tow the casualty to the UAE. On 21 August anchor was dropped 18 miles off Sharjah, the cargo was tested and the vessel was inspected by various surveyors and experts. STS operations were not permitted off Sharjah and so the convoy proceeded to Khor Fakkan, arriving on 30 August. The cargo was transhipped by an STS operation which was commenced on 4 September and was completed on 27 September. The service under LOF was terminated on 7 October.

Discussion

The arrangements for the unarmed security

320. The Underwriters made several points arising out of these events.

321. The first point was that the hiring of a security team to board the vessel at Aden was a "ruse" to explain why the vessel was drifting off Aden. The Underwriters' case, as articulated in the closing submissions at paragraph 479 (and paragraph 428) is that, based upon the evidence of Mr. Plakakis, the ruse was developed after Poseidon's tug VOUKEFALAS had experienced engine trouble en route to a Turkish vessel in need of salvage services. The Underwriters say that the original plan had been for a fake attack by pirates in the southern Red Sea. The tug's engine problems meant that "it made sense from this point onwards for the plan to be revised, and for the incident to take place closer to Aden." By contrast the Bank's pleaded case was that the security team had been engaged because the charterers had suggested it. However, the Bank's closing submissions advanced a more subtle case. The Bank accepted that the Owner rejected the charterers' suggestion (see paragraph 190) and sometime after doing so "had a change of heart" (see paragraph 195) because it was a "prudent thing to do".

322. The Underwriters said that the Bank had no explanation for the admitted "change of heart" and suggested that their explanation was supported by an email sent by Mr. Plakakis on 1 July 2011 to a friend which referred to a project which had been lost "due to a mechanical defect". I have already said that the court cannot rely upon the evidence of Mr.Plakakis unless other evidence shows it to be correct. The email relied upon is one of 5 attached to Mr. Plakakis' statement to the police. It is a puzzling email and I have no confidence that all the emails sent or received by Mr. Plakakis at this time have been made available. In the circumstances I am not persuaded that I can safely make findings based upon it. In any event the reference to a project having been lost "due to a mechanical defect" is lacking in particulars and cannot be regarded as clear support for the Underwriters' case.

323. The Underwriters say that it made no sense to embark a security team as late as Aden, as this was after the vessel had already passed through some of the most dangerous waters on her route. Further, the engagement of unarmed security made no sense because their function was to help with risk assessment and "hardening" of the vessel, activities which it was too late to conduct off Aden. There is some force in these points. But there is also some force in at least some of the many points made by the Bank in support of the suggestion that the engagement of the security team was a genuine commercial engagement and against the suggestion that the engagement of the security was a ruse; see paragraphs 172-248 of the closing submissions. I have noted in particular the point that, if it were a ruse, one would have expected the Owners to have accepted the charterers' suggestion when it was first made (see paragraph 193) and also the point that, if it were a ruse, the Owners were unlikely to have entered into detailed negotiations with Hydrasec over several days (see paragraph 199). But any conclusion on this issue must await consideration of all of the evidence in the case.

324. The Underwriters further submitted that the request to Hydrasec for quotations based on Djibouti and Aden was a charade designed to give the impression that the choice

of Aden as the location where the security team would board was not that of the Owner but was the choice of Hydrasec. The Underwriters' submission is that the suggested charade was an attempt to lay a false paper trail to make it look unlikely that a staged attack by pirates at Aden was planned by the Owner. This was based upon the Owner's email to Anyland on 1 July which showed that the Owner had already decided that the security team would fly to Aden. There is, as counsel accepted, an alternative explanation, namely, that "the right hand" of the Owner did not know what "the left hand" of the Owner was doing. Both explanations are possible and are supported by evidence. I was not persuaded that this was a significant matter.

325. The third submission made by the Underwriters in this context was very similar in character. When the Owner's claim was still live and the Underwriters sought permission to amend their defence to allege wilful misconduct it was suggested on behalf of the Owner that whereas it had been intended that the security team would arrive on 5 July at 1845 their flight was cancelled which caused the vessel to have to wait off Aden for some hours. The Underwriters maintain that this was untrue and deliberately so.

326. The Owner obtained a letter from the travel agent, Anyland, on 12 August 2011 which was drafted by the Owner. It stated that the security team had been "programmed" to fly from Athens to Cairo and thence to Aden, arriving at 1845 on 5 July 2011. But it was said that the flight from Cairo to Aden was cancelled and that the agent made alternative plans for the team to reach Aden, via Istanbul and Amman, arriving at 0430 on 6 July 2011.

327. Counsel for the Underwriters submitted that this was a lie and that the Owner has been caught "red-handed" in obtaining an untrue statement from Anyland in order that it might be used to counter any suggestion that there had been wilful misconduct by the Owner. The letter was deployed as soon as that allegation was made. Counsel for the Bank have resisted this submission at length; see paragraphs 251-275 of their closing submissions.

328. There are certainly difficulties with the letter. No proof of a booking on a flight to Aden via Cairo has been provided. Further, the suggested flight from Athens to Cairo did not exist. Finally, as now appears to be common ground, the flight from Cairo to Aden was not cancelled but was brought forward (by less than an hour). The Bank has suggested that in consequence the security team were unable to take that flight. But the team in fact never went to Cairo, and there is no proof of them ever having been booked on any flight other than the one which they took, via Istanbul and Amman.

329. The Bank adduced in evidence a statement from a lawyer at Clyde and Co. who spoke to Polina Mastrogianni of Anyland. The latter confirmed that the flight had been cancelled and said that she recalled being asked to make alternative arrangements. It is surprising that she recalled this matter several years after the event. When informed that there was evidence that the flight had been brought forward and not cancelled she said that the flight might have been reinstated. She did not sign a statement herself and ceased co-operating with Clyde and Co. I am unable to place any weight on this evidence.

330. In the result there appears to be force in the Underwriters' submission that it was not true that the flight to Aden had been cancelled. Indeed that is admitted by the Bank. It is further clear that the Owner drafted a letter for Anyland to sign stating that untruth. Whilst the Bank maintains that the Owner at the time believed that the flight had been cancelled (see paragraph 262(3) of the Bank's closing submissions) the Bank is unable to explain why the Owner drafted the letter for Anyland to sign beyond the suggestion that "it was perfectly reasonable and understandable to seek written confirmation from the travel agent of the reasons why the security crew could not travel on the earlier flight" (see paragraph 262(4)). However, whether the Owner intended to use that letter to show (untruthfully) that the arrival of the security team had been delayed and that as a result the vessel drifted off Aden for longer than had been intended in order to suggest, if it ever became necessary to do so, that there was an innocent explanation for the vessel drifting off Aden, is an issue which, in order to be determined, must await a consideration of all of the evidence.

The permission to board

331. The master gave permission for the armed men to board in circumstances where, although they announced that they were "security", they gave every appearance of not being "security". First, there were seven in the boat and the master was expecting only three. Second, they were armed and the master was expecting unarmed security personnel. Third, their faces were covered. There was no obvious reason why security personnel should arrive with their faces covered. Fourth, they had arrived shortly before midnight when the master was not expecting them until 0500. In circumstances where the vessel was drifting in the Gulf of Aden and piracy was feared it is a matter of some surprise that the master, without even leaving his cabin and investigating the matter for himself, authorised the armed men to board the vessel by the pilot ladder. He did so having been told that there had been no call from the boat and that there were 7 persons on board. I would have expected a prudent master to have left his cabin and investigated the matter himself in order to make sure that the armed men in the boat were in fact the security personnel who had come to assist rather than attack the vessel. He already had good reason to think that they might not be the expected security.

332. I have been unable to accept the master's oral evidence that he believed the armed men to be the "authorities". I have found that they had announced themselves to be the "security". It is deeply improbable that the master can have thought they were "security". Indeed, the master accepted when cross-examined that there were several reasons why they could not have been "security", notwithstanding that in his 2018 statement he had said that he permitted the armed men to board because they were "security". His written and oral evidence on this topic was in truth incoherent and invites the conclusion that he permitted the armed men to board because he was part of a conspiracy to permit a group of armed men to board the vessel. There is no other explanation in circumstances where his oral evidence that he believed they were the authorities cannot be accepted. Stupidity or incompetence is in theory another explanation but that seems to me fanciful in circumstances where the risk of piracy was something of which the master was aware. At 2258 on 5 July 2011 the master had confirmed "safe receipt and understanding" of Central Mare's earlier email which had advised him that three unarmed persons would board the vessel at Aden and which had reminded him of the risks of piracy and what to do in the event of an actual

or suspected pirate attack. Further, the master accepted when cross-examined that the danger of a pirate attack was on everyone's mind on the evening of 5 July.

The actions of the master and chief engineer after the armed men had boarded

333. The master did not sound the SSAS alarm when he was aware that there was alongside his vessel a boat containing armed, masked men who could not be the "security" he was expecting. Yet at 2258 on 5 July he had confirmed safe receipt and understanding of Central Mare's email advising extreme vigilance and that the SSAS alarm should be sounded in the event of a suspected attack. This failure, in the Gulf of Aden within the HRA, is surprising. It is most improbable that there is an innocent explanation for the failure.

334. The armed men ordered the master to sail to Somalia. Despite the men being armed and the master being unarmed the master steered the vessel, not towards Somalia, but away from Somalia. It is possible that this was a courageous action. But that is improbable for several reasons. First, the advice in BMP 3 was to cooperate with pirates. Second, the master must have appreciated that there was, at the least, a real risk that the armed men would have appreciated that the vessel was not proceeding to Somalia. Third, the master must have feared (on his account of events) that the armed men might be violent when they learnt that, contrary to their apparent command, the vessel was not being sailed to Somalia. Fourth, the master could not have had any expectation that he could have overcome the armed men.

335. Counsel for the Bank accepted that the gyro compass and repeater would indicate the direction in which the vessel was being navigated. It was suggested that "the master initially steered the wrong course, looking to see whether or not it had been spotted. If it was instantaneously spotted, the master would still have been able to pretend that the mistake was innocent, and have corrected it accordingly." This was not the evidence of the master. Even if it were his evidence it is highly improbable that the master could hope to explain that he had a made a mistake in steering a south westerly course, instead of an east south easterly course.

336. The chief engineer, after the main engine had been running for over an hour, deliberately slowed and stopped the main engine in the conventional manner by reducing the speed of the engine to half ahead, slow ahead and dead slow ahead and then stopping the main engine. The fact that he chose to do so (it was not necessitated by surging of the turbo charger) in the company of armed men invites the conclusion that he did so by agreement with the armed men.

337. His account of hiding from the two armed men who accompanied him to the engine room is improbable for the reasons I have already given.

338. After the fire broke out the master decided to abandon ship. At this time the fire had not spread to the accommodation. Although the master and crew took with them their passports and some personal belongings the master did not take with him the deck log or chart. A prudent and responsible master would wish to do so. Indeed it was the evidence of the master that he wished to return to the vessel later in the day to recover the ship's documents. His failure to take the log and chart with him when he abandoned the vessel is therefore surprising. Counsel for the Bank suggested that in

the modern world, where vessels are equipped with a VDR, there should be nothing surprising about the master's failure to take the log and working chart. But the master, on his own account, went back to recover the ship's documents. In any event I do not accept that masters would not be expected to bring with them the log and working chart where there is a VDR on board. They are crucial records of the vessel's navigation and of other events and remain so notwithstanding the existence of a VDR.

339. The chief engineer remained on board on his own for over two hours. He took no steps to fight the fire. This is surprising because the marine engineering experts agreed that he would have been expected to (a) operate the remote stops for the ventilation fans and fire ducts, (b) close off any accessible manual ventilation fan dampers, (c) if accessible, operate the remote control quick-closing valves for the various fuel and lubricating oil tanks and (d) release the CO2 to the purifier and engine rooms. The controls in the Fire Control Room (and probably those in the CO2 room) were accessible to him. Since he went into the accommodation up to C deck it is also surprising that he did not close the doors in the accommodation.

The actions of the armed men

340. Counsel for the Bank submitted that it was at least plausible to suggest that the Yemeni coast guard personnel who boarded the vessel were motivated to and did hijack the vessel with a view to trying to sell or trade it to Somali pirates. They relied upon expert evidence that Yemen was a failing state, that the security situation in Yemen had deteriorated in the early part of 2011, that Yemen was one of the poorest countries in the world, that the coastguard had suffered a dramatic budget cut in 2009, that by July 2011 the coastguard had ceased to carry out private security operations, that corruption was endemic in Yemen, and that at least some of the coast guard personnel would have been prepared to use their position to obtain illicit benefits to supplement their income. Pausing there, these circumstances are just as consistent with the Underwriters' case as they are with the Bank's case. Counsel for the Bank further relied upon evidence that the Yemeni coastguard colluded with Somali pirates at the logistical level (the supply of food, fuel and/or weapons) and that there were criminal connections between Somalia and Yemen in legal and illegal trades including weapons, narcotics and people smuggling. Professor Jones considered that "existing patterns of collaboration between Somali pirates and Yemenis could have paved the way for joint piracy operations, in which Yemenis might have acted as the perpetrators of attacks." Dr. Lewis disagreed with that hypothesis, "given that (i) the available evidence suggests that any collaboration between Somali pirates and Yemenis was limited and would not naturally lead to joint attacks, (ii) Yemeni involvement in Somali piracy would potentially be unwelcome to Somalis, and (iii) there is no evidence of such joint attacks having occurred." It seemed to me that Dr. Lewis' doubts were well founded. Another contentious element in counsel's argument was the suggestion, based upon Dr. Shortland's evidence, that the established links between Somali piracy and illicit criminal trades between Yemen and Somalia could plausibly have formed the basis for "the conclusion of a self-enforcing criminal agreement between those who organised the attack on the BV and Somali pirates for the purpose of carrying out a ransom transaction, or an arbitrated enforceable contract based on several channels of informal contract enforcement" (see paragraph 920 of the Bank's closing). The enforcers of illegal contracts were "clan elders, businessmen and in some areas religious elites, based around clan groups" (see paragraph 922 of

the Bank's closing). Captain Northwood had a less optimistic view of what might have happened. "The most likely reaction from the Somalis would have been to kill the Yemenis and take all of that windfall for themselves."

341. The expert evidence as to Piracy and Yemeni criminality spawned extensive debate in the written closing arguments; see paragraphs 907-974 of the Bank's closing and paragraphs 704-763 of the Underwriters' closing. The possibilities canvassed in the evidence and in submissions included the Yemeni coastguard seizing the opportunity to hijack a tanker with a valuable cargo and get it within "the range of a phone mast on the Somali coast" and start "a telephone conversation" with Somali pirates. There was also considered "some sort of transaction agreed in advance of the arrival of the BRILLANTE VIRTUOSO off the East coast of Somalia" with the benefit of "Somali clan protection …providing a guarantee of safe passage". These suggestions were freely discussed by the Bank's experts and counsel notwithstanding that there was no evidence of Yemeni piracy either before or after the event which befell BRILLANTE VIRTUOSO. This was criticised by counsel for the Underwriters as unwarranted speculation and counsel for the Bank had to accept that it involved a "degree of conjecture". Counsel for the Bank submitted that this was acceptable in circumstances where the experts were in "uncharted territory" and that "the Court must do the best it can, taking into account the actual circumstances of the attack and matters which are properly the subject of expert evidence in the fields of Piracy and Yemeni criminality."

342. In this area of wide-ranging speculation and conjecture I consider it helpful to examine "the actual circumstances of the attack", that is, what happened on board BRILLANTE VIRTUOSO, and in particular the actions of the armed men themselves, and, in the light of such matters, to consider whether it is plausible to suggest that the armed men who boarded BRILLANTE VIRTUOSO had the intention suggested by the Bank. That seems to me a safer route to a sound conclusion than consideration of the possible scenarios suggested by Dr. Shortland and Professor Jones. That is particularly so given the general observations upon which the Yemeni criminality experts were agreed, namely, that "Yemen is an inherently complex case to study. The fragility of the state in 2011, its poor capacity to collect accurate data on its citizens, and the lack of journalistic freedom in this time period have meant that only general observations can be made about the security situation". It was agreed that "crime is also inherently difficult to study by virtue of the facts that (i) it is designed to occur undetected and (ii) the availability of reliable data is limited, particularly in Yemen."

343. Indeed, Dr. Lewis' view was that the unique nature of the BRILLANTE VIRTUOSO "makes it very difficult to account for the incident simply by reference to the situation in Yemen in 2011. As I stated in the joint memo, I consider that in light of the absence of any similar attacks, the incident is likely to have been the product of factors specific to the individual case, rather than general socio-economic conditions or general trends in Yemeni criminality. If these general matters alone had been the cause of the incident, then I would have expected there to be other such attacks, both before and afterwards. There was nothing about the situation in Yemen in July 2011 specifically which was uniquely conducive to the commission of this type of crime." This seemed to me to be a rational approach and a further reason for concentrating upon "the actual circumstances of the attack".

344. If the armed men were pirates in the sense suggested it appears that they must have intended to board the vessel by deception. When they arrived alongside the vessel shortly before midnight they announced that they were "security". This was false information but must, on the Bank's case, have been intended to gain them permission to board. The deception, if such it was, was successful, notwithstanding that the security team was supposed to consist of three unarmed men, not seven armed men, and was expected to arrive at 5 am, not at midnight. The Underwriters ask, rhetorically, how did the armed men know that security were expected by the vessel ? Those who knew of the arrangement for unarmed security guards were the Owner, Hydrasec (the Greek company who provided the security team of three from Greece), and the two agents in Aden who had been informed of the arrangement. However, there is no obvious reason why (assuming the absence of the suggested conspiracy to fake an attack by pirates) any of those persons would have had cause to reveal to the Yemeni coast guard that BRILLANTE VIRTUOSO was expecting "security" and no evidence to suggest that they did. The fact that the armed men knew that "security" was expected is therefore surprising and improbable.

345. Counsel for the Bank have suggested that this is not surprising. It was said that there was evidence of a connection between Hydrasec and Poseidon. There was such evidence; they shared an address. But that does not explain why the armed men from the Yemeni coastguard would know that the vessel was expecting a security team unless, as alleged by the Underwriters, Mr. Vergos of Poseidon was involved in the conspiracy and told the Yemeni coastguard. It was also said that the owner of Yemen Shipping, Mr. Nashwan, would know of the security team. But that does not explain why the Yemeni coastguard would know that the vessel was expecting a security team, unless of course Mr. Nashwan was involved in the conspiracy, as was suggested by Mr. Plakakis, and told the Yemeni coastguard.

346. The armed men arrived with an IEID. That is a device intended to start a fire. It is improbable that a group of armed men apparently intent on hijacking the vessel for ransom would wish to set fire to it.

347. It was suggested by counsel for the Bank that "there are a number of reasons why the intruders may have wished to bring an IED on board". They suggested the following: (i) a contingency plan in case anything happened which thwarted their primary aim, (ii) an insurance policy against a range of possible outcomes including smoking out the crew from the citadel, creating a distraction to cover their escape in case of intervention by naval forces and providing additional leverage or reassurance over the crew or if possession were contested by rival Somali pirate groups. Captain Northwood was unimpressed by explanations of this nature. He could not "reconcile" the possession of an IEID "with the suggestion that they were pirates whose objective was to hijack and trade the vessel." But there is a further problem with all of these suggestions (even assuming that they are realistic), namely, that the device the armed men brought was incomplete. It lacked accelerant. That is common ground. If the armed men truly wanted a device for any of the suggested purposes they would surely have brought with them a complete device rather than hope to find an accelerant on board a vessel with which they were not familiar. Although there have been, according to the piracy experts, three reported cases of Somali pirates starting fires on board a vessel to smoke out the crew from a citadel there is no known example of Somali pirates carrying with them an IEID. It is improbable, as it seems to me, that

disaffected members of the Yemeni coast guard on their first foray into piracy would decide to take an IEID without accelerant for use in certain contingencies or as an insurance against certain outcomes. It would suggest that there had been deep and sophisticated thought about the various things which might go wrong (the crew retreating to a citadel, the need to escape and the risks of dealing with Somali pirates – though with regard to the last it is wholly unclear how an IEID would assist). But such sophisticated pre-planning appears quite unlikely in circumstances where the armed men did not plan to bring with them any accelerant and whose instruction to the master was no more sophisticated than "Move to Somalia".

348. It is suggested by the Bank that it is plausible to suggest that the IEID was activated "out of frustration and/or to punish the crew and/or to cause a distraction to mask their escape and allow them to get away unobserved." Again, Captain Northwood was unimpressed. "Detonating an IED in the BV's purifier room would have been an extremely strange expression of frustration or form of punishment; and the men had no obvious need to cause any sort of diversion ……..I cannot see why they would simply have given up, and doing so would have been quite unlike normal pirate behaviour. The use of an IED is therefore, in my view, fundamentally inconsistent with an explanation of the incident as an act of piracy."

349. There is a further point. Given that the decision to activate the IEID must have been made quickly in the period of less than 20 minutes between the stopping of the main engines by the chief engineer and the sounding of the fire alarm, this change of plan from one of hijack to one of punishment or causing a distraction must have been made very quickly. That is surprising and improbable, for at least two reasons. First, given the work and effort presumably put into the hijacking attempt and the anticipated rewards one would not expect the armed men to abandon their suggested plan so quickly. One would expect them to look for the chief engineer (if he had escaped) or seek assistance from one of the other engineers. I note in this regard that Captain Northwood, with his knowledge of piracy, expressed the opinion that "genuine pirates would have been likely to seek to persist in the hijack". Second, the available time (20 minutes) appears insufficient for all that was necessary, including deciding to give up on the hijacking plan, locating a container in which to put the accelerant, locating the accelerant, putting the accelerant into the container and activating the accelerant (all in a vessel with which the armed men were unfamiliar). They succeeded in all of this on their own without, on the chief engineer's evidence, seeking any assistance from him as to where and how to source accelerant. The Bank's case is that the armed men located diesel oil in the purifier room as an accelerant by means of a tap on a retrofitted diesel oil line. The Underwriters say that the retrofitted line was an air line and in any event would have been difficult for the armed men, being unfamiliar with the engine room, to find. The Bank's alternative case was that diesel oil could have been located via the diesel oil drain cock. However, the drain cock was fitted with a tundish and so, in the absence of a siphon, was not an obvious means by which to extract diesel oil from the tank. Thus whichever device was used by the armed men (on the Bank's case) would take time to be found and/or used.

350. All of these matters indicate to me that it is not realistic or plausible to suggest that the armed men from the Yemeni coastguard were intent on hijacking the vessel and then seeking a ransom in a joint venture with Somali pirates.

The VDR audio record

351. Consideration of (i) the circumstances in which the armed men were permitted to board the vessel, (ii) the actions of the master and chief engineer and (iii) the actions of the armed men on board the vessel reveal a number of improbabilities or surprising circumstances in the short time between midnight on 5 July and shortly after 0400 on 6 July. Taken together these are cogent indicators that the apparent attack by pirates was not genuine

352. But against those matters must be placed the actions and statements of the "intruders" as recorded in the VDR audio record. An intruder requested the chart and instructed the master to go to Somalia. After the vessel had been underway for over half an hour there were gun shots on the bridge. After the vessel had been underway for over an hour an intruder demanded to know where the safe box was. Further shots were fired and the intruder asked where the money was. When the main engine was stopped an intruder asked the master "Why you stop?" and said "you play something bad…Why?". These actions and statements are consistent with the intruders being pirates.

353. The Underwriters say they were a charade. That is supported by a number of matters. First, once the vessel was underway there was no complaint by the intruders that the vessel was not going to Somalia even though it is likely that, being members of the coast guard, they could ascertain that the vessel was proceeding away from Somalia. Second, there is no obvious reason for the gun shots. Third, the late request for the safe is odd and suggestive of an attempt to appear to be pirates. Fourth, although it must have been apparent to the intruders from 0226 that the main engine was slowing, no question was asked about this until 0228 when the fourth engine telegraph movement indicated that the main engine had been stopped. Fifth, at about the time of the fire alarm an intruder asked the master "are you OK?".

354. If the actions and statements of the intruders were genuine, that is, not play-acting, the court must accept that the improbable or surprising events which occurred in succession over a short period time between midnight and 0400 were coincidences. I consider that to be most improbable. It follows that the suggestion that there was play-acting by the intruders is a cogent suggestion and likely to be correct. Rather than the oddity of the events being a badge of truth, the oddity of the events, in my judgment, indicates that they were not real.

The response by Poseidon, the local salvors

355. The response by Poseidon was impressively rapid. Although possible this was an improbably rapid response by Poseidon. Maintaining a salvage station with a salvage tug ready to respond promptly to a call for assistance requires considerable investment. This was recognised by Lord Donaldson in his report *"Safer Ships, Cleaner Seas"* (1994) when he recommended that tribunals should, when assessing a salvage award, take particular account of the decline of the salvage industry and ensure that they give sufficient encouragement to dedicated professional salvors; see for example *Navigator Spirit SA v Five Oceans Salvage SA* [2018] EWHC 1108 (Comm) at paragraph 25. It is unlikely that a local salvor such as Poseidon, with modest facilities, was capable of the necessary investment to maintain a tug on salvage station, that is, ready to respond with minimal delay to the need for salvage

assistance. Counsel for the Bank pointed out (with support from Mr. Herrebout) that the salvage team lived on board the salvage tug and that the casualty was not far away, just 11 miles off Aden. I accept that these considerations would assist Poseidon in making a rapid response to this particular vessel. But I remain of the view that a response time of between half an hour and an hour and a half is improbable for a local salvor such as Poseidon.

356. The Underwriters' explanation for the speed of response is that Mr. Vergos knew what was to happen and so was ready to proceed as soon as he learnt of the "attack" by pirates. That was indeed the evidence of Mr. Plakakis. His evidence that a call from the vessel on VHF was heard mentioning pirates is supported by the VDR. However, there is no support for his evidence that Mr. Vergos was waiting for the call, save that such evidence would explain why Mr. Vergos was able to respond so promptly. I shall return to this matter after reviewing other relevant evidence.

357. The Underwriters also placed reliance upon what they said were failures by Poseidon to take obvious steps to protect the accommodation from fire damage. The salvage experts considered the question whether, on arrival at the casualty, Poseidon ought to have (i) closed all doors or other openings to the engine room and accommodation, (ii) released CO2 into the engine room and (iii) taken steps to prevent the fire spreading into and through the accommodation. These were the steps which it was pleaded had not been taken. The reports ranged rather wider than that but it is sufficient to concentrate on the pleaded failures.

358. There was no dispute that doors and other openings to the engine room and accommodation ought to have been closed, assuming that the salvors had the necessary access. There was also no dispute that doors in the accommodation were not closed and that certain vents and dampers from the engine room were not closed. The issue was whether Poseidon had the necessary access.

359. On this point little assistance is given by Mr. Vergos' salvage statement. In that statement he said that on arrival "we got on board using the Jacob's ladder on the casualty's starboard side and we immediately closed all the doors and access ways into the accommodation and engine room to limit the oxygen reaching the fire." That suggests that there was no problem of access to the stern of the vessel and in particular to the doors in the accommodation. But since the statement that doors and access ways were closed is untrue it cannot be cogent evidence that there was adequate access. Further, although Mr. Vergos states that the salvage team boarded on the starboard side (and the photographs show a pilot ladder on the starboard side aft of the accommodation) this may also be untrue. The early photographs show the tug on the portside of the casualty near the pilot ladder which was forward, towards the bow. That suggests that that was where the salvors boarded, not right aft on the starboard side.

360. The salvage experts are agreed that the starboard side doors to the accommodation could definitely have been accessed. However, Mr. Herrebout said that access to the port side doors to the accommodation might have been more difficult due to heat. Captain Stirling disagreed. He said there was no evidence of heat in the photographs (such as steam, smoke or discoloration) but that if there was heat the tug's monitor could cool the hot parts, so permitting access.

361. At 0840 the smoke from the pump room was no more than "a whisper". Other photographs show that the aft end of the accommodation on the portside had been affected by heat. That must have occurred in the early stage of the fire as flames and hot gases escaped from the engine room skylight and mushroom vent in the alleyway between the accommodation and the engine casing, portside. The photographs around 1000 do not reveal much, if any smoke on the portside and the fire was on its way out. The salvors can be seen to be boundary cooling on the portside at this time which, whilst it did not cause the fire to go out, must have served to cool any hotspots.

362. In these circumstances it seems to me that at some stage around 1000 it is more likely than not that the salvors could safely have approached the portside of the accommodation to close the doors and close the vents (which would, on the expert evidence of Captain Stirling, have been visible). Had there been any lingering heat the tug's monitor could have cooled it. Mr. Herrebout relied upon what he regarded as evidence of smoke from the pump room at this time but, for the reasons I have already given, I do not accept that evidence. In any event, I found Captain Stirling's opinion on the question of access firm, clear, reasoned and persuasive. Mr. Herrebout said, rightly, that much would depend upon the judgment of the man on the spot, Mr. Vergos. But there is no evidence from Mr. Vergos that such were the conditions of heat and smoke before 1000 that he and his team could not safely access the portside of the accommodation. Captain Stirling had much experience of acting as salvage master and I preferred his evidence on this issue to that of Mr. Herrebout.

363. The Fire Control Station, from where it was possible to close dampers from the engine room remotely, was on the portside of the accommodation. I accept the evidence of Captain Stirling that its presence would have been apparent to the salvors. In any event, by about 1000 Mr. Vergos was able to ask the master and chief engineer about such matters. By this time they were on the tug. Closing the dampers from the engine room would have been an obvious step to take assuming that there was access to the Fire Control Station. For the reasons I have given there was such access.

364. The CO2 system could also have been activated from the Fire Control station (or from the CO2 room which was in the alleyway between the accommodation and the engine casing towards the starboard side). It is not common for salvors to operate a vessel's CO2 system because the casualty's crew usually do that or the salvors usually arrive long after CO2 would be effective. Further, the experts agreed that operating the CO2 system was probably outside Poseidon's expertise if acting alone. But in circumstances where Poseidon were able from about 1000 to get advice and information from the master and chief engineer they would not be acting alone. Moreover, the master and chief engineer are likely to have told Poseidon that they had not activated the CO2 system. In those circumstances my conclusion is that Poseidon could reasonably have been expected to activate the CO2 system in an attempt either to smother what remained of the fire or as a precaution against re-ignition. It is true that in circumstances where all doors, vents and dampers had not been closed the CO2 could not be expected to remain effective for long. But I accept the evidence of Captain Stirling that that is not a reason for not releasing the CO2. I noted the Bank's reliance on certain fire fighting guides which identify the need to close all doors, vents and dampers but I found Captain Stirling's reasons for operating the CO2, even if those steps had not been taken, compelling. Poseidon could be expected to use their

best endeavours to fight the fire and, as counsel for the Underwriters remarked, would surely make "the best possible use of the resources available to them".

365. The remaining step which it was alleged (in the pleading) that Poseidon failed to take was flooding the accommodation with water so as to create a "horizontal barrier" to the spread of fire into the accommodation. In circumstances where the doors to the accommodation on the portside were open and the engine room fire had very substantially diminished, flooding the accommodation from the tug's monitor was a means by which the deck between the accommodation and the engine room below could have been cooled and as result the risk of fire spread into the accommodation reduced. I accept Captain Stirling's evidence that the obvious first step would have been to close the doors to the accommodation but I also accept his evidence that thereafter it would also have been appropriate to open a door in order to flood the accommodation. I accept Mr. Herrebout's evidence that not all areas of the deck would necessarily be cooled and so the "barrier" would not be complete but the injection of water into the accommodation would serve to cool the deck and so reduce the risk of fire spread as explained by Captain Stirling. Whilst Captain Stirling expressed the opinion that this step ought to have been taken by Poseidon he appeared to accept that, given the doubts as to the efficacy of horizontal cooling, a salvor might reasonably decide to concentrate on boundary cooling. That being so, I am not persuaded that in not injecting water into the accommodation to form a horizontal barrier, Poseidon failed to take a step which they could reasonably have been expected to take.

366. There were therefore at least two steps which Poseidon would have been expected to take but did not. The Underwriters' case is that the steps were not taken because Poseidon was party to a conspiracy to damage the vessel by fire. Whilst the failure of Poseidon to take those steps is consistent with the Underwriters' case, the question whether Mr. Vergos and his team were party to such a conspiracy can only be answered after all of the evidence has been considered, and in particular the evidence concerning the resurgence of the fire which occurred whilst Poseidon were in attendance. The fact that the steps in question were not taken does not establish that Poseidon was party to such a conspiracy. The steps may not have been taken because of incompetence by Poseidon or because Poseidon unjustifiably feared to approach the accommodation or because Poseidon confined its actions to those which had been directed by FOS, namely, boundary cooling. Poseidon was a small local diving and salvage company which was not known to either Mr. Herrebout or Captain Stirling, notwithstanding their knowledge and experience of the savage industry. There is little if any firm evidence of the abilities and experience of Mr. Vergos and his salvage team. At this stage I observe that, if Poseidon were in such a state of readiness for salvage services that they were able to respond as rapidly as they apparently did to the need for salvage services by BRILLANTE VIRTUOSO, it is very surprising that, on arrival at the casualty, they failed to take the steps which would be expected of a competent salvor, notwithstanding (as emphasised by counsel for the Bank) that they had not been instructed to take those steps by FOS. On the Underwriters' case the explanation is that the response was not what it seemed and that the obvious steps to fight the fire were deliberately not taken.

The progress of the fire

367. I have recounted the progress of the fire. There are two striking aspects of it. First, although the engine room fire was on its way out at 1030 it resurged before 1230 in the purifier room. That must have required additional fuel and there is common ground between the fire experts that the most likely candidate is diesel oil. Second, Poseidon were on site but neither the statement of Mr. Vergos nor the unsigned report of Poseidon's services refer to this resurgence. Yet it must have been a most significant event. Whilst there are photographs taken by Poseidon from 0703 until 1028 there are none between 1030 and 1230 during which period the resurgence must have occurred. Thus there is no evidence from Poseidon as to why the resurgence occurred.

368. The Underwriters say that there is photographic evidence of mechanical damage in the purifier room in way of the diesel oil service tank, the fuel conditioning unit and the boiler supply unit. Whilst they accept that there is also evidence of damage caused by fire and some evidence of mechanical damage after the structure had suffered damage by fire (for example, the "sagging" of the fuel conditioning unit) they say that certain damage was mechanical damage which had been caused deliberately by the use of something like a sledgehammer.

369. Of the three sites of suggested deliberate mechanical damage the most important site is the damage to the diesel oil service tank drain cock. The Underwriters' case is that this was deliberately damaged, after the fire had been started, to provide additional fuel to the fire. In a photograph dated 21 July 2011 (taken, I was told, by FOS) it can be seen to be damaged. The drain cock was broken off. The Underwriters' case is that this was the means by which the fire was fed additional fuel, as a result of which the fire resurged on 6 July 2011.

370. This case gives rise to three questions. First, when was the damage caused? Second, was the damage deliberate? Third, was the resurgence of the fire deliberate or natural? They are related questions.

371. The Underwriters first relied upon the fire experts' evidence. Dr. Craggs considered that if the drain cock had been broken off after the fire he would have expected to see a clean fracture surface which he did not. Dr. Mitcheson considered that the general appearance of the fracture surface was of it having been exposed to an actively burning fire. Thus the fire experts' evidence suggested that it was more likely than not that the drain cock had not been broken off after the fire had gone out on 8 July.

372. The Underwriters' case was that the damage to the drain cock was deliberate. This case was based upon the expert evidence of Mr. Gibson, the marine engineer, and of Dr. Craggs, the fire expert.

373. Although the Bank had advanced a case, based upon the expert evidence of Mr. Lillie and Dr. Mitcheson, that the damage to the drain cock had been caused by a BLEVE in the fuel oil conditioning unit which had propelled an item of machinery across the purifier room causing it to strike the bulkhead and fall down onto the drain cock, thereby damaging it, that case was abandoned during the trial. For some time it was still maintained that there had indeed been a BLEVE (though not causative of the damage to the drain cock) but that case was abandoned on Day 35 of the trial. What

remains is the evidence of Mr. Gibson and Dr. Craggs that the damage to the drain cock was deliberate.

374. That evidence is supported by a photograph taken on 25 August 2011 which shows that drain cock had been re-attached. The photograph suggests, though not clearly, that the mechanism, in particular the lever linkage, had also been re-assembled. Mr. Lillie said he could not see evidence of re-assembly but Mr. Gibson said he could. My own observation of the photograph agrees with Mr. Gibson. The suggestion of re-assembly is also supported by the evidence of Dr. Craggs who operated the lever at the time of his inspection (as recorded in his factual witness statement). He was challenged as to whether he had an actual memory at the time of writing his third expert report in 2018 of the lever returning to its original position. He said that he did. I do not doubt that he gave that evidence in good faith but I am doubtful that he has such a memory, having regard to the passage of time. However, if the lever had not returned to its original position it is likely that he would have noticed that and recorded that in his factual witness statement. Indeed, he himself said that he thought he would have noted it if it had not returned to its position. It was not noted and so it is more likely than not that the lever did return to its original position. The marine engineers disagreed as to the significance of this but I accept Mr. Gibson's evidence that it suggests that the lever linkage had been re-assembled. I therefore find that it is more probable than not that the drain cock was reassembled.

375. The evidence that the drain cock had been re-attached and re-assembled supports the Underwriters' case that it had been damaged deliberately because it is very likely that the reason the drain cock had been re-attached and re-assembled was to disguise the fact that it had been previously been deliberately broken off.

376. The Bank's principal response (after the demise of the BLEVE theory) was that there was evidence from Captain Mockett who surveyed the vessel on 12 and 13 July that the drain cock was not damaged so that the damage seen on 21 July must have been caused between 13 and 21 July 2011. Captain Mockett was an experienced surveyor who tragically lost his life - indeed, appears to have been murdered – in Aden shortly after this survey. Noble Denton were instructed on behalf of Underwriters and they, it appears, instructed Captain Mockett, who was in Aden, to attend the vessel.

377. Captain Mockett surveyed the vessel on 12/13 July and described the diesel oil tank (in his survey report dated 14 July) as intact. Counsel for the Bank argued that the drain cock cannot have been damaged on 12/13 July; for otherwise Captain Mockett would not have described the tank as intact.

378. There is, it seems to me, a difficulty with the Bank's reliance upon Captain Mockett's report. In his "brief description" of the extent of the damage he said that it was not possible to provide a "full description" due to "lack of safe access to most of the damaged areas". He attached a large number of photographs but none of them featured the purifier room where the diesel oil tank was. He said that it appeared that "the fire had started in the vicinity of the engine control room and progressed upwards." That does not suggest that he had noted the damage in the purifier room on the deck below the engine control room. Indeed he said that there was "little fire damage visible below the engine room control room, other than consequential damage from heat, falling debris and flooding." Having seen the photographs of the purifier room I find it difficult to accept that, had Captain Mockett entered the purifier room,

he would have said there was little fire damage below the engine control room. It is true that he described the diesel oil tank and other tanks as intact. But he did not provide a photograph of the diesel oil tank (or of the other tanks to which he referred). He provided a photograph of the sewage tank on the third deck outside the purifier room which he wrongly describes as the "settling/service tank portside". That photograph and its description suggests that, although he must have descended to the third deck, he did not enter the purifier room (otherwise he would surely have taken a photograph of the inside of the purifier room) and also that he was mistaken in his description of the tank he did see.

379. It was suggested that an experienced surveyor such as Captain Mockett would have known what the diesel tanks were and would not have described them as intact if they were not. It was said that the mis-description of the photograph was merely a labelling error, nothing more than that, because he must have known what the tanks were. There is of course some force in those suggestions. But in circumstances where Captain Mockett, on his own admission (and for understandable reasons) had difficulties of access and gave an account of the fire spreading upwards from the engine control room his inspection of the third deck, where the purifier room was, cannot have been thorough. In those circumstances there must be real doubt as to the reliance that can be placed on his comment that the diesel oil tanks were intact. In his later report dated 19 July 2011 he reported (without any further survey) that the fire probably started "below or beside the engine room control room, but not inside." But if he had been in the purifier room and observed the damage there thoroughly he would surely have been more particular than simply referring to "below" the control room.

380. Captain Mockett surveyed the vessel in the company of Mr. Paikopoulos. The latter's report makes no specific mention of the purifier room though it also refers to "all tanks" being "intact". Neither of his witness statements refers to an inspection of the purifier room. In his second statement he said that a full inspection of the engine room was not possible because it had been flooded and that because of heat he could only stay below for "the briefest of time". At the end of that statement he referred to the purifier room damage (and said that no surveyor suggested that it was other than fire damage). But in circumstances where he made no reference to visiting it either in his survey report or in his first statement I am not persuaded that he did. In any event I did not regard Mr. Paikopoulos as a reliable witness.

381. Counsel for the Bank said that it was likely that if the drain cock had been damaged before Captain Mockett's survey those responsible for it would not have risked it being seen by Captain Mockett on 12/13 July (or, I suppose by FOS on 21 July). But there are other explanations for the failure to mask the damage before 12/13 July (or before 21 July). Either those responsible did not think of masking the damage before Captain Mockett's survey or, if they did, they were unable to do so before his survey. I am not persuaded that their failure to mask the damage before his survey is a cogent indication that the damage had not occurred by 12/13 July.

382. I note that counsel for the Bank have suggested in their closing submissions that the damage may have been "accidental" (see paragraph 639 of the Bank's closing). This is, I think, speculation. It was not supported by Dr. Mitcheson who said, when asked in cross-examination, that his view was that the drain cock had been broken intentionally. Moreover, the evidence that the drain cock had been re-attached and re-

assembled later strongly suggests that an attempt was made to hide that which had been done deliberately. Counsel also suggest that "it may have been deliberately dislodged prior to bunging the tank opening so that it might receive liquids, the integrity of the valve closure being questionable due to fire damage". But this explanation is again speculation and runs into the difficulty that if it had been deliberately dislodged but for an innocent reason, there was no need to re-attach and re-assemble the drain cock.

383. The Bank's case as to the reason for the reattachment and re-assembly of the diesel oil cock is that the salvors may have re-attached the drain cock to assist with the stripping of oily water from the vessel. The suggestion is that the salvors may have wished to store oily water in the diesel oil tank and so needed to ensure that the contents of the tank did not leak out through the hole created by the broken off drain cock.

384. But the suggested aim of the salvors could have been achieved by merely blocking the hole; the blocking of the hole did not require the re-attachment and reassembly of the drain cock. Further, the evidence from the salvors does not support the Bank's case. The evidence is that oily water was pumped into the vessel's fresh water tanks and the tanks on board VERGINA 1. It was suggested by Mr. Herrebout, the Bank's salvage expert, that the salvors may have been looking for additional storage in the diesel oil tank and that this explains why the salvors took photographs of the tank. But there was no evidence from the salvors that this is what they had in mind. In any event the diesel oil service tank was a small one for the suggested purpose and both Dr. Mitcheson and Mr. Lillie said that it was not attractive in this context.

385. I consider that the likely reason (indeed the only realistic reason) for the re-attachment and re-assembly of the drain cock was to hide the damage deliberately inflicted on 6 July.

386. There was a further debate as to whether the damage may have been done before the first fire. The Underwriters said that, since the only realistic source of fuel for the resurgent fire was the diesel oil service tank, the damage cannot have been done before the first fire. For if it had been done then there would have been no fuel for the resurgent fire from the diesel oil service tank. The Bank said that, if the fire did not resurge in the purifier room, then it is possible that the damage was done before the first fire, because there would be no need for diesel oil to fuel a resurgent fire in the purifier room. The Bank suggested (if the point on Captain Mockett's report did not persuade the court) that the drain cock may have been "knocked off at the very outset" (see paragraph 499) with a "heavy implement" (see paragraph 501). Since I have concluded that, as both fire experts said, the purifier room is the most likely location for the resurgent fire because of the presence of diesel oil as the required additional fuel, the premise of the Bank's (alternative) case falls away. Thus it is more likely than not that the damage to the drain cock was done after the first fire and before the fire resurged.

387. Counsel for the Bank have suggested that the "spectre of deliberate dislocation of the drain cock" is "purely illusory" (see paragraph 532 of the Bank's closing). They ask, if it were nefarious and required concealment, why was it not masked before the inspection by Captain Mockett on 12 and 13 July 2011 ? I have already commented on this point. Of course it would have been sensible to mask the damage before the inspection (assuming the damage had been done deliberately) but I do not consider

that this point is of such weight that it makes it unlikely that the damage was deliberate.

388. There is therefore convincing evidence of deliberate damage to the drain cock of the diesel oil service tank after the first fire and before the second, or resurgent, fire. It was submitted on behalf of the Bank that entry into the engine room would have been "impossible or, at the very least, highly dangerous, being a confined space that was too hot for re-entry". There can be no dispute that entry would have been dangerous. However, the evidence of physical damage suggests that someone entered the purifier room and caused physical damage allowing the release of diesel oil. The salvage experts described the task as difficult; and no doubt it would have been. But whilst I accept that the task was also hazardous and, as Dr. Mitcheson said, foolhardy, I am not persuaded that it was impossible for a person intent on adding fuel to the fire to enter the purifier and cause the damage shown in the photographs.

389. The Bank's case is that the resurgence before 1230 was a natural resurgence. But there is a powerful case that it was deliberate.

390. First, the evidence of a damaged and refitted drain cock to the diesel oil service tank in the purifier room strongly suggests a deliberate resurgence; for the purifier room is where the resurgence occurred. If the resurgence were natural it would be a remarkable coincidence that the drain cock to the diesel oil tank in the space where the resurgence occurred had been damaged and then refitted.

391. Second, the fire experts were in agreement that the oil fire in the engine room had gone out by about 1030 on 6 July 2011, though there may have been residual non-oil fires consisting of smouldering materials in the engine room. Dr. Mitcheson accepted that such fires as existed would probably go out that morning. But both experts accepted that the smoke seen in the afternoon of 6 July was indicative of an oil fire in the engine room. Dr. Craggs' view was that oil must have been deliberately introduced and Dr. Mitcheson accepted that diesel oil must have been released in the purifier room to enable an oil fire to develop. There did not appear to be any disagreement between the fire experts that the second oil fire was separate from the first oil fire. Thus, having accepted that the first fire was probably going out. Dr. Mitcheson was asked: "So the probability is that the second fire was a separate fire, isn't it?" To which he replied "Yes".

392. Counsel for the Bank submitted that the resurgence was natural. They relied upon what they described as the "second diminution and resurgence" between 6 and 7 July 2011; see paragraphs 540-549 of the Bank's closing. This is a reference to the fact that in the last photograph on 6 July at 1703 the fire appeared to be diminishing but that in the first photograph on 7 July at 0858 the fire appeared to have grown. The suggestion was that since the second resurgence may have been natural, so may the first resurgence before 1230 have been.

393. This point was a late entrant into the trial. It had not been the subject of the fire experts' reports. It was not described as a second resurgence until the cross-examination of Dr. Craggs on Day 34, after Dr. Mitcheson had been cross-examined. It is not, however, disputed that there appears to have been a diminution followed by a resurgence. Again, there are no photographs of the resurgence overnight though Mr. Vergos does refer in his salvage statement to an explosion at 0030 on 7 July the effect

of which was to reignite the fire in the accommodation block which then spread to the wheelhouse. This was not regarded as true by the fire experts. Thus there is no reliable evidence about this resurgence. There was however evidence about the first resurgence. It has enabled the fire experts and the court to conclude (a) that the resurgence was in the purifier room, (b) that diesel oil was the additional fuel which enabled the resurgence to take place and (c) in the purifier room there was a damaged drain cock which was later re-assembled. There is therefore considerable material to support the suggestion that the first resurgence was deliberate, whereas there is no material from which to draw conclusions as to the cause of the second resurgence.

394. Counsel for the Bank also relied upon the likelihood that the fire had already spread to the accommodation before the resurgence (though, as I have found, it was only a possibility) and suggested that therefore there cannot have been any point in resetting the fire in the purifier room. That submission assumes that those desirous of a fire would have concluded from the very small fire in the accommodation (assuming that there was one) that there was no need to cause a resurgence of the fire in the purifier room by adding further diesel oil to it. I do not consider that such an assumption is justified. But in any event, there is, as I have sought to explain, good reason for concluding that the resurgence of the fire in the purifier room was deliberate.

395. It is difficult for the Bank to suggest that the fire had resurged naturally because their own fire expert accepted that the only logical inference was that the diesel oil had been released deliberately. Neither a party nor the court is bound by what an expert accepts but there must be good reason for departing from that which an expert, who has plainly considered the matter carefully and fully, has accepted to be the case.

396. In view of the reliance placed by the Underwriters upon Dr. Mitcheson's "concessions" in cross-examination and of the criticism of that cross-examination it is appropriate to set out the passage at the beginning of Day 33 which summarises the position reached by Dr. Mitcheson when cross-examined.

> Q. I want you to assume that the fire resurged or reignited in the purifier room, as you now think likely; okay?
>
> A. Yes. Sorry.
>
> Q. You agreed, on Day 32, that HFO alone could not have brought this about. Do you remember doing that?
>
> A. Yes.
>
> Q. So diesel oil was necessary, what you agreed was the obvious candidate, in order for that resurgence or re-ignition to take place in the purifier room.
>
> A. Diesel oil would be an attractive -- an available source potentially, yes.
>
> Q. Well, you agreed it was the obvious candidate?
>
> A. The obvious candidate, yes.

Q. The most obvious candidate?

A. Yes.

Q. Right. That's what Dr Craggs agrees. Now, if the diesel oil service tank drain cock had been knocked off before or at the very outset of the initial fire, you agreed that that necessary diesel oil from that tank would not have been available for the resurgence or re-ignition, didn't you?

A. That's correct.

Q. The only possible alternative source of diesel oil in the purifier room that anyone knows about was the tap on the retrofitted line, wasn't it, as you pointed out?

A. Correct.

Q. If one -- and we'll look at it on both hypotheses -- discounts that tap for some reason, you agreed that it is likely that the diesel oil service tank drain cock was knocked off before the resurgent or reignited fire and not at the outset, didn't you?

A. Yes.

Q. You agreed that that was likely but in fact it is the inevitable inference if one discounts the tap on the retrofitted line, isn't it?

A. Correct.

Q. Your view now is that the drain cock was broken off intentionally, isn't it?

A. Correct.

Q. And for good measure let us just remind ourselves that you agree that the drain cock on the diesel oil service tank wasn't knocked off after the fire finally went out on 7 July because you have agreed that the fracture surface showed that it had been expressed to an active fire; correct?

A. Yes, that conclusion is equivocal but I think it is more likely than not that it had been subjected to a fire.

Q. Well, I am a bit surprised you say it is equivocal. You are in no real doubt about it in your third report, paragraph 109, and you said that that was your view, I think, three times on Day 32?

A. Yes.

Q. That is your view, isn't it, of the likely state of affairs?

A. It is. I think it's more likely than not.

Q. Okay. Now, I said we would look at this on both hypotheses. Now let's assume that we don't discount diesel oil tap on the retrofitted line; okay, which is what Mr Lillie says it is?

A. Yes.

Q. Now let's assume that the diesel oil service tank drain cock was knocked off right at the beginning, at the very beginning of the initial fire.

A. Yes.

Q. And let's assume that diesel oil for the resurgent fire was available from the tap on the retrofitted line; okay?

A. Yes.

Q. Now, on those assumptions, it must be the case that somebody who knew about that tap went into the purifier room and opened that tap, not at the outset but before the resurgent or reignited fire; correct?

A. That's a logical inference.

Q. Yes. Because otherwise there would have been no source of the necessary diesel oil in order to fuel the resurgent or reignited fire in the purifier room; correct?

A. That's correct.

Q. It is not just a logical inference, it is the only inference, unless there is some third completely unknown source of diesel oil; correct?

A. That's right.

Q. Sorry?

A. That's right.

Q. Yes. So whether the diesel oil for the resurgent/reignited fire came from the drain cock or from the retrofitted tap, someone must have entered the purifier room and either smashed off the drain cock or opened the tap. In either case, shortly before the reignited/resurgent fire. That must follow from what we have agreed so far, mustn't it?

A. That's correct.

> Q. Therefore, to use your adjective, foolhardy as it was to have done so, someone must have entered the purifier room after the first fire either went out or nearly went out and released the necessary diesel oil in one or other of the two ways we have agreed. That also follows, doesn't it?
>
> A. That's correct.

397. Counsel for the Bank criticised the cross-examination of Dr. Mitcheson as having been based upon a "crass and invalid version of the balance of probabilities" (paragraph 572 of the Bank's closing) and only on the photographs (paragraph 575).

398. The first criticism, that the cross-examination was based on probabilities, relied upon the note of caution expressed by Dr. Mitcheson with regard to the interpretation of fire damage on board the ship. "No fire expert can state with certainty what was burning and where, or what sources of fuel became available at any particular moment during the course of this fire, that apparently burned over a period of about 36 hours and involved numerous individual enclosures." But since the court makes findings on the basis of probabilities I do not consider that counsel can be criticised for seeking to elicit from Dr. Mitcheson what he thought, based upon his expertise, was probably the case. The second criticism was that there was more to the case than the photographs. Again, I do not consider that counsel can be criticised for cross-examining on the basis of the photographs. They were an important source of evidence as to what had happened. If there was other evidence which led to or suggested a different conclusion from that put to Dr. Mitcheson I have no doubt that he would have said so. The three items of evidence relied upon by the Bank (at paragraph 576 of the Bank's closing) were not impressive. Mr. Lillie's evidence as to the impossibility of entering the engine room after other fires was of little assistance in dealing with the evidence of this fire. The master was said to be a credible witness. He was not. Captain Mockett's report does not, on analysis, assist (see above).

399. My firm conclusion is that the resurgence of the fire was deliberate. I do not consider it a plausible, realistic or substantial possibility that the resurgence was natural.

400. In the light of my findings as to the damage to the diesel oil drain cock it is unnecessary to lengthen this judgment with a consideration of alleged further deliberate damage to the fuel conditioning unit and to the boiler supply unit.

The crew's initial statements

401. The master, in his first witness statement dated 11 July 2011, said that he had been informed by the second officer that the persons arriving in the small boat "are Authorities". He said the same in his second witness statement dated 14 July 2011 and in his third witness statement dated 4 September 2011 (made in Manila).

402. The second officer on watch from 2000 until 2400, Mr. Artezuela, in his first witness statement dated 11 July 2011 said the persons on the boat said "they were Authority". In his second witness statement dated 14 July 2011 he said that they said "they were the Authorities".

403. The able seaman on watch, Mr. Marquez, said in his first witness statement dated July 2011 that the vessel was "waiting for authorities who escort on board" and saw persons in a boat "wearing …uniform and it looks like authority, because they have gun and megaphone". A little later he said: "I speak "Who are you?" I am authorities. I inform to the Duty Officer that they said they are authorities". In his Manila statement dated 31 August 2011 he said that the persons in the boat were "wearing uniform like authorities". He was instructed by the second officer to go down to the main deck and "check who they are". He said he asked "who are you?" and they replied "they are the authorities".

404. The extra lookout was ordinary seaman Magno. In his first witness statement he said he was woken up by the duty AB at around 2355. In his Manila witness statement dated 30 August 2011 he said he had been on watch on the bridge from 2000 until 2400. He said that he understood the men who came on board to be "the authorities".

405. Second officer Advincula who took over the watch at 2400 said in his first witness statement dated 11 July 2011 that the vessel was "waiting for our security escort" and that the "pirates pretended to be our security". In his Manila statement dated 1 September 2011 he said that he was aware that a security escort would be picked up at Aden and that when he relieved second officer Artezuela the latter told him that there were some armed men on board who were "the authorities".

406. Given the clarity of the evidence from the VDR audio record and the naval log that the armed men announced themselves as security, it is striking that the master, second officer and able seaman who were actively involved with the arrival of the armed men all said in their early statements that the armed men said they were the authorities.

407. When the audio record from the VDR became available further statements were made. The master in his statement dated 22 September 2015 said that he had been told by the second officer that he had been told by the able seaman that the men were in fact "security". He accepted that the audio record does not mention "the authorities". Second Officer Advincula in his witness statement dated 24 September 2015 said that he could not explain why in his Manila statement he had said the men were "the authorities". Able seaman Marquez said in his statement dated 8 October 2015 that he thought the men were "authorities from Aden" because they were wearing uniform. He said that he recalled them saying (using a megaphone) that they were "the authorities" though he accepts that on the audio record he uses the term "security". He said he could not explain why he used that term. Ordinary seaman Magno in his statement dated 24 November 2015 said that he returned to the bridge at 2240 (and was wrong to say that he had been awoken at 2355). He said that when on the starboard bridge wing he heard the men on board the boat shout through a megaphone that they were "security". He said that he had been wrong in his Manila statement to say that he understood the men to be from "the authorities".

408. The best evidence of who the armed men said they were must be the VDR audio record. That records that they reported they were "security". That is also supported by the naval log which records a report at 0812 that "the attackers were dressed like military members and claimed to be from the vessel's agent and were tasked with providing them security for their transit."

409. The Underwriters submitted that the crew members who stated in their early statements that the armed men said they were "the authorities" had been told to do so by Mr. Iliopoulos. They relied upon a statement given by Mr. Marquez to them in 2017 in which it was said that Mr. Iliopoulos and the chief engineer had threatened him if he said that the armed men had said they were "security". I am unable to place any weight on the evidence of threatening behaviour by Mr. Marquez. It was not tested in cross-examination. It was denied by the chief engineer and Mr. Paikopoulos.

410. However, I find it impossible to resist the conclusion that those who said that the armed men announced themselves as "the authorities" did so because they had been requested to do so, and not because it was the truth. That request is likely to have been made by Mr Paikopoulos who had arrived in Aden on 10 July 2011 with Mr. Iliopoulos. He said that the taking of the statements was the first thing he did after checking into his hotel. In cross-examination he admitted that some of the crew had mentioned "security" yet he made no mention of this in his report. It is true that three crew, including Mr. Artezuela (together with the cook and a messman), said in their first statements that the armed men were from security. But Mr. Artezuela changed his account in his later Manila statement. His first statement was not amongst those initially provided to the Underwriters. Indeed, I was told that it was only days before the Underwriters' application to amend to plead wilful misconduct was heard it was provided to the Underwriters (along with 17 other manuscript statements of the crew made in Aden). That is consistent with a wish on the part of the Owner not to reveal to the Underwriters that the armed men had claimed to be "security". Counsel for the Bank submitted that had that been so the Owner would have ensured that the statements were destroyed and he did not do so. However, the Owner may have had reasons for keeping them and is unlikely to have contemplated that the Underwriters would learn of what the crew had told the USS PHILIPPINE SEA by means of documents obtained in 2013 through a request under the US Freedom of Information Act.

411. Counsel for the Bank have suggested that, rather than the crew having been requested to state an untruth, there has been a misrecollection by the crew in circumstances where the armed men wore uniform and therefore looked like the authorities. I am unable to accept this in circumstances where the naval log states that early on 6 July it was reported that those who boarded were "tasked with providing….security". There had been no misrecollection then. Counsel for the Bank supported the suggestion of misrecollection by suggesting that it was unlikely that there had been a request to change the crew's evidence because, if there was the alleged conspiracy, the Owner would surely wish the account given by the crew to tally with the VDR. But whoever requested the change may have wished to hide the evidence that the armed men said they were security and had not then known that the VDR may have recorded evidence to the contrary. The fact that those early statements which referred to security were initially kept by the Owner and not disclosed to the Underwriters is consistent with a wish to hide the fact that the armed men said they were security.

412. Counsel for the Bank have submitted (based on 10 reasons, see paragraphs 1138-1154 of the Bank's closing) that the crew were not told what to say about the armed men. However, this submission is based almost entirely upon the evidence of the master, chief engineer and Mr. Paikopoulos. I did not regard them as reliable witnesses.

The story as a whole

413. Having narrated the events and discussed and commented upon the factual and expert evidence it is necessary to stand back from the detail, view the matter in the round and take the story as a whole.

414. There are several matters (many of them improbabilities) which, when viewed collectively, cogently suggest that the supposed attack by pirates was a fake attack.

415. First, it is improbable that the armed men, if intent upon hijacking the vessel, would know that the vessel was expecting a security team.

416. Second, it is improbable that the master's decision to allow the armed men to board was, as submitted by counsel on behalf of the Bank, an "innocent mistake". It is, in my judgment, extraordinary that the master permitted armed men to board his vessel in an area where there was a risk of piracy when it must have been clear to him that, apart from the fact that they said they were "security", there was nothing to suggest that they were and much to suggest that they were not, namely, the fact that there had been no call from them, their number, the fact that they were armed and masked and the fact the security team were not expected until about 0500. It is also extraordinary that the master permitted them to board without leaving his cabin. It is to be expected that he would have wished to proceed to the bridge immediately. (In this regard it is to be noted that the vessel's "suspect boat" drill provided for the master to be called to the bridge.) Counsel for the Bank said that this was an irrelevant matter because the execution of the alleged conspiracy would not be facilitated by the master remaining in his cabin. But that misses the point, which is that it is improbable that a master of a laden tanker adrift in the Gulf of Aden would remain in his cabin when a small boat containing armed men had come alongside his vessel and there was reason to believe they were not the security they claimed to be.

417. Third, it is improbable that a group of pirates, said to be intent on hijacking the vessel and on sharing a ransom for the release of the vessel (in co-operation with Somali pirates), would bring with them an IEID and, moreover, one which, in order to be activated, required accelerant which the armed men did not possess.

418. Fourth, it is improbable that the master would disobey an instruction from the armed men to steer a course to Somalia.

419. Fifth, it is improbable that members of the Yemeni coast guard, who had demanded that the vessel be taken to Somalia, would not notice for over an hour that the vessel was proceeding away from Somalia, rather than towards Somalia. Being members of the Yemeni coast guard they were likely to be familiar with (a) the course required to get to Somalia and (b) what the instruments on the bridge said was the course of the vessel.

420. Sixth, it is improbable that the chief engineer slowed and stopped the main engine and that the master turned the vessel round to starboard in circumstances where they apparently feared violence from the armed men.

421. Seventh, it is improbable that the armed men, if they had boarded with an intention of taking the vessel to Somalia and there ransoming her, should so quickly abandon that intention and decide to activate the IEID and so to set the vessel on fire.

422. Eighth, it is improbable that the armed men located accelerant (to activate the IEID) and additional fuel (to fuel the fire so that it spread out of the purifier room) in an unfamiliar engine room in the short time available between the main engine stopping and the IEID being activated.

423. The improbable can happen. But when a number of improbabilities occur consecutively within a short period of time it is very difficult to accept that they are coincidences. Collectively, they are a cogent indication that the improbable did not happen and that the explanation must be that the master and chief engineer, far from being the victims of an attack by Yemeni pirates, were in fact co-conspirators with the armed men in a scheme to damage the vessel by fire.

424. Counsel for the Bank asked why, if there was a conspiracy as suggested, it would have involved the vessel sailing westwards rather than toward Somalia (see paragraph 335 of the Bank's closing). It was suggested that this was an "incongruity" in the Underwriters' version of events which "speaks firmly against the incident having been staged". The series of improbabilities supports the Underwriters' answer to this question, namely, that "neither the master nor the intruders ever had any intention of proceeding to Somalia: the idea was simply to sail just a short distance from Aden, whereupon the vessel would be stopped under the pretext of having had a main engine breakdown, and set on fire" (see paragraph 782 of the Underwriters' closing submissions).

425. The alternative scenario would be that the armed men, having somehow learnt that the vessel was expecting a security team, had the good fortune to encounter a master who was so lax in his regard for the safety of his vessel that he let them board without even checking himself that they were the security team. The alternative scenario would then require the master to be both very courageous in steering the vessel away from Somalia and also very fortunate in having on board members of the Yemeni coast guard who did not appreciate that the vessel was not being steered towards Somalia as instructed. Similarly the chief engineer would have to be both very courageous in deciding to stop the engines and also very fortunate in having armed guards who, although they saw him enter the purifier room, were unable to find him a short distance to the aft of the purifier room. The armed guards would have to have had the foresight to have brought on board an IEID (for use in an unintended eventuality) and yet to have lacked the foresight to bring on board a suitable accelerant. The main engine having been unexpectedly stopped, the alternative scenario would then require the armed men to be unable to find the chief engineer (and to be unwilling to seek assistance from another engineer officer), to decide to abandon their plan to hijack the vessel and instead (for whatever reason) to activate the IEID with minimal delay and then to have the good fortune to locate, with minimal further delay, a suitable accelerant in an unfamiliar engine room. I am unable to accept that this sequence of improbabilities occurred. To use Tom Bingham's phrase it is an account which I "simply cannot swallow". The master and chief engineer denied that they were involved in a conspiracy to damage the vessel by fire. That evidence must be "tested in the light of the probabilities and the evidence as a whole" as was made clear in *The*

Ikarian Reefer. Having so tested their evidence I have concluded that it must be untrue.

426. In addition to the above, there are several matters which, when viewed collectively rather than individually, point to the master and chief engineer being involved in a conspiracy to damage the vessel by fire. First, there is the fact that the vessel was drifting in the Gulf of Aden. That made it easier for the armed men in the small boat to come alongside. Second, there is the fact that the master did not sound the SSAS signal when the small boat came alongside or thereafter until 0306. That meant that the authorities did not learn of the apparent attack until it was over. Third, there is the fact that the master had the crew's passports ready. Fourth, there is the fact that the master, although he had time to fetch and bring with him a bag of personal belongings, did not take with him the vessel's working chart and log. Fifth, there is the improbability of the chief engineer's suggested "escape". Sixth, there is the chief engineer's failure to take any steps to fight the fire when on board the vessel. Seventh, there is the fact that the master and the chief engineer told untruths to the USS PHILIPPINE SEA on the morning of 6 July. The master said that the intruders' attention turned to the theft of money after the engines had stopped, which was untrue, and the chief engineer said that he had "sabotaged" the vessel's engines, which was untrue.

427. The fire, which it is common ground was started deliberately, was almost out by 1030. The oil fire was out and all that remained were non-oil embers which were shortly to go out. But there was a second oil fire by 1230. It reignited or resurged in the purifier room where the drain cock to the diesel oil tank had been deliberately damaged. It is probable that the drain cock was damaged after the initial fire and before the resurgent fire. Those circumstances are a cogent indication that the resurgence of the fire was deliberate because it is a reasonable inference from the damage to the drain cock that it was done to provide fuel for the fire. Further, the fact that the resurgent fire occurred in the purifier room indicates that it was deliberate because the only plausible fuel, namely diesel oil, must have been released deliberately, as the fire experts agreed.

428. At the time of the second oil fire the vessel had been abandoned (not only by the crew but also by the armed men) and Poseidon Salvage was on site apparently providing salvage services to the casualty. It is remarkable and surprising that the witness statement of Mr. Vergos, which had been prepared for use in the salvage arbitration, made no reference to the resurgence of the fire and that no photographs were taken during this period. Those circumstances suggest that Mr. Vergos was seeking to hide something, either his own incompetence in failing to take the appropriate steps to fight the fire or his own involvement in deliberately causing the resurgence of the fire.

429. It is possible that Mr. Vergos had failed to take those actions which would be expected of a salvor because of his incompetence. He was a small local salvor and salvage was not his primary occupation, a matter emphasised by counsel for the Bank. But in circumstances where, as I have found, the re-ignition or resurgence of the fire was deliberate and it occurred at a time when Mr. Vergos was the on-site salvage master, it is more likely than not that Poseidon were responsible for the damage to the drain cock and for the re-ignition or resurgence of the fire. No-one else was on board save possibly for the chief engineer. If he was on board it is probable that he assisted Poseidon. It is therefore much more likely that Mr. Vergos failed to mention the

resurgence of the fire, not to hide his own incompetence, but to hide his involvement in the events which led to the resurgence.

430. One would expect that a salvor accused of involvement in scuttling a casualty which he was supposed to salve would be most anxious to defend himself by giving evidence. Yet he did not; and I was given no explanation as to why he did not. There was no evidence that he feared arrest if he came to this jurisdiction. But if he did he could have given evidence by video link. There was no evidence that he was for some reason unable to give evidence.

431. The only evidence from him was his statement prepared for the salvage arbitration which was a most unimpressive document. It contained several untruths, in particular, that there was a substantial fire in the accommodation at the time of Poseidon's arrival on site, that the fire was effectively under control when the tug took the casualty under tow and that there was an explosion in the early hours of 7 July. Moreover, Mr. Vergos failed to mention the resurgence of the fire before 1230 on 6 July and instead suggested that as a result of boundary cooling of the accommodation, main deck and shell plating the fire had been brought under control by 1600 on 6 July. For a small, local salvor apparently engaged on the salvage of a major casualty, one would expect a comprehensive, detailed and accurate account of the salvage service. For such a statement would assist in Mr. Vergos' claim for a substantial part of the salvage award as sub-contractor.

432. If Mr. Vergos had been a party to this action or had been a servant or agent of a party to this action it would be a reasonable inference from the absence of evidence from him dealing with the allegations made against him that he had no answer to them or at any rate none that would stand up to cross-examination. Counsel for the Bank said that Mr. Vergos was not the Bank's servant or agent which is of course correct. But neither were the master and chief engineer whom the Bank called to give evidence. I have been told why the Owner did not give evidence but not why Mr. Vergos did not. Counsel submitted that no inference should be drawn from the absence of evidence from him where there is no evidence that Mr. Vergos knew of the allegations made against him. However, it is improbable that he did not know of the allegations made against him. Given the allegations made against him he would have been an obvious person for the Bank to seek to obtain evidence from, just as the master and chief engineer were. I was not told that the Bank had not informed Mr. Vergos of the allegations against him.

433. The principles underlying the circumstances when an adverse inference may be drawn from the absence of a witness were explained in *Wiesneiski v Central Manchester Health Authority* [1998] PIQR 324 by Brooke LJ at p.14 as follows:

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

434. In the present case there was certainly a case for Mr. Vergos to answer and he could certainly have been expected to have material evidence to give. Counsel for the Bank invited the court to take the following matters into account.

435. The first was that the Bank does not know where Mr. Vergos is. I was told that by counsel on instructions. Reference was made to Poseidon's web site which stated that a permanent salvage station was maintained in Aden from 2009 until 2012 and to Mr. Plakakis' evidence that he was in Ghana with Mr. Vergos in 2015 but had not spoken to him since. However, I was not told that an attempt had been made to contact him through the telephone numbers on the web site which attempt had failed. The second matter was that the Bank had no control over him, which is no doubt correct, and has had no commercial relationship with him, which is also no doubt correct. But those matters do not mean that the Bank was unable to call him. Lastly it was said that there was no reason why Mr. Vergos would wish to give evidence. I am not able to accept that because there is every reason why, if he were innocent of the serious allegations made against him, he would wish to give evidence refuting them.

436. Whilst I was told that the Bank did not know whether Mr. Vergos was willing to give evidence I was not told in terms whether the Bank had or had not looked for Mr. Vergos or sought to enquire whether he was willing to give evidence. Just as the Bank must obviously have enquired of the master and chief engineer whether they were willing to give oral evidence refuting the allegations made against them so I would have expected the Bank to have wished to make the same enquiry of Mr. Vergos. It would be in the Bank's interests to do so. If he denied the allegations made against him the Bank would obviously have wished to call him. But I have not been told whether they did or did not. The Bank has failed, in my judgment, to adduce any good reason for Mr. Vergos' absence.

437. I have therefore concluded that the absence of evidence from Mr. Vergos strengthens the case of the Underwriters and makes it yet more likely that he was responsible for the deliberate resurgence of the fire.

438. For all these reasons I am driven to the conclusion that Poseidon was responsible for the re-ignition or resurgence of the fire before 1230 on 6 July 2011. Although I have not relied upon the evidence of what Mr. Theodorou told Mr. Veale, the thrust of his account of deliberate damage in the engine room, whilst it may have been exaggerated and untrue in parts, can now be seen to be essentially true.

439. Given Poseidon's actions in that regard, it is also more probable than not that the reason for Poseidon's apparent prompt response was that Mr. Vergos was waiting for

the call which he knew was to be made. It is probable, based upon the evidence of Mr. Pappas, that he received the expected call from Mr. Iliopoulos. He may also have heard the VHF call on 0303 as is suggested by the evidence of Mr. Plakakis but it is difficult to rely upon the latter's evidence in this regard which was only set down in writing in 2017. It seems likely that the call from Mr. Iliopoulos was later than 0303. Mr. Pappas' evidence would suggest that it was between 0300 and 0400. Mr. Vergos did not refer to a call from Mr. Iliopoulos himself, probably because he did not wish to highlight Mr. Iliopoulos' involvement.

440. It is also more probable than not that the reason why Mr. Vergos failed to take obvious steps to fight the fire, such as closing the doors in the accommodation and vents to the engine room, was that he in fact intended that the fire should continue to burn.

441. Counsel for the Bank identified 7 points which were said to demonstrate Poseidon's lack of complicity (see paragraphs 730-739 of the Bank's closing). I have considered these but do not view them as cogent indications of a lack of complicity. There *was* boundary cooling. But if there had not been that would have invited comment. It was in any event ineffective, as the salvage experts agreed. Photographs were taken by Poseidon, some of which *are* damaging (for example those which show that the doors in the accommodation were not shut). But, although they were passed on to FOS, I do not consider that that is a cogent indication of Poseidon having nothing to hide. The absence of photographs showing the resurging of the fire is a cogent indication that they had something to hide. It was said that if Poseidon had been party to the alleged conspiracy they would want to be sure that they were employed as salvor yet instead "it was left in the gift of Five Oceans". But it was Mr. Iliopoulos who telephoned Mr. Vergos in the early hours of 6 July instructing him to proceed. Their employment was thus not in the gift of FOS. Reliance is placed on the prompt response but, as I have explained, it was *remarkably* prompt. USS PHILIPPINE SEA made no adverse criticism of the fire fighting. But all that could be seen would be the boundary cooling. Finally it is said that the photographs show "a group of regional salvors excited by and proud of their salvage of a major casualty" and reliance is placed on Mr. Herrebout's opinion that Poseidon "did what they needed to do to preserve the vessel and cargo as a whole." But these points have to be considered in the light of the fact that the resurgence of the fire was caused deliberately when Poseidon were on site.

442. There is therefore a powerful and, in my judgment, a compelling case, based upon the series of events from the approach of the small boat before midnight on 5 July with armed men on board to the resurgence of the fire after midday on 6 July when Poseidon were on site, that the armed men who activated the IEID pretended to be pirates and that the chief engineer, with the knowledge and approval of the master, was involved in starting the fire (by locating the accelerant and additional fuel) and that Mr. Vergos, possibly with the assistance of the chief engineer, took steps to ensure its resurgence. In summary, the matters which evidence the alleged conspiracy are:

i) the several improbabilities occurring in rapid succession over a short period of time;

ii) the other suspicious circumstances involving the master and chief engineer; and

iii) the fact that the resurgence or re-ignition of the fire was deliberate and that it occurred whilst Poseidon was on site.

443. It is improbable that the armed men, the master, chief engineer and Mr. Vergos would have been involved in the conspiracy without the knowledge and approval of Mr. Iliopoulos. There is no reason why disaffected personnel from the Yemeni coast guard would be involved other than because of the promise of financial reward from the owner of the vessel. There is no evidence of any reason why the master and chief engineer would seek to damage the vessel on their own initiative. Nor is there any evidence of any reason why Mr. Vergos would seek to damage the vessel on his own initiative. That would make no sense. As a salvor (or a sub-contracted salvor) he would wish to maximise the value of the vessel so as to maximise the salved fund.

444. There are two indications of the involvement of Mr. Iliopoulos. First, there is the evidence of Mr. Pappas that Mr. Iliopoulos was active in the early hours of 6 July informing both FOS and Poseidon of the need for salvage assistance. Mr. Pappas said that Mr. Iliopoulos told him that the vessel was on fire. But how Mr. Iliopoulos knew that the vessel was on fire is not known. It is likely that Mr. Iliopoulos also told Mr. Vergos that the vessel was on fire. Second, those members of the crew involved with the arrival of the armed men who were asked (as I have found) to state in their early statements that the armed men announced they were "the authorities", when that was not true, can only have been asked to do so by or on behalf of Mr. Iliopoulos. No one else would have a reason to make that request. That is a cogent indication of Mr. Iliopoulos' involvement in the plot to set fire to the vessel.

445. In circumstances where Mr. Iliopoulos has been advised not to give evidence no inference can be drawn from the fact that the Bank has not called him to give evidence. However, counsel for the Underwriters relied upon the findings made by Flaux J. that Mr. Iliopoulos, who gave evidence before Flaux J. over two days, had lied to the court when seeking to explain why he had not provided his solicitors with an electronic archive of documents. I have read Flaux J.s judgment. The findings are summarised between paragraphs 384 and 394 of the Underwriters' closing. They are remarkable in that they show that Mr. Iliopoulos is prepared, not merely to lie to the court on oath, but to fabricate an entirely untrue story and to get associates to act out their false roles. These findings are indicative of his character. He is capable of dishonesty, telling elaborate lies and supporting them by charades in an endeavour to make the deception effective. I accept that it cannot be inferred from these findings that he scuttled his vessel but the findings are supportive of the case that he did. I accept counsel's submission that the findings are "part of the mix when assessing the evidence as a whole; and its consequence is that there can be no default assumption that Mr. Iliopoulos acted honestly".

446. It was further submitted that it can be inferred from his refusal to hand over the electronic archive that it contained documents which would have damaged his case that there had been a genuine attack on his vessel by pirates. The case for drawing such an inference is that unless the archive contained damaging evidence it is difficult to see why Mr. Iliopoulos would have risked having his claim to $77 million struck out. As Flaux J. said, "the knowledge that there was or might be such damaging

material would provide a powerful motive for unwillingness to disclose the archive". It was noted by the Bank that Mr. Iliopoulos had in fact given considerable disclosure and it was suggested that the archive may have contained material which was embarrassing or confidential or which related to other vessels. But that is unlikely to be a reason for not providing his own solicitors with the archive. Irrelevant material need not be disclosed to the Underwriters. If there was truly confidential material which was irrelevant to the issues in the case his solicitors could make the appropriate application to the court. I consider it more likely than not that the archive did contain material which Mr. Iliopoulos feared would damage his case. That is the only realistic explanation of the risk he took that his valuable and substantial claim would be struck out. This adverse inference strengthens the Underwriters' case against Mr. Iliopoulos.

447. But there are matters upon which the Bank relies, when stepping back and viewing the case in the round, to suggest that it cannot safely be concluded that this was a fake attack by pirates to which the Owner was privy. Those matters, no less than 35 of them, can be broken down into more manageable categories:

i) The large number of alleged conspirators (points 1-4);

ii) The chosen method of scuttling (points 5-10 and 15);

iii) The availability of evidence (points 11-14);

iv) The evidence that there was a genuine attack by pirates (points 16-18 and 35);

v) The unreliability of the "whistle blower" and circumstantial evidence relied upon by the Underwriters (points 19-25);

vi) The reasons why the financial considerations provide no motive (points 26-28 and 31);

vii) The alleged conspiracy to defraud the Chinese authorities and the alleged theft of fuel oil (points 29-30);

viii) The absence of certain evidence (points 32-34).

448. I have considered all of these points but none of them, either individually or collectively, is or are of such weight as to cause me to doubt the cogency of the several matters which I have identified as supporting the Underwriters' case and which arise from a study of the available evidence. My particular comments upon the several categories of points relied upon by counsel for the Bank follow.

449. The number of conspirators is large, including, at least, Mr. Iliopoulos, the master and chief engineer, Mr. Vergos (together with his salvage team including Mr. Theodorou) and the seven disaffected members of the Yemeni coast guard. However, for the reasons which I have given, there is very cogent evidence of their involvement in the alleged conspiracy. I accept that the risk of detection was significant, given the number of people involved. (Mr. Plakakis and Mr. Theodorou have suggested others in important roles but their evidence was the only evidence against those other persons.) However, Mr. Iliopoulos was prepared to run the risk that his valuable claim under the policy might be struck out if the court saw through his attempt to avoid

disclosure of documents which he did not wish the Underwriters to see. Thus he is a risk taker. The conspirators would require rewards and there is no evidence of the payments which must have been made by Mr. Iliopoulos. That is part of the canvas which is blank. But it has long been recognised that underwriters in cases such as the present cannot be expected to be able to light all parts of the canvas. Finally, it is said that the evidence from Mr. Plakakis that the major players in the conspiracy did not trust each other "belies any conspiracy". But unlawful conspiracies are made between dishonest and hence untrustworthy persons.

450. The chosen method of scuttling was said to involve the Owner in orchestrating an extraordinary set of events. But Mr. Iliopoulos has a penchant for charades. That is apparent from the lengths to which he went to disguise his failure to disclose the archive of electronic documents. Thus the ruse which, on the Underwriters' case, he planned in the present case appears to be consistent with his known character.

451. There is nothing unusual about the use of fire in a scuttling case; see *The Captain Panagos DP* [1989] 1 Lloyd's Reports 33 and *The Ikarian Reefer* [1995] 1 Lloyd's Reports 455. In the present case there was a risk, because the insured value was so high, that a total loss might not be achieved. But Mr. Iliopoulos was a risk taker; and he achieved a total loss. The decision to scuttle the vessel whilst fully laden was said to expose the Owner to liabilities for pollution but the salvage experts agreed that the cargo of fuel oil was not at risk of explosion. The choice of location was said to carry risk (close to shore, within the territorial waters of Yemen and in an area where there had been few attacks by pirates) but this observation tends to assume that those who seek to defraud will carry out their aims in a manner which will avoid all risks, including those of detection. That is not always so. But the chosen location also had advantages. Its proximity to Aden, at or about the limit of Yemeni territorial waters, enabled the armed men and Poseidon to reach it with minimal delay. It was said that there was a risk of an unseaworthiness claim by cargo interests which would lead to further scrutiny. But a disguised attack by pirates would reduce the risk of such a claim. There was risk of injury to those who activated the IEID but scuttling will often involve risks of injury to those involved; see *The Atlantik Confidence* [2016] 2 Lloyd's Reports 525 at paragraph 309.

452. Evidence was available in the form of inspections by surveyors, the VDR and the making available of the crew for interviews. But any attempt to hide these sources of evidence would cause more suspicion. There was in fact an attempt to change the crew's evidence in interview.

453. The evidence of a genuine attack is said to be found in "the authentic and raw account" in the VDR and in the evidence from the master and chief engineer that they were traumatised by the events. But the account in the VDR is, as was accepted elsewhere in the Bank's closing submissions, "odd" and is more likely to involve a charade than reality. For the reasons I have given the master and chief engineer cannot be regarded as reliable witnesses.

454. The "whistle-blower" evidence is said to be unreliable. But I have not relied upon it save where it is shown to be true by other reliable evidence. The circumstantial evidence is said to make the Underwriters' case "fragile". But for the reasons I have given the Underwriters' case receives cogent support from the circumstantial evidence.

455. The conspiracy to defraud the Chinese authorities (see later, under the heading "implied warranty of legality") is said to tell against a conspiracy to scuttle the vessel. But that conspiracy was proposed by the charterers and so this point does not appear to carry great weight. Furthermore, the Owner received US$500,000 under the charter when passing the Suez Canal. I do not accept that the theft of cargo at Jeddah was inconsistent with a conspiracy to scuttle. There would still be a very valuable salved cargo fund out of which Poseidon could expect a substantial salvage award. The replacement of cargo by seawater was liable to be detected but I am not persuaded that this point is of such weight that it outweighs the force of the circumstances clearly pointing to scuttling.

456. The absence of certain evidence is relevant to note but, given the evidence which does exist, carries little weight. It is true that there is no document which provides direct evidence of Mr. Iliopoulos' wilful misconduct, but there rarely is in cases of this nature. It is true that there is no evidence of a connection between the Owner and the armed men and yet, if the Underwriters' case is to be established, there must have been such a connection. There *was* evidence of a connection between Mr. Iliopoulos and Mr. Vergos (the latter had provided salvage services to another of the former's vessels, the ELLI, which had suffered a fire and a later grounding) and Mr. Vergos, being based in Aden, had the opportunity to meet with the Yemeni coast guard, from whose numbers the armed men came. It is true that there is no evidence that anyone involved in the alleged conspiracy had any history of violence or insurance fraud. That must be borne in mind but previous good character is no defence to the charge of scuttling.

457. However, "some parts of the canvas remain blank". Precisely when Mr. Iliopoulos made his plans known to the master and chief engineer and obtained their agreement is not known. Precisely when Mr. Iliopoulos made his plans known to Mr. Vergos and secured his consent is not known. Precisely when the disaffected members of the Yemeni coast guard were identified and engaged, whether by Mr. Vergos or others, is not known. Precisely how Mr. Iliopoulos rewarded his fellow conspirators is not known. There is no evidence as to the cause of the second resurgence of the fire during the night of 6 July and early morning of 7 July. But the fact that parts of the canvas remain blank is not a sound reason for not accepting the Underwriters' case if the probabilities nevertheless point clearly and irresistibly to the conclusion that the Underwriters' case is correct.

Motive

458. Finally, there is the question of motive (see category (vi) at paragraph 447 above). The presence of a motive to scuttle may, depending upon the circumstances of the case, assist those who allege that a ship has been scuttled to prove their case. "…if there is a motive for dishonesty then it may assist in determining whether there has been dishonesty in fact" (per Aikens J. in *The Milasan* [2000] 2 Lloyd's Reports 458 at paragraph 28(10)). But the presence of a motive to scuttle does not mean that the ship must have been scuttled. "An over-insured ship owned by a scoundrel may yet meet her end by perils of the sea" (per Branson J. in *The Gloria* (1936) 54 Ll.L.R 35 at p.51). Many shipowners may have a motive to scuttle but have no difficulty in resisting the temptation. Similarly, the absence of a motive may cause a court to decline to infer scuttling. But where the facts of the case are sufficiently unambiguous

a motive need not be established (per Aikens J. in *The Milasan*). Thus the question of motive is one of the relevant circumstances to be considered and weighed. But the starting point must be "the evidence relating to the loss itself" (per Branson J. in *The Gloria*). Having considered the evidence relating to the loss I now turn to the question of motive.

459. In *The Arnus* (1924) 19 Ll.L.Rep 95 at p.99 Lord Sumner said that the motive for scuttling was usually found in "the hope of gain".

460. In this case a number of matters stand out. First, as a result of the collapse of the freight market in 2008 the vessel was loss-making. Excluding depreciation and impairment charges (caused by the dramatic loss in the market value of the vessel) there had been reported operating losses of over $10 million between 2009 and mid-2011. (Taking depreciation and impairment charges into account the reported losses were over $44 million.) Consistently with those reported losses Mr. Iliopoulos informed the Bank in an email dated 21 December 2011 (more than 5 months after the casualty) that BRILLANTE VIRTUOSO was "running at an operating loss of total about $12 million" since 2009. The expert accountant for the Bank agreed that the vessel had been unable to contribute anything towards debt service and was a "cash drain". Second, the accounting experts agreed that the evidence suggested that certain trade debts in respect of insurance, crew wages and bunkers were overdue in the period to 30 June 2011. Arrest had been threatened by bunker suppliers in February and June 2011 and was threatened on the vessel's arrival in China. Third, the Owner had defaulted in respect of repayments of interest and capital due to the Bank. Fourth, it was accepted by the Bank's expert accountant that in the absence of funds lent by associated companies the Loan Group would not have been able to carry on trading. Fifth, the combined financial statements of the Loan Group for the year ended 31 December 2010 issued on 29 June 2011 contained a note entitled "Going Concern" which noted (a) that the companies show negative working capital, (b) are in default of their debt obligations and (c) the companies' cash flow for 2011 is expected to be lower than in 2010. For the future it was planned (a) to reduce outstanding loan liabilities by the sale proceeds from two vessels, (b) to implement a cost cutting strategy and (c) to appoint a new manager to assist with chartering and to explore new trade areas for the vessels. The accountants, Deloitte, drew attention to this and said that the matters noted raised "substantial doubt" about the companies' ability to continue as a going concern. Sixth, notices of default had been served by the Bank. In particular, on 18 February 2011 an interim "balloon" repayment of $4.652 million had not been paid and on 1 March 2011 a notice of default was served. The Bank referred to certain other matters and requested the Loan Group to "realise the seriousness of the situation and revert with immediate and concrete actions." A further notice of default was issued following a failure to make a further payment on 15 March 2011. A letter raising a number of matters was sent on 28 March 2011 to which no reply was received. On 18 April 2011 a letter was sent addressed not only to the companies in the Loan group but also to Mr. Iliopoulos, described as "Personal Guarantor/Pledgor". The Bank expressly put the addressees on notice "for the last time" that they had failed to make various payments and that failing payment by 3 May 2011 the Bank would be "entitled to proceed to any act for securing all or any of its rights and remedies under the contract, the law or otherwise without any further notice." Thereafter, pursuant to a Supplementary Agreement, the balloon repayment was deferred until the end of July 2011. A payment of $325,000 under that agreement

was due on 15 June 2011 but was paid late. Seventh, the loan repayments increased substantially from 2012 (thus, $2.1 million was required in 2012, $5.2 million in 2013 and $6.1 million in 2014).

461. For all these reasons the Bank's expert accountant agreed that the Owners and the Loan Group were in "serious financial difficulties". He said "the overall position, with the amounts that they owed the bank and with creditors and so on, yes, they were struggling. So the position was serious. So yes, serious financial difficulties."

462. In those circumstances the recovery of US$77 million upon a fraudulent insurance claim would be a clear financial or pecuniary advantage to the Owner. By 31 December 2009 the vessel's market value was US$18.25 million, by 31 December 2010 it was US$16.64 million and by 30 June 2011 it was US$13.5 million (though it is possible that this last fall in value was not known to Mr. Iliopoulos until after the fire, because the June 2011 accounts were unlikely to have been drawn up before 5 July 2011). I bear in mind that the Owner (by reason of his experience with the claim on the *Elli*) may well have foreseen a long investigation by the Underwriters and delay in resolution of the claim but I do not consider that that eliminates the prospect of a clear financial gain for the Owner. Even a long delayed recovery of US$77 million must on any view amount to a "hope of gain". Of course, it does not follow that the Owner scuttled the vessel. The evidence has to be carefully assessed to see whether the facts of the case (of which motive is but one) justify such a finding.

463. Counsel for the Bank advanced 12 reasons for saying that the Owner had no "strong financial motive to contrive an insurance claim for the total loss of BRILLANTE VIRTUOSO." These reasons were developed between paragraphs 977 and 1119 of the Bank's closing. The Underwriters replied to these points between paragraphs 1245 and 1371 of their closing. I have considered them all but only propose to mention those which appeared to me to merit special mention.

464. First, counsel for the Bank accepted that the Loan Group had "cash flow and liquidity issues" (see paragraph 975(3)) but submitted that trading results were starting to improve. But up until 30 June 2011 they had not improved. The accounting experts agreed that the operating result for the first six months of 2011 was a loss of $2,031,000 compared with a loss in 2010 of $1,879,000. The "time charter equivalent" earnings (TCE) were $5,568 in 2010 and $3,567 in the first six months of 2011. The case for saying that results were starting to improve depended upon the charterparty which BRILLANTE VIRTUOSO was performing at the time of the loss, the Solal charterparty, which was said to generate a profit of $1.4 million on discharge in China and so produce a TCE of $11,853. It is true that the freight rate achieved was higher than on the charters performed in the first 6 months of 2011. It is not clear why (though counsel for the Underwriters have suggested that the reason is connected with the charterers' proposal that the bills of lading be changed to describe the cargo, falsely, as bitumen mixture, see below). Whether the expected net profit would have been achieved is also not clear. There was evidence of the cargo being contaminated by sea water. But even if the expected profit were achieved it would make little headway on the Loan Group's current liabilities as at June 2011 of $26.5 million of which $11.19 million consisted of trade creditors.

465. There was a debate as to whether it made sense for Mr. Iliopoulos to scuttle the vessel when it was performing the valuable Solal charterparty. The Bank said that it "made

absolutely no sense" whilst the Underwriters said that, given the plan designed by Mr. Iliopoulos, which involved a fake attack by pirates, the Solal charterparty, which required a voyage through the Red Sea and the Gulf of Aden, was the "opportunity" for the plan to be put into effect and the Owner received an advance payment of $500,000. The answer to that debate can only be determined by considering whether the circumstances of the case as a whole enable the Underwriters to discharge the heavy burden which lies upon them to establish wilful misconduct by Mr. Iliopoulos.

466. Second, reliance was placed on the sale of two vessels which would generate $8.6 million. That would enable the balloon payment to be made and leave $2.55 million over to pay trade creditors and meet other loan obligations. It is not known when Mr. Iliopoulos thought that these sales would in fact be completed (they were not in fact completed until 2013) but $2.55 million would make little headway on the Loan Group's current liabilities.

467. Third, it was said that there was a potential for a very valuable charter with Valeska, an example of the Owner's "ability to leverage personal business relationships in order to exploit opportunities" (see paragraph 1059(1) of the Bank's closing). It was said that this possible charter (together with the Solal charter) would have generated net earnings of US$7.5 million in the next 12 to 30 months (see paragraph 1050 of the Bank's closing). I heard no evidence on this subject but evidence had been given on the subject before Flaux J. when he was hearing the constructive total loss issue. I was taken to that evidence. It was not impressive. Cross-examination revealed that the person giving the evidence, Mr. Bezas, had no personal knowledge of the matter. Flaux J. said:

> "It emerged in cross-examination that this information was not from Mr Bezas' own knowledge but obtained by him from the owners' chartering department. I have to say that I am very sceptical as to whether the vessel could have obtained any such long term fixture. In the recent past, she had traded on the spot market with voyage charters and her age and condition suggests that pattern would have continued."

468. I was also taken to certain emails dating from March 2011 which had not been before Flaux J. They were said to support the Bank's suggestion that Valeska, a Nigerian charterer, was controlled by a Mr. Peters who was said to owe Mr. Iliopoulos US$1 million and to have proposed to repay that sum by chartering BRILLANTE VIRTUOSO at above market rates. It was said to be "highly likely" that the discussions in July 2011 mentioned by Mr. Bezas were a continuation of the March discussions (see paragraph 1053(6) of the Bank's closing). The true meaning of the emails in question appeared to me to be obscure. Further, the suggestion made by the Bank had not been made by Mr. Bezas. Moreover, he signed the 2010 accounts in late June 2011 which said that the cash flow position in 2011 was expected to be lower than in 2010. This sits unhappily with the suggestion now made by the Bank, notwithstanding the suggestion made by counsel for the Bank at paragraphs 1060-1066 that the accounts are not inconsistent with Mr. Bezas' evidence. I am unable to accept the Bank's case with regard to the proposed Valeska charter.

469. Fourth, reliance was placed on the fact that Deloitte approved the accounts of the Loan Group on a going concern basis. It seemed to me that this point was overplayed

because, as noted above, Deloitte also said in terms that there was a substantial doubt about that. It appears that associated companies (which were said to include Mr. Iliopoulos's father) had made loans to enable trading to continue. There was no evidence as to whether that support would continue. But in circumstances where it was accepted by the Bank's expert accountant that there was no realistic prospect of BRILLANTE VIRTUOSO ever generating a return to shareholders (because of the magnitude of the finance debt and the age of the vessel) there is likely to have been a limit to the extent to which associated companies would continue to support the Owner.

470. Fifth, reliance was placed on the fact that the Bank had not embarked on a process of foreclosure and that the rating of the loan ("special mention") had not changed. Mr. Leostakos gave evidence that foreclosure would require an extensive series of preparatory steps which had not been taken. But the reference to warning the Owner "for the last time" in the letter dated 18 April 2011 was ominous and indicated that the Bank believed that time was running out for Mr. Iliopoulos. I accept however that thereafter a later date for payment of the balloon repayment was agreed (the end of July) so that in fact further, albeit limited, time was granted.

471. The Bank denies that there was a "strong financial motive" (see paragraph 975 of the Bank's closing) and counsel for the Bank submitted that "an insurance claim did not provide the only or even an obvious way out of Mr. Iliopoulos' companies' financial issues" (see paragraph 1114 of the Bank's closing). The Bank's case appears to accept that there was *a* financial motive and the submission appears to accept that an insurance claim was *one* way out of the Owner's financial issues. But even if that is not conceded it seems to me that the claim held out the prospect of substantial financial gain. There was therefore a motive. Whether Mr. Iliopoulos attempted to procure that gain dishonestly, notwithstanding (i) the planned strategies to improve the financial position noted in the accounts, (ii) the Solal charterparty, (iii) the risk that there may be no recovery and (iv) the risk to Mr. Iliopoulos' reputation, depends upon a consideration of all of the evidence in the case.

Conclusion as to wilful misconduct

472. Having considered all of the evidence in the case and counsel's detailed submissions on that evidence and having stood back from the detail to view the story as a whole, in the round, I have reached several firm conclusions.

473. First, the armed men who boarded BRILLANTE VIRTUOSO with an IEID did so with the intention of starting a fire on board the vessel. They had no intention of hijacking the vessel for ransom and only pretended to be pirates. They activated the IEID for the purpose of starting a fire on board the vessel.

474. Second, the master and chief engineer assisted the armed men in their task. The master decided to drift off Aden to make it easier for the small boat carrying the armed men to come alongside the vessel and then permitted the armed men to board the vessel. The chief engineer in all probability provided the accelerant for the IEID and the additional fuel to enable the fire to spread from the purifier room. There is no clear evidence as to what the accelerant and additional fuel consisted of, but it may have been diesel oil as suggested by the fire experts.

475. Third, Mr. Vergos of Poseidon was party to the conspiracy to damage the vessel by fire. He was aware that there was to be a "fake" attack by pirates and once he knew that that had occurred and that the vessel was on fire he proceeded to the casualty. On arrival he failed to take obvious precautions to prevent the spread of the fire. When it appeared that the fire was about to go out he, or one or more of his salvage team, damaged the drain cock to the diesel oil service tank so as to cause the resurgence of the fire.

476. Fourth, the orchestrator of these events was the owner of BRILLANTE VIRTUOSO, Mr. Iliopoulos. It is improbable that the armed men, master, chief engineer and Mr. Vergos took part in the conspiracy on their own initiative. By contrast Mr. Iliopoulos had a motive to want the vessel to be damaged by fire, namely, the making of a fraudulent claim for the total loss of the vessel in the sum of some US$77 million which, if successful, would solve the serious financial difficulties in which he and his companies were at the time. Moreover, his involvement is consistent with his early telephone calls to FOS and Poseidon between 0300 and 0400 on 6 July reporting that the vessel was on fire and positively indicated by the striking coincidences that (i), although it is clear from the VDR audio record that the armed men identified themselves as "security", almost all of the crew in their early statements said that the armed men identified themselves as "the authorities" and (ii) that the statements of those few crew members who said that the armed men identified themselves as "security" were amongst those not disclosed to the Underwriters until, some years later, the Owner's solicitors disclosed them. Only Mr. Iliopoulos had reason for the crew to tell an untrue story. Thus the evidence relating to the loss, the crew's untrue evidence in their early witness statements that the armed men described themselves as the authorities and Mr. Iliopoulos' motive for setting fire to his vessel amount to a cogent and compelling case that the events were orchestrated by him. The case against him is strengthened by what is known of his character from the findings made by Flaux J. and by the inference that the documents he was unwilling to disclose would have supported the case against him. I have therefore concluded that Mr. Iliopoulos was the instigator of the conspiracy.

477. I am not left in any doubt as to those conclusions. Applying the guidance referred to in the various authorities I consider that "the probabilities point clearly and irresistibly" to those conclusions (per Neill LJ in *The Captain Panagos DP*), that there is no "substantial possibility" that Mr. Iliopoulos did not consent to the vessel being damaged by fire (per Stuart-Smith LJ in *The Ikarian Reefer*), that I have "a high level of confidence" in that conclusion (per Colman J. in *The Grecia Express)* and that the facts of the case are "sufficiently unambiguous" to justify the conclusion (per Aikens J. in *The Milasan*). I do not consider that there is a plausible explanation of the events which befell BRILLANTE VIRTUOSO which is consistent with an innocent explanation.

478. A number of detailed points which I was not able to answer earlier in this judgment must be touched on again. Was the recruitment of three unarmed security personnel a ruse to provide an explanation for the vessel drifting off Aden ? I consider that it is more likely than not that it was, notwithstanding that it appears to have been a genuine and costly arrangement. It is also more likely than not that the Owner drafted the letter from Anyland to sign confirming that the security team's flight had been cancelled in order to support that ruse. Was the call at 2043 between the master and

Mr. Iliopoulos ? Again, on the balance of probabilities I consider that it was. The arrangement for the security personnel had only been finalised on 5 July. It is likely that there was a need for a last minute discussion as to the planned events. Both parties agree that the master and Owner would have known that conversations on the bridge were recorded. However, in circumstances where the words spoken by the Owner would not be recorded they probably thought that, in the interests of finalising the arrangements, the risk was worth taking. It was after this conversation that the master proceeded to a position at which he commenced to drift. But even if the master's conversation at 2043 was not with the Owner I would still have reached the conclusions I have; for the events on board indicate very clearly what in fact happened.

Insured perils

479. It follows that the Owner's claim, if it had not been struck out, would have failed. However, it is accepted that the Bank was not just an assignee of the Bank's claim but was also a co-assured under the policy. Thus the mere fact that the Owner is disabled from claiming by reason of his wilful misconduct does not disable the Bank from claiming. However, in order to make a successful claim the Bank has to show that the loss was caused by an insured peril.

480. The Bank submitted that the loss, on the facts found by the court, was caused by one or more insured perils.

Piracy

481. The first peril relied upon was piracy. *Arnold on Marine Insurance* 19th.ed. (at paragraph 23-34) does not attempt a definition of piracy but counsel for the Bank did. It was submitted that there was an act of piracy where:

> (1) A person carries out a theft or attack upon a ship or other form of maritime property and/or the persons on board the ship or property. The theft or attack does not have to be successful.
>
> (2) The theft or attack is carried out "at sea". This includes thefts or attacks within a nation's territorial seas, tidal waters and ports and harbours.
>
> (3) The theft or attack is carried out with the use and/or the threat of violence.
>
> (4) The attack can be carried out from another vessel, from on board the insured vessel or from the shore.
>
> (5) The person carrying out the theft or attack does so with motives of personal gain or to satisfy personal senses of vengeance or hatred. If the motives are political, religious or ideological in some other sense, the attack or theft will not be treated as one of piracy.

482. This definition of piracy was derived from several authorities; *Le Louis* (1817) 2 Dods 210; *In re Tivnan* (1864) 5 B&S 645, 662; *Attorney-General v Kwok-a-Sing* (1873) LR 5 PC 179; *Republic of Bolivia v Indemnity Mutual Marine* [1909] 1 KB 785; *Banque Monetaca v Motor Union Insurance* (1923) 14 Ll L Rep 48; *The Salem* [1982] QB 946, 985-986; rev'd on other grounds [1983] 2 AC 375; and *The Andreas Lemos* [1983] 1 QB 647.

483. Counsel for the Underwriters submitted that the necessary attack had to be for private gain or for the purpose of extracting a ransom. The former is the classic form of piracy. The latter (which is also for private gain) is the form seen in Somalia in recent years; see *Arnould on Marine Insurance* 19th.ed. para.23-34.

484. Counsel for the Underwriters also submitted that piracy in a marine insurance policy has to be understood in a popular or business sense, which required the attack to be "indiscriminate", in the sense that the pirates' motive must be indiscriminate plundering of whatever valuable ship they come across. This submission was based upon the judgment of Vaughan Williams LJ in *Republic of Bolivia v Indemnity Mutual Marine* [1909] 1 KB 785 where, at p.796, the Lord Justice adopted the approach of the judge at first instance, Pickford J, later Lord Sterndale MR:

> "I adopt what Pickford J. says as to the meaning of " piracy " in the following passage of his judgment: "I do not think that can be better expressed than it is in Hall's International Law, 5th ed. p. 259, where it is said: 'Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private as contrasted with public ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State.' That I think expresses what I have called the popular or business meaning of the word ' pirate,' and I find that several, though not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. No doubt there are definitions which do not embody that idea, but that I think is the common and ordinary meaning; a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organized. Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to attach to ' piracy' a popular or business meaning, and I do not think, therefore, that this was a loss by piracy." I adopt that passage as the basis of my judgment."

485. It is clear from that passage that the phrase "plundering indiscriminately" is used to differentiate piracy from operations against the ships of a particular state for a public end. Thus Sir Francis Drake, assuming that he was acting with the approval of Queen Elizabeth I against the Spanish, was not a pirate in the popular or business sense used in a policy of marine insurance governed by English law, notwithstanding that the King of Spain regarded him as a pirate. Kennedy LJ approved the same approach and explained, at pp.803-4, why there was no piracy on the facts of that case:

> "In my opinion Pickford J. was right in holding that, so far as the matter is one of legal construction, the term "piracy" must be regarded as having been used in a business document like this policy of insurance in the sense in which business men would generally understand it; and I think that, from that point of view, he was right in defining " pirates " as being those who plunder indiscriminately for their own gain, not persons who operate solely against the property of a particular Government for such objects as those for which the persons who seized the goods insured were operating against the Government of Bolivia in the present case. ……. To my mind the term "piracy" is inapplicable to the acts of the persons who seized the goods insured in this case, however wrongful or lawless their conduct may have been according to the law of Brazil or Bolivia. They seized these goods not for their private gain, but in furtherance of a political adventure in the latter country. I do not think that any business man would say that those acts constituted "piracy" in the sense in which that term is used in this policy. They are more like the matters mentioned in the warranted free clause, such as riot or civil commotion."

486. The decision and reasoning in *Republic of Bolivia v Indemnity Mutual Marine* show that it is not enough for conduct to amount to piracy that it involves an unlawful attack at sea. The conduct must be that which a business man would say amounted to piracy. The present case does not involve theft for political purposes, as did *Republic of Bolivia v Indemnity Mutual Marine*. So the decision in that case does not dictate the decision in the present case.

487. I have found that in the present case a group of armed men, on the instructions of the Owner, were permitted to board the vessel and set fire to it, as part of an attempt by the Owner to defraud the Underwriters. I accept that they did so for motives of personal gain. I also accept that there was a threat of violence to the crew who were not party to the conspiracy. There may also have been a theft of a laptop (as suggested by the VDR audio record). But in my judgment such conduct does not in the popular or business sense amount to piracy. First, there was no attack on the vessel. Rather, there was an arranged rendezvous at sea pursuant to which the master was willing to let the armed men board. Second, the motives of the armed men were not to steal or ransom the vessel or to steal from the crew, but to assist the Owner to commit a fraud upon Underwriters. In my judgment a business man would say that there was no attack by pirates, that the armed men only pretended to be pirates (demanding that the vessel go to Somalia, firing their guns and asking where the money was) and that Mr.

Iliopoulos, who authorised the actions of the armed men, was not a pirate but was a shipowner seeking to defraud his underwriters.

488. Counsel for the Bank pursued an elaborate argument based upon the nature of the policy as a composite policy pursuant to which the interests of the Owner and the Bank were insured. A composite policy was described in the following terms by Rix J. *in Arab Bank v Zurich* [1991] 2 Lloyd's Reports 262 at p.277:

> "…….in the typical case of a composite policy where there are several assureds with separate interests, the single policy is indeed a bundle of separate contracts. That is the prima facie position under a composite policy, without any need for a meticulous examination, for instance, to see whether separate premiums have been agreed for the various interests……"

489. The consequence of being a co-insured under a composite policy with a separate contract of insurance is that the Bank is not disabled from suing by reason of the wilful misconduct of the Owner (see *Samuel v Dumas* [1924] AC 431 at pp.445-6) and that any right to avoid liability on account of a misrepresentation or non-disclosure by the Owner does not enable the insurer to avoid liability to the Bank (see *New Hampshire Insurance v MGM* [1997] Lloyd's Insurance and Reinsurance 24 at p.49 and 57-58). It was submitted that a further consequence was that "as far as the Bank was concerned, the Owner's wilful misconduct constituted an act of a pirate in that the loss of the Bank's interest in the insured vessel resulted from a violent attack on that interest motivated by personal gain." Thus counsel for the Bank submitted that, on the acts which I have found, Mr. Iliopoulos was a pirate.

490. Counsel for the Underwriters drew my attention to the New Zealand case of *New Zealand Fire Service Commission v IBA of New Zealand* [2015] NZSC 59 which, it was said, doubted that there was a prima facie position with regard to composite policies and that instead the question whether there was a single or multiple contracts turned on the nature of the identity between the different interests insured under the policy (see, for example, paragraphs 137-140 of the report).

491. I do not consider that it is necessary to decide whether the composite policy in the present case contained a single contract or multiple contracts of insurance. In my judgment, whichever is the correct analysis, the Bank is obliged to establish that the loss was caused by an act of piracy. I do not consider that the nature or quality of the event which befell BRILLANTE VIRTUOSO differs whether it is looked at from the point of view of the Owner or of the Bank. When deciding whether there has been a loss by an insured peril the court must determine as a matter of fact the nature of the event which has caused the loss. The reason why the wilful misconduct of, or misrepresentation or non-disclosure by, one assured does not affect the ability of the other assured to recover under a composite policy is that the wrongful actions of the one are not wrongful actions of the other. There is no scope for the application of that principle when determining the nature of the event which has caused loss. In my judgment an attempted insurance fraud is not an act of piracy, whether looked at from the point of view of the Owner or of the Bank. The Bank may have a proprietary interest in the vessel by reason of its mortgage but it is not realistic to suggest that on the facts of this case there was an attack by pirates on the Bank's proprietary interest

as mortgagee. Rather, as a result of the execution of the fraudulent conspiracy by the Owner and others, there has been damage, albeit foreseeable, to the Bank's proprietary interest.

492. It was submitted that if the Bank had had its own policy it could, on the facts which I have found, recover for a loss by piracy and the same should be so under a composite policy. I was not persuaded that this was so. Even if the Bank had had its own separate policy of insurance the Bank would still be unable to establish a loss by piracy. Mr. Iliopoulos was not, in the popular or business sense, a pirate. He was a shipowner seeking to defraud his underwriters.

493. It was also submitted that there was the required "attack" on the vessel because an IEID was activated and so there was violence to the vessel. Counsel for the Underwriters submitted that this was not enough, relying upon *The Andreos Lemos* [1983] 1 QB 647 at p.661 B and *Marine Insurance Fraud* by Professor Soyer at paragraph 7.32. It was said that there had to be force, actual or threatened, against the crew. The same conclusion was reached by Miss Julia Dias QC in *McKeever v Northernreef Insurance Co.* [2019] 5 WLUK 444 where, at paragraph 77, she held:

> "The strong implication from the decisions is that piracy requires the threat or use of force against persons, not simply against property, and I so hold."

494. In this regard the Bank said there was, on the facts of this case, the threat of violence to the crew.

495. In my judgment, neither the violence to the vessel nor the threat of violence to the crew is sufficient, on the facts of the present case, to make what happened an act of piracy. The violence to the vessel and the threat of violence to the crew were simply the means by which the conspirators sought to defraud the Underwriters. Violence to a vessel and the threat of violence to the crew can be indicative of an act of piracy but they are not on the facts of the present case.

496. I therefore am unable to accept the Bank's case that on the facts which I have found there was a loss by piracy.

497. I should also mention a broader argument which was advanced by counsel for the Underwriters. It was said that the Lloyd's SG form of policy was never intended to insure any of the three possible parties to the marine adventure i.e. ship, cargo and freight, against wrongful action by any of them against any other party to the adventure, but only against action by outsiders to the prejudice of the parties' common interest in the adventure; see Kerr LJ. in *The Salem* [1982] QB 946 at 990G-991C. This was said to be relevant to the construction of the Institute War and Strike Clauses because they are an update by the market of the SG form and time honoured concepts in the SG form had not been abandoned; see *The B Atlantic* [2018] UKSC 26 per Lord Mance. Allied with this submission was the further submission based on *Samuel v Dumas* [1924] AC 431 at p.459 that to cover scuttling express words would be required. There were no such words. It was further said that this was understood by the market because mortgagees protect themselves against losses by scuttling by taking out an MII policy, as was done in this case; see *The Law of Ship Mortgages* by Osborne, Bowtle and Buss 2nd ed. at paragraph 6.4.1. This was a broad, sweeping

argument with which it is unnecessary for me to grapple, notwithstanding its interest and the force with which it was advanced. I prefer to deal with the Bank's submission that the loss in this case was caused by an insured peril by asking whether the event which caused the loss was an insured peril. For the reasons I have given the event which caused the loss was not an act of piracy.

"Persons acting maliciously"

498. The second suggested peril was a loss caused by "persons acting maliciously". The meaning of "persons acting maliciously" has recently been considered by the Supreme Court in *The B Atlantic* [2018] 2 WLR 1671. Lord Mance said:

> "22 In my view, therefore, the concept of "any person acting maliciously" in clause 1.5 would have been understood in 1983 and should now be understood as relating to situations where a person acts in a way which involves an element of spite or ill-will or the like in relation to the property insured or at least to other property or perhaps even a person, and consequential loss of, or damage to, the insured vessel or cargo. It is not designed to cater for situations where the state of mind of spite, ill-will or the like is absent …

499. In my judgment, on the facts which I have found, those who were permitted to board the vessel did not act out of "spite or ill-will or the like" in relation to the vessel, the property insured. They intended to damage the vessel but not out of spite or ill-will but because the Owner had requested that they did so. They were seeking to assist him in his fraudulent plan and no doubt intended to profit from doing so.

500. In *The Salem* [1982] QB 946 conspirators disposed of a cargo of oil dishonestly, in South Africa, in breach of sanctions and with a view to profit. Mustill J. considered whether this loss was caused by persons acting maliciously, that is out of spite or ill-will or the like. He decided at p.966 that it was not.

> "……..the cargo was not lost because the conspirators desired to harm either the goods or their owner. The loss was simply a by-product of an operation carried out for the purposes of gain."

501. This decision was not challenged on appeal. Lord Denning said at p.986D:

> The judge held (ante, p. 966A-B) that the crooks were not acting maliciously, i.e. out of spite, ill will or the like, but for their own gain. The judge's ruling on this point was accepted by Shell.

502. In my judgment the same is true in the present case. The vessel was not lost or damaged because the armed men desired to harm the vessel or the Owner. The vessel was lost or damaged because the armed men desired to make money from their actions.

503. Reference was made to Lord Mance's query in *The B. Atlantic* at paragraph 28 as to Mustill J.'s approach. However, Lord Mance did not suggest that the matter should now be decided differently.

504. The submission made by counsel for the Bank in their written closing (at paragraph 1222) was that the damage to the vessel was deliberate and that that was sufficient. I do not accept that submission. There was deliberate damage but it was not out of "spite, ill-will or the like". The owner sought to damage his own property and the armed men sought to assist the owner, not to harm him.

505. In their oral closing submissions counsel advanced a different argument. It was said that the facts of *The Salem* were "qualitatively different" in that there was no violence in that case whereas in the present case violence was threatened and that must have been out of "ill-will". On the facts of this case there probably was a threat of violence to the crew who were not party to the conspiracy. Counsel for the Underwriters said that the armed men did not wish harm; they merely wished the crew out of the way. That is probably so but from the point of view of the crew the threats probably appeared real. I further accept that a threat of harm can signify "ill-will". However, I do not consider that this element of ill-will is sufficient to colour the operation as a whole. It is, for the reasons I have endeavoured to explain, impossible to say that the operation as a whole was conducted out of "spite, ill-will or the like".

506. For the same reason, I do not consider that the phrase "malicious mischief", which is also relied upon by the Bank "for good measure", can assist the Bank. "Malicious" must have the same meaning in this context. Counsel for the Bank referred to the Scots offence of malicious mischief which is a "deliberate and malicious act to damage another's property or to interfere with it to the detriment of the owner or lawful possessor……Malice connoted the evil intent deliberately to do injury or damage to the property"; see *HM Advocate v Wilson* (1984) SLT 117 at 119. It was not explained why this definition should be imported into the war risks policy in this case. Nor was it explained why an owner's deliberate damage to his own property was within the meaning of malicious mischief or why the action of the armed men was within the meaning in circumstances where they were acting with a view to assisting the owner rather than to harm him.

Vandalism or sabotage

507. The Bank also submitted that the loss was caused by vandalism or sabotage. But in my judgment neither is apt to describe the conduct of those involved in a conspiracy to defraud the Underwriters.

508. Vandalism connotes not just damage to property but wanton or senseless damage to property. There *was* damage inflicted to the vessel, not only by the fire but also by deliberate damage to equipment in the purifier room. But both were for the specific purpose of assisting the Owner to defraud the Underwriters. It was not wanton or senseless in the sense of undirected or mindless violence. Whilst such conduct is to be deplored, like vandalism, it is not ordinarily described as vandalism. The causing of damage for a particular defined purpose, namely, to enable a fraud to be perpetrated on the vessel's insurers, would ordinarily be described as a conspiracy to defraud, not as vandalism.

509. Sabotage is the damage to, or disabling of, property so as to frustrate the use of that property for its intended purpose. The damage inflicted in the course of executing the planned fraud was not sabotage, notwithstanding that the damage in fact prevented the vessel from being used for its intended purpose. It was suggested that it was sabotage because its aim was to render the vessel an actual or constructive total loss, which, if achieved, would prevent the vessel from being used for its intended purpose. But the purpose of the damage was not to frustrate the Owner's ability to use the vessel to trade. The Owner had decided that he had no wish to continue trading the vessel and instead wished to render the vessel a total loss so that he could claim the insurance proceeds. That is not what is ordinarily regarded as sabotage.

Capture, seizure, arrest, restraint or detainment

510. Finally, the Bank relied upon "capture, seizure, arrest, restraint or detainment". Capture and seizure suggest that the Owner has been deprived of possession of his vessel or of the ability to direct its movements. The Owner was in possession of the vessel through the agency of the master. The Owner remained in possession of the vessel after the armed men had boarded. The armed men had not taken possession or control of the vessel from the master. They were acting in concert with him. Once the master and crew had abandoned the vessel the salvors probably had possession of the vessel; see *Cossman v West* [1887] 13 App.Cas. 160 at p,181 and *The Law of Salvage*, Kennedy and Rose at paragraph 14.010. But it would not be right to say that they had captured or seized the vessel so as to deprive the Owner of possession. Rather, they were acting in accordance with the Owner's instructions. For the same reason there was no arrest, restraint or detainment.

511. It follows that the Bank's claim in this action must be dismissed. There was no loss by an insured peril.

The Aden Agreement

512. The Underwriters raised further defences which were only required in the event that the Bank was able to prove a loss by an insured peril. The Bank has not proved that and so strictly these additional defences need not be considered. They have, however, been argued and involve issues of fact. I shall deal with them as shortly as I can.

513. The first additional defence raised by the Underwriters concerned the Aden Agreement. In the absence of the Aden Agreement the Underwriters were not on risk because the vessel had sailed for Yemeni territorial waters ("OPL Aden") which were outside the navigational limits of the policy. But the Aden Agreement permitted the vessel to be in such waters. The Underwriters submitted that there were two reasons why they were not bound by the Aden Agreement. First, it was said not to apply on its true construction. Second, they had rescinded it on account of a misrepresentation.

514. Before considering the construction arguments it is first necessary to deal with the meaning of "OPL Aden". The Bank's expert on this issue considered that it referred to an area outside or off port limits and the Underwriters' expert agreed that that was its most common meaning, though he said it could refer to "outer port limits". In those circumstances the most likely meaning of OPL Aden, assessed on an objective basis, is off or outside port limits. But there remains the question, how far off or outside port limits is within the phrase OPL Aden ? On that issue I accept the

submission made on behalf of the Underwriters, and supported by their expert, that the area outside or off port limits must, on an objective basis, have been intended to refer to an area in close proximity to the port limits. It is unlikely that the parties to the Aden Agreement envisaged that anywhere outside port limits was contemplated as being the place where the vessel was to anchor. There was evidence from the Bank's expert that the port limits of Aden were about 3.15 nautical miles from the coastline.

515. The submission made by counsel on behalf of the Underwriters was that on the true construction of the Aden Agreement it applied only for the purposes of the vessel proceeding to and remaining at a designated anchorage area at or in close proximity to the port limits where the vessel would benefit from the protection of the port (see paragraph 1849 of the Underwriters' closing submissions). The further submission made was that in any event the vessel did not proceed to or remain at anchorage but chose instead to drift (see paragraph 1851). These submissions were resisted by counsel for the Bank at paragraphs 1289-1304 of their closing submissions. It was submitted that the details of the proposed call were not provided as proposed conditions or restrictions on the call.

516. The written submission on behalf of the Underwriters, by referring to a "designated anchorage area" where "the vessel would benefit from the protection of the port" seems to me to go too far and to read words into the Aden Agreement which are not there. However, the request made to the Underwriters was to approve a call at "OPL Aden". The question therefore is whether calling at a place initially about 11 miles off the coast (close to the limit of Yemeni territorial waters which were 12 miles off the coast) was a call at "OPL Aden". Since the port limits were about 3.15 miles off the coast I do not consider that the place where the master chose to drift can, in the context of the Aden Agreement, realistically be referred to as close to the port limits. I accept the submission made by counsel for the Underwriters that the Underwriters "cannot sensibly be taken to have permitted the vessel to wait just inside Yemeni territorial waters, 10-12 miles from the port." For some purposes it may be that a point 11 miles off Aden may be regarded as close to the port limits. But the context in question is one in which the Underwriters were being requested to permit the vessel to enter waters which were otherwise outside the navigational limits of the policy. In that context it is reasonable to expect that OPL Aden was intended to refer to a location quite close to the port limits (where the vessel can be expected to be relatively safe) rather than to a location about 8 miles distant from those port limits and almost in international waters.

517. As for the further submission that permission was given to anchor rather than to drift I accept the submission made by counsel for the Bank that anchoring was not a condition of the call. At best there was a statement by the broker that the vessel was "expected" to anchor and it appears that at one stage that that was indeed envisaged. For on 5 July 2011 at 1832 the master was in discussion with the agent at Aden and was told to anchor outside port limits. (That is likely to have been before the Aden Agreement was made between 1632 and 1708 BST).

518. Counsel for the Underwriters also submitted that the Underwriters' agreement to the vessel calling at OPL Aden was only for the purpose stated in the Aden Agreement, that is, for the purposes of embarking the security team.

519. On the facts which have been found by the court the vessel was drifting off Aden for a quite different reason, namely, to embark a team of armed men who intended, with the consent of the Owner, to set fire to the vessel in order to enable the Owner to make a fraudulent insurance claim. This was not the stated purpose and so it was submitted that the Aden Agreement, on its true construction, did not amount to consent for what in fact happened.

520. It was submitted on behalf of the Bank that there was only one condition specified in the Aden Agreement and that was that the vessel's call at Aden would not exceed 48 hours.

521. The insurance broker who sought the Aden Agreement, having informed the Underwriters that the vessel was calling "OPL Aden to embark unarmed guards to sail with the vessel to Gale [sic] Sri Lanka", sought confirmation that there would be no additional premium "in view of the above reason for calling". Mr. MacColl confirmed that there would be no additional premium "this instance not exceeding 48 hours".

522. Mr. MacColl, in agreeing to the request, made one condition, namely, that the visit should not exceed 48 hours. He did not impose any other condition regarding the purpose of the visit. But it is arguable that he did not need to because the request was expressly made on the basis of the stated reason for calling and that the agreement reached by email on 5 July 2011 was an agreement that the vessel may call OPL Aden to embark unarmed guards with no additional premium provided that the visit lasted no more than 48 hours.

523. This issue of construction, being a short point, was not argued at length. The agreement reached must be construed against the backdrop of clause 2 of the Navigation Limits endorsement which provided as follows:

> "2. BREACH OF NAVIGATION PROVISIONS
>
> (a) If the Insured wishes to secure continuation of coverage under this insurance for a voyage which would otherwise breach Clause 1, it shall give notice to Underwriters and shall only undertake such voyage if it agrees with the Underwriters any amended terms of cover and any additional premium which may be required by the Underwriters
>
> (b) In the event of any breach of any of the provisions of Clause 1, the Underwriters shall not be liable for any loss, damage, liability or expense arising out of or resulting from an accident or occurrence otherwise covered under this insurance during the period of breach, unless notice of such breach is given to the Underwriters as soon as practicable and any amended terms of cover and any additional premium required by them are agreed …"

524. Clause 2(a) applies prospectively and so is the relevant part of the clause. It provides for a continuation of coverage if the assured agrees with the underwriter "any amended terms of cover and any additional premium". It is arguable that the only

amended terms of cover agreed with the Underwriters were that the visit to Aden should not last more than 48 hours. No additional premium was sought.

525. There is force in the Bank's construction of the Aden Agreement. The natural place for any additional terms of cover to be found is in Mr. MacColl's response and in that there is but one additional term of cover. But looking at the exchange between the broker and Mr. MacColl as a whole and seeking to identify the meaning which the agreement would reasonably convey I consider that the Underwriters agreed to the request on the basis (i) that the reason for the call was that stated by the broker and (ii) that the call would not last for more than 48 hours. It seems to me unrealistic and unreasonable to construe the Aden Agreement as permitting a call OPL Aden, whatever the reason for it, so long as it did not exceed 48 hours.

526. I therefore accept that the Aden Agreement did not apply, first, because the vessel did not call OPL Aden and, second, because the vessel did not call for the agreed purpose.

527. I have noted the further arguments advanced by counsel for the Bank at paragraphs 1308 and 1309 but am unpersuaded by them. There is no scope for construing the Aden Agreement by reference to what the Bank understood and expected. The purpose of the call was clearly stated and was the reason why the Underwriters agreed to the call at OPL Aden. The question is not whether the Bank breached the Aden Agreement but whether the Aden Agreement applied on its true construction to what in fact happened.

528. The Underwriters next submitted that there had been a misrepresentation of the purpose of the visit which had induced them to enter into the Aden Agreement and that on that account they had avoided the Agreement.

529. On my findings there had been a misrepresentation of the purpose of the visit. However, it was submitted on behalf of the Bank that although there had been a misrepresentation by the Owner (see paragraph 1257 of the Bank's closing), there had been no misrepresentation by the Bank. At best there was a representation by the Bank of its expectation or belief that the vessel was to proceed to Aden to embark a security team and that was true (see paragraph 1259 of the Bank's closing). This submission developed from the submission that the policy was a composite policy pursuant to which the Owner and the Bank had separate contracts of insurance.

530. I am unable to accept this submission by the Bank, even on the assumption that the policy was a composite policy. The Bank accepts that the representation in the broker's email of 5 July 2011 was made on behalf of both the Owner and the Bank. It is, I think, unrealistic, to suggest that the recipient of the email, Mr. MacColl, understood the representation to have one meaning when sent on behalf of the Owner and another meaning when sent on behalf of the Bank. It is one email sent on behalf of two parties and it contains one representation as to the purpose of the call at OPL Aden. That representation was that the purpose of the call was to embark unarmed guards. In the light of my findings that representation was untrue and it plainly induced Mr. MacColl to make the Aden Agreement.

531. It was submitted on behalf of the Bank that the Underwriters had affirmed the Aden Agreement in May 2015 when, with knowledge of the Owner's wilful misconduct (which they had pleaded in March 2015) they served an Amended Defence which

referred to the existence of the Aden Agreement. I shall assume, though there was a debate about this, that referring to the existence of the Aden Agreement in a pleading, without questioning its validity, was the communication of an election to affirm the existence of the Aden Agreement.

532. Counsel for the Bank accepted that in order to establish an affirmation it was necessary to show that the Underwriters had actual knowledge of the facts constituting the alleged misrepresentation and of their legal right to avoid the Aden Agreement. (Counsel for the Bank reserved the right to challenge the need for actual knowledge of the right to avoid in a higher court. The argument has already been articulated by Leggatt J. in *Involnert Management v Aprilgrange* [2015] 2 Lloyds Reports 289 at paragraph 160.) Counsel for the Underwriters said that neither form of actual knowledge could be established on the facts.

533. It is necessary to consider, first, whether, when pleading the defence of wilful misconduct by the Owner in March 2015, the Underwriters had actual knowledge of the Owner's wilful misconduct and in particular that the true reason for drifting off Aden was to enable a group of armed men to board the vessel and set fire to it. The nature of the required knowledge was addressed by Mance J. in *ICCI v Royal Hotel Limited* [1998] Lloyds Insurance Reinsurance 151 at p.161:

> Whether a person has knowledge is for lawyers essentially a jury question. The meaning of knowledge has perplexed philosophers from Plato (and no doubt before) to after A J Ayer, and been said by some to be ultimately unanswerable. But as a matter of law and everyday understanding some points are reasonably clear. First of all, I reject Miss Bucknall's submission that a party must be taken to know whatever he could properly plead. The submission cannot be accepted, even if attention is confined to dishonest conduct which, under the Code of Conduct of the Bar of England and Wales, requires a pleader to have " ... before him reasonably credible material which as it stands establishes a prima facie case."
>
> At the other extreme, knowledge is not to be equated with absolute certainty, itself an ultimately elusive concept. The impossibility of doubt which Descartes found only in the maxim "I think, therefore I exist" is not the criterion of legal knowledge. For practical purposes, knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question.

534. I was at one stage troubled that the "statement of truth" now attached to pleadings (that the facts alleged are believed to be true) undermined Mance J's rejection of the submission that a party must be taken to know whatever he could properly plead. But I was persuaded that it did not and that the best guide to the meaning of knowledge in this context remained Mance J's threefold test: (1) the matters said to be known must be true; (2) there must be a firm belief in their truth; and (3) there must be sufficient

justification for that belief in terms of experience, information or reasoning. In the present case the matters said to be known are true, because the court has found them to be true. The Underwriters also had a belief in their truth because that was stated in the "statement of truth" at the end of the Amended Defence. The crucial question is whether that belief can fairly be described as firm and sufficiently justified by the information available to them at that time. The Underwriters had sufficient information to justify the pleading but in 2015 they had much less information than they have now. The particulars then available were pleaded under paragraph 33C of the Amended Defence. Counsel for the Underwriters were able to say in closing (see paragraph 1 of the written closing) that it was "obvious" that there had been wilful misconduct. I very much doubt that that could have been said in 2015 because so much more factual and expert evidence has since emerged. At that time, not only was the allegation of wilful misconduct denied, but the Owner argued that it was so hopeless that permission to amend to plead the allegation should not be granted. Counsel fairly summed up the state of the Underwriters' knowledge in these terms: "Underwriters strongly suspected wilful misconduct, believed it, and committed themselves to attempting to prove it." When I ask myself whether in 2015 the Underwriters can fairly be said to have had a "firm belief" supported by the necessary "sufficient justification for that belief in terms of experience, information and/or reasoning" I am persuaded that they did not.

535. Counsel for the Bank relied, first, upon the statement of belief in the truth of the allegations made in the Amended Defence. I do not consider that this is sufficient for the reasons given by Mance J. Further, the purpose of the requirement for a statement of belief in the truth of allegations made in a pleading is to prevent allegations being made in the truth of which there is no belief. The purpose is not to prevent a party from pleading an allegation which is supported by evidence but which may only be established at trial. In that sense the required "belief" need not amount to "knowledge". Thus in *Clarke v Marlborough Fine Art Limited* [2002] 1 WLR 1731 Patten J said

> "20. The purpose of the requirement that a party should verify the factual contents of his own pleadings was to eliminate as far as possible claims in which the party had no honest belief. The consequence of making a false statement in a document verified by a statement of truth are serious and CPR r 32.14 provides for proceedings for contempt to be brought in such circumstances. It is therefore important at the outset to identify what Part 22 does and does not require. In relation to a pleading the claimant or other relevant party who puts the document forward as a statement of his case is required to certify that he believes the facts alleged are true. He is not required to vouch for the legal consequences which he seeks to attach to these facts. That is a matter for argument and ultimately for the decision of the court. The purpose of Part 22 is simply to exclude factual allegations which to the knowledge of the claimant or other party are untrue or which the party putting forward the pleading to the court is unable to say are true.

> 21 In the most simple case the requirements of CPR r 22.1 will, if observed, exclude untruthful or fanciful claims but the notes to Part 22 also indicate that the purpose of the new rule was to discourage the pleading of cases which when settled were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial……
>
> 22 There may however be cases in which the claimant has no personal knowledge of the events which form the factual basis of the claim. Executors or liquidators of companies are obvious examples. They are often required to investigate matters years after they have occurred with a view to establishing a possible claim. In such cases the same rules of conduct will apply to those whom they instruct but a position will often be reached when the available evidence does not point clearly to any single factual possibility. In a case of alleged undue influence for example it may be possible to infer from the relative positions of the donor and donee coupled with the obviously disadvantageous nature of the transaction that some form of oppressive or abusive behaviour has occurred yet the precise form which the undue influence took can only be established, if at all, at the trial. The evidence at the pleading stage from various potential witnesses may disclose a number of possibilities. In such a case it seems to me perfectly legitimate for counsel with sight of that evidence to plead out those possibilities as alternatives. There will be evidence to support each plea. The determination of which, if any, of the possibilities was the probable cause is a matter not for the pleader but for the court at trial."

536. Counsel for the Bank further submitted that an insurer need not know "all the particulars or incidents or the available evidence or the means of proof of the relevant circumstances giving rise to the right to avoid." I accept that but, as stated by Mance J., there must be "sufficient justification for that belief in terms of experience, information and/or reasoning." Not everything need be known, but sufficient must be known to enable the insurer to have the necessary "firm belief".

537. Counsel for the Bank's principal submission was that if an insurer knows enough to avoid a contract of insurance he must also know enough to affirm the contract. Counsel submitted that when the Underwriters purported to avoid the Aden Agreement in September 2016 the information on which they relied was known to them in March and May 2015. Support for this approach is to be found in *Moore Large v Hermes Credit and Guarantee* [2003] Lloyds Insurance and Reinsurance 315 at paragraph 91 (per Colman J.) and in *Coastal Estates Pty Ltd. v Melevende* [1965] VR 451. However, the question of whether or not a party had the necessary to degree of knowledge to support a case of affirmation is, as Mance J. said, very much a "jury question". One must therefore be careful when using the facts of other cases to justify a factual finding in the instant case. Moreover, avoidance does not require knowledge in the same way that affirmation does and thus, whilst it may be relevant to enquire whether an insurer had sufficient information to avoid a contract when deciding

whether the insurer had sufficient knowledge for the purpose of affirming the contract, it would be unsafe to use the suggested test in every case.

538. The facts of the present case must be borne well in mind. They involve an allegation of wilful misconduct against a shipowner. Such allegations are only proved by examination of a large number of matters, both factual and expert. Typically, they are hotly disputed and in the years and months leading to trial new pieces of evidence will be discovered which will refocus the argument. It will only be in rare cases that an underwriter who has sufficient evidence to allege scuttling and to state that he believes the allegation to be true can fairly be said to "know" that the allegation is true. Rather, the underwriter's state of mind is one where the available evidence causes him so strongly to suspect scuttling that he feels justified in making the allegation and commits himself to proving it. It will only be after extensive disclosure, detailed examination of the principal witnesses and an assessment of the technical arguments by experts that he might be able to say that he has actual knowledge of scuttling. In the present case I do not consider that the Underwriters had that knowledge in 2015.

539. The next question is whether the Underwriters had actual knowledge of their legal right to rescind. Counsel for the Bank have said that the right to avoid the Aden Agreement would have been obvious and that the Underwriters were advised by experienced solicitors and counsel from the outset. However, the Underwriters' claims manager, Mr. Cunningham, and their solicitor Mr. Zavos gave evidence that they were not aware of the right to avoid the Aden Agreement until 2016. Their evidence was supported by the disclosure of (and waiver of privilege in respect of) an attendance note dated 14 July 2016 which referred to a "new defence …..that the extension of cover which had been granted on 5 July 2011 was voidable for non-disclosure of an intention to scuttle the ship." In an email dated 18 July 2016 Mr. Zavos said that counsel had come up with this "new argument".

540. There was no suggestion that Mr. Cunningham or Mr. Zavos were giving dishonest evidence. Instead, it was suggested that they were mistaken in their recollection. I have considered the several matters relied upon in this regard in paragraph 1279 of the Bank's closing.

541. With the benefit of hindsight it looks as if, as suggested by counsel for the Underwriters, the penny was slow to drop. But one can understand why. So long as the Owner's claim was live attention was directed primarily to the allegation of wilful misconduct and to defeating the Owner's claim on that ground. Once the Owner's claim had been struck out the focus of attention was directed to defeating the Bank's claim and hence the Aden Agreement came into greater focus. But in any event a mistaken recollection seems improbable because, as Mr. Zavos said, if he had been aware of it earlier it would have been pleaded earlier. Further, the disclosed conference note and email support the evidence of Mr. Zavos and Mr. Cunningham. I therefore accept their evidence.

542. It follows that the Aden Agreement was not affirmed but was avoided by the Underwriters. In these circumstances it is unnecessary to deal with the further argument based upon non-disclosure as opposed to misrepresentation.

543. Counsel for the Bank sought to avoid the above result by arguing that by clause 2 of the Navigational Limits endorsement the Bank was nevertheless "held covered" and that no actual agreement was required but merely an agreement which could reasonably be made on the basis of disclosure by the assured in accordance with the duty of utmost good faith. I found this submission difficult to follow because there did not appear to be any words in clause 2 which had the effect suggested. Reliance was placed on *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Reports 560. It suffices to say that in that case Donaldson J. held that a held covered clause only applied if the premium to be arranged would be such as could properly be described as a reasonable commercial rate and in the present case no underwriter, knowing the true reason for calling OPL Aden, would have agreed a premium. For this reason alone I am unable to accept the "held covered" argument.

BMP 3

544. The second additional defence concerned the obligation to follow BMP 3. The Underwriters maintained that that there had been a breach of BMP 3 and so cover under the policy was suspended. (The Bank's claim was made before the Insurance Act 2015 came into force and so the effect of breach of the BMP 3 warranty depends on the law before that Act.) This defence only comes into play in the event that, contrary to the conclusion which I have reached, the Bank is able to establish a loss by an insured peril and, contrary to the conclusion which I have reached, the Bank can rely upon the Aden Agreement to establish that the Underwriters were on risk whilst the vessel was in Yemeni waters.

545. BMP 3 contained advice and recommendations in the form of an IMO circular. It had been first issued in February 2009 and was revised in August 2009. BMP 3 was issued in August 2010. BMP 3 contained "suggested planning and operational practices for ship operators and masters of ships transiting the Gulf of Aden and the Arabian Sea." The advice was "intended purely as guidance" and "the extent to which the guidance given in this booklet is followed is always to be at the discretion of the ship operator and master."

546. The Bank submitted that the obligation in the "Subjectivity" clause (which I have set out above) to follow BMP 3 was imposed on the Owner and the vessel's manager but not on the master. The obligation was imposed on the "vessel/owner." There is no dispute that that imposes an obligation on the Owner. In my judgment a reasonable person would have understood "vessel" to mean the master. It is he who has command of the vessel and so is able to ensure that the appropriate steps are taken by the vessel. A reasonable person would not have understood "vessel" to mean the vessel's manager. The Bank relied upon section 55(2)(a) of the Marine Insurance Act 1906 which provides that "the insurer …is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for …the negligence of the master or crew." But that section is concerned with the causation of loss flowing from a peril insured against. The "Subjectivity" clause is concerned with conduct which (as is common ground) suspends the Underwriters' liability so long as it continues. I do not consider that section 55(2)(a) assists in this context.

547. The Bank further submitted that the obligation in the "Subjectivity" clause did not require compliance with any of the recommendations applicable prior to the vessel

entering the Gulf of Aden because it only applies "whilst vessel are transiting/port call within the Gulf of Aden….". But in circumstances where some of the recommendations in BMP 3 refer to what must be done in preparation for transiting the Gulf of Aden a vessel transiting the Gulf of Aden without having followed those recommendations before entering the Gulf of Aden would not, in my judgment, be regarded by a reasonable person as having complied with BMP 3.

548. JW2009/02 expressly provided that "owners/master" were to apply BMP and expressly recommended compliance "before entering the Gulf of Aden" (although the "express warranties" which incorporated JW2009/02 referred to vessels "transiting…within the Gulf of Aden"). That might be thought to put the construction issues beyond doubt. However, the Bank submitted that this clause referred to the superseded with which compliance was not required because its terms were inconsistent with the "Subjectivity" clause, whilst the Underwriters submitted that it would be commercially absurd to require compliance with an outdated version of BMP and that JW2009/02 should be construed as referring to then current edition of BMP, namely BMP 3. Thus the Bank's case is that the terms of JW2009/02 are inconsistent with, and must therefore yield to, the Subjectivity clause whilst the Underwriters' case is that JW2009/02 should be understood as referring to BMP 3. One party seeks to read down JW2009/02 in favour of the "Subjectivity" clause whilst the other seeks to alter the literal meaning of the clause by making it refer to BMP 3. In terms of practical outcome there does not appear to be much, if any, difference between the two approaches. If it is necessary for me to choose between the two analyses I would prefer the Underwriters' analysis. It would be commercially absurd to construe JW2009/02 as requiring compliance with an out of date version of BMP when, at the date of the policy, BMP 3 had replaced the earlier version and it was common ground that another provision of the policy, the "Subjectivity" clause, required compliance with BMP 3. But in either event, the Subjectivity" clause, on its true construction, applied to both owner and master and required a vessel to comply with those parts of BMP 3 which applied before entering the Gulf of Aden.

549. However, in circumstances where BMP contains advice and recommendations and emphasises that the guidance it affords was always subject to the discretion of the master, there remains the question, what does the "Subjectivity" clause require the owner and master to do? The Bank submitted that the clause required the owner and master to follow the framework of BMP 3 and to implement those provisions of BMP 3 which they considered, in their sole discretion, should be followed or implemented or, alternatively, those which it would have been reasonably appropriate for them to do so. The Underwriters submitted that the clause required the process in BMP 3 to be followed with regard to the selection of anti-piracy self-protection measures. If suitable self-protection measures were not implemented or alternatively if the master or owner failed properly to exercise their discretion in this regard the clause will not have been complied with. Further, if the recommendations as regards voyage planning, contingency plans and liaison with the naval forces were not followed there will have been a breach of the clause. Similarly if the recommendations about what to do in the event of an attack by pirates were not followed, there will have been a breach.

550. The Underwriters have chosen to make their liability under the policy subject to compliance with BMP 3. Yet BMP 3 contains few directions for mandatory action. It

largely consists of guidance which is always subject to the discretion of the master. Thus in the event of a dispute there must be an investigation into what was done or not done and the reasons why the master acted as he did. This must inevitably give rise to uncertainty as to whether, in the event of a loss, there is cover or not. Commercial entities generally prefer certainty to uncertainty. In my judgment the reasonable (commercial) man would construe the policy in such a way as to minimise the uncertainty to which the obligation to follow BMP 3 gives rise. This approach is analogous to the approach of the court in *Sea Glory Maritime Co. v Al Sagr National Insurance Co.* [2014] 1 Lloyd's Reports 14 at paragraph 219 (which concerned a warranty that a vessel was ISM compliant) and *The Rowan* [2012] 1 Lloyd's Reports 564 at paragraph 24 (which concerned a warranty that the vessel had the approval of major oil companies). I therefore consider that the requirement in the Subjectivity clause to "follow Recommended Best Practice" should be construed as requiring the master, when deciding what steps or action to take to guard against the risk of an attack by pirates, to take into account, in good faith, the recommendations in BMP 3. I do not consider that the obligation to "follow Recommended Best Practice" requires the master to take that action which is considered objectively to be the right action. So long as the master takes the recommendations in BMP 3 into account in good faith when deciding what action to take there will have been compliance with the "Subjectivity" clause.

551. Counsel for the Underwriters relied upon the following statement by Lady Hale in *Braganza v BP* [2015] 1 WLR 1661 at paragraph 30.

> "It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable - for example, a reasonable price or a reasonable term - the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test. "

552. However, as Lady Hale recognised in the next paragraph

> "But whatever term may be implied will depend on the terms and the context of the particular contract involved."

553. I do not consider that the context in which the obligation to follow BMP 3 is found requires a term to be implied that the master make his decision rationally in the *Wednesbury* sense so long as he takes the recommendations in BMP 3 into account in good faith when deciding on anti-piracy measures. Any stricter test would be inappropriate in the context of decisions taken by the master of a vessel and would lead to considerable uncertainty in the cover provided by the policy.

554. The Underwriters have alleged a host of failures to follow BMP 3; see paragraphs 1694 -1825 of the closing submissions. It is unnecessary to deal with all of them. I shall consider three of the alleged failures in preparation (or, to pick up the language

of BMP 3, in "planning") and two of the alleged failures in execution (or "operational practices").

Risk assessment

555. BMP 3 paragraph 3.1 provides that, prior to transiting the HRA, ship operators and masters should carry out a risk assessment to assess the likelihood and consequences of piracy attacks to the vessel. Paragraph 3.2 provided that the factors to be considered included crew safety, freeboard, speed, sea state and pirate activity.

556. The documentary record is to the effect that on 29 June 2011, just before the vessel entered the HRA, the chief officer of BRILLANTE VIRTUOSO carried out a risk assessment which was approved by the master and by Central Mare. The methodology employed was based upon Central Mare's Risk Assessment Manual which was designed for safety matters, but not specifically for the security of the vessel from an attack by pirates. The assessment was curious for several reasons. First, the assessment of the risk to crew was that it was highly likely that on the voyage in question there would be multiple fatalities. Neither expert was able to understand how this assessment had been reached. Counsel for the Bank accepted that this was "nonsensical". Second, certain of the steps suggested to lessen the risks in question were already in place. This suggested that the assessment had been a "cut and paste" exercise from an earlier assessment or from BMP 3 itself. Third, additional control measures were to be in place by 13 July 2011, by which time the vessel was expected to have left the HRA. These features caused Mr. Hussey to describe the assessment as "dysfunctional". In truth it was not a real assessment. It was simply the production of a document, a paper exercise, done on the eve of entering the HRA.

557. But Mr. Hussey also said that BMP 3 did not require the risk assessment to be carried out in any particular manner and the fact that the master in fact took measures of self-protection (for example, installing razor wire around the perimeter of the vessel and nominating a citadel) showed that there had been a genuine risk assessment at some point. Counsel for the Bank submitted that this was self- evident, noted that Captain Cleaver accepted that there had been a risk assessment and relied upon Mr. Hussey's evidence that the range of measures deployed was consistent with the vast majority of the merchant fleet at the time. Counsel for the Underwriters said that it was not self-evident that there had been a risk assessment because (i) the master and chief officer in their evidence relied solely on the paper exercise and (ii) the fact that the master took measures of self-protection is more consistent with the vessel installing what happened to be on board than with there having been an assessment of what was sufficient.

558. Ultimately I was persuaded that, on the balance of probabilities, there had been no genuine risk assessment as contemplated by BMP 3. I accept that BMP 3 did not require the assessment to be in any particular form but it did require the assessment to consider crew safety, freeboard, speed, sea state and pirate activity. In circumstances where the only evidence that such matters were taken into account was no more than a paper exercise it seems to me more probable than not that the chief officer and master did not make an assessment of the required matters in good faith but merely put in place such security measures as were available on board and had been used before and, just before entering the HRA, carried out a meaningless paper exercise to suggest that a genuine risk assessment had taken place. The previous risk assessment exercise

conducted on 16 May 2011 for the northbound voyage through the HRA was also dysfunctional in that it indicated certain risks as "intolerable" and yet no additional measures were taken. As counsel for the Bank submitted "it is inconceivable that the master would have been willing to put himself and his crew in harm's way by knowingly running an intolerable risk". That suggests that the previous risk assessment was also not genuine. Thus there appears to have been a culture on board the vessel of not carrying out a genuine risk assessment. The master is not solely to blame for this. The vessel's managers received a copy of the northbound assessment and did not, it seems, query the intolerable risks. There is evidence that they noted "missing data" but they ought surely to have made a much more penetrating enquiry as to whether the master and chief officer were carrying out a genuine risk assessment in accordance with BMP 3.

A contingency plan

559. BMP 3 paragraph 6.5 stated that the Company Security Officer was encouraged to see that a contingency plan was in place for a passage through the HRA and that this was "exercised, briefed and discussed" with the master and the Ship Security Officer.

560. The vessel's Ship Security Plan contained, at paragraph 16.6.7, a list of steps to take where a suspect vessel approached the ship. This was in effect a contingency plan though it was not specific to a passage through the HRA and, in certain respects, conflicted with other recommendations in BMP 3 (for example, with regard to the switching off of upper deck lighting). Further, the documentary record showed that there was a practice on board the vessel of conducting security drills with the crew. One, conducted on 30 April 2011, was to prepare the crew for a suspect boat approaching the ship and another, conducted on 7 May 2011, was to prepare the crew for an attack by pirates. These indicate that a contingency plan for transiting the HRA was in fact exercised and discussed with the crew. The chief officer (who was the deputy Ship Security Officer, the master being the Ship Security Officer) gave evidence in his written statement dated 4 September 2011 that there were monthly security meetings on board. He said the last was conducted "during the last week of June 2011". He said that a record of the meeting was kept on board the vessel and sent ashore with a "technician". The former record obviously did not survive the fire but the latter does not appear to have been disclosed by the Owner. The Bank did not have a copy. The failure of the Owner to disclose the written record of the last security meeting gives rise to a doubt as to the truthfulness of the chief officer's evidence. However, his evidence that there were monthly security meetings is supported by the written records of security drills in April and May 2011 and so it is likely that his evidence is true. I therefore accept that there was a contingency plan for dealing with the risk of a suspect boat or a pirate attack in June 2011. Since that must have been shortly before transiting the HRA I accept that it was for the purpose of transiting the HRA even though it was based upon the contingency plan set out in the Ship Security Plan.

Emergency communication plan

561. BMP 3 at section 7.4 advised masters to prepare "an emergency communication plan, to include all essential emergency contact numbers and prepared messages which should be ready at hand". The Underwriters' case was that there was no such plan. The Bank's case was there was.

562. The master's evidence that there was an email distribution list for contacting authorities and a list of emergency telephone contact numbers posted on the bridge (two documents known as EMER 27 and EMER 26) did not appear to be challenged. What was said was that whilst the former referred to UKMTO (on p.4) the latter did not mention UKMTO. This latter omission was said to be significant because the experts agreed that UKMTO was the primary recipient. However, UKMTO was added as a recipient of the SSAS signal. For the reasons stated by the Bank's counsel at fn. 1987 of their closing submissions it is likely that the location of the SSAS button was known to officers other than the master. Overall it seems to me that that there was an adequate list of essential emergency contact numbers.

563. However, the plan was also supposed to contain prepared messages as well. On this topic the master's written evidence was inconsistent. In one statement he said there were no prepared messages and in another he said there were but that he was unware of them. The submission by counsel for the Underwriters was that if there were prepared messages they cannot have been "ready at hand"; see paragraph 1796 of their closing. Counsel's response on behalf of the Bank appeared to be that the SSAS alarm, if activated, would send an "alert signal" to UKMTO. To that extent there was a prepared message for the UKMTO.

564. In the result, whilst the plan might well have benefitted from further and better thought and preparation, I was not persuaded by the Underwriters that there was no emergency communication plan on board the vessel.

The decision to drift

565. BMP 3 contemplates that vessels transiting the HRA will be under way. Paragraph 8.3 advises masters to avoid slow speed or waiting. "Ships are particularly vulnerable to a pirate attack if they slowly approach or wait at the forming up points" for the Group Transit Scheme. Paragraph 10.7 recommends that attack can be prevented by "altering course and increasing speed wherever possible".

566. The Underwriters have succeeded in their allegation of scuttling. This finding is relevant to the question of the decision to drift because BMP 3 contemplates that vessels transiting the HRA will be under way.

567. On the court's findings the master decided to drift in the Gulf of Aden so as to facilitate the boarding of his vessel by armed men. Thus, far from considering whether there was a good navigational (or other) reason for drifting, as opposed to following the guidance in BMP 3 to proceed at speed, the master decided to drift within the HRA to enable the boarding of his vessel by armed men. He did not take BMP 3 into account or, if he did, he did not do so in good faith. The court's findings undermine the submissions made by counsel for the Bank that the vessel drifted for a "good reason", that the master's decision to drift was a "question of navigational judgment and security" and that the decision to drift was "reasonable in the circumstances".

568. There was therefore a failure by the master to follow BMP 3 and accordingly the Underwriters' liability under the policy was suspended.

569. It was said that even in the absence of the court's findings there was no attempt to follow the guidance in BMP 3 to be under way. The master's decision to drift when 11 miles off Aden was certainly striking. Captain Cleaver described the decision as making the vessel "a sitting duck". He could not envisage a reasonable master making that decision.

570. However, on the assumption that, contrary to my findings, the master was not privy to a conspiracy to scuttle the vessel and his evidence is to be accepted, he said that he considered the decision to drift safe because there were two other vessels in the vicinity (one adrift and the other at anchor) and he could hear navy warships on the VHF. But keeping a vessel underway makes it more difficult for pirates to attack (notwithstanding that the expert evidence suggested that an attack was still possible at the vessel's full speed of 12 knots and Mr. Hussey said that any increase in risk by drifting rather than by steaming was negligible).

571. In my judgment, the master's decision to drift rather than proceed up and down the coast at speed was surprising, given the advice in BMP 3 and what appears to me to be its good sense. Upon the assumption that the master was not party to the alleged conspiracy the master took the decision to drift for the reasons he gave. I do not regard those as being good or sufficient reasons for not following the advice in BMP 3. The result of the decision (coupled with the fact that the engines, as a result of being on "short notice", could not be started for about 20 minutes) was that the vessel was vulnerable to an attack by pirates. Captain Cleaver thought that the master's decision was quite wrong. I find it impossible to disagree, notwithstanding Mr. Hussey's evidence (which I am told was uncontested) that it is the practice for vessels to drift off ports in areas where there is a high risk of piracy such as off Nigeria. So, on the assumption to which I have referred, the master exercised his discretion unreasonably. However, I cannot say that he failed to consider the matter in good faith. I therefore do not consider, upon the assumption that the master was not party to the alleged conspiracy, that there was a breach in this regard.

A high state of readiness and vigilance

572. BMP 3 paragraph 2.3 stated that a high state of readiness and vigilance should be maintained. Counsel for the Bank submitted that this was a high level statement of aspiration and too vague and uncertain to be given the status of a suspensory warranty. However, it cannot be denied that a high state of readiness and vigilance is other than prudent in the HRA and it is impossible to envisage any owner contemplating that anything less would be appropriate in the HRA. I therefore accept that it forms part of the warranty to follow BMP 3 but I also accept that so long as a master endeavours to ensure in good faith that a high state of readiness and vigilance is maintained there will be no failure to comply with the recommendation in section 2.3.

573. The vessel's engines, whilst the vessel was drifting, were not on immediate notice but were on short (20 minutes) notice. Mr. Hussey accepted that in this regard a high state of readiness had not been maintained. Counsel for the Bank nevertheless submitted that this was a point without substance because the decision was one of navigational judgment. However, on the facts as I have found them, the master's decision was so bound up with his involvement in the conspiracy that I do not consider that the master's decision can be regarded as simply one of navigational judgment taken in

good faith with BMP 3 in mind. It was also submitted that having the engines on immediate notice rather than on short notice would have made little difference. That may be so in certain circumstances but it is unrealistic to suppose that a master who had decided to drift in the HRA would not, if he were concerned to maintain a high state of readiness, choose to have his engines on short rather than on immediate notice.

574. Further, the master remained in his cabin when a small boat was observed approaching his vessel. By remaining in his cabin and failing to proceed to the bridge there was, in my judgment, an obvious failure by the master to exhibit any level of vigilance. The suspect boat drill required the master to be called to the bridge. If he had been on the bridge he would have been able to observe the boat himself and, if necessary, communicate with it by loudhailer. Those would be the very basic requirements of vigilance by the master. He did not make any attempt to comply with them. I do not consider that it can be said that the master endeavoured to ensure that there was a high state of vigilance by asking the second officer to check from the bridge. The vessel's suspect boat drill recognised that it was essential for the master to investigate a suspect boat himself from the bridge. Counsel for the Bank submitted that by the time the master let the armed men board the master and crew were "already in the grip of the peril" and so his actions or inactions cannot constitute a breach of warranty. I do not agree that the master and crew were already in the grip of the peril whilst the armed men were in their small boat and the pilot ladder had not been lowered. But further, on the facts which I have found, the master remained in his cabin and failed to exercise vigilance because he had agreed in advance to let the armed men board.

575. Thus, in respect of risk assessment, the decision to drift and the need to maintain a high state of readiness and vigilance there was a failure to follow BMP 3 which (on the law which prevailed before the Insurance Act 2015) resulted in cover being suspended. In the light of these conclusions it is unnecessary to lengthen this judgment yet further by considering the other alleged breaches of BMP 3. Most relate to the measures which ought to have been taken as a result of the risk assessment. Since there was no genuine risk assessment there is little purpose in considering them.

The warranty of legality

576. The third additional defence concerns the warranty of legality implied by section 41 of the Marine Insurance Act. The suggested illegality is an agreement between the Owner and the Charterers to mis-describe the vessel's cargo as bitumen mixture instead of fuel oil so as to enable the Charterers to take the benefit of lower import duties in China.

577. There is a factual dispute as to whether there was an agreement to mis-describe the vessel's cargo.

578. Emails between 9 and 13 June 2011 show that the Charterers requested and the Owners agreed that the original bills of lading showing a shipment of fuel oil would be amended to show a shipment of bitumen mixture. The Owner's agreement is apparent from an email from Mr. Agha of WWGT acting as Owner's chartering manager dated 13 June. On 14 June the broker agreed that it was in "common benefit to not put anything in RECAP".

579. The cargo was loaded on 23 June and bills were issued showing that fuel oil had been shipped. On 28 June the Charterers sent an email saying that they were to proceed with the change from fuel oil to bitumen mixture. The Owners were asked where the original bills were to be sent and the master was asked to change the stowage plan to show bitumen mixture. On the same day Central Mare instructed the master "not to disclose the load port documents as understand charterers want to re-issue cargo docs with cargo to be named as bitumen mixture."

580. On 1 July the Charterers informed Central Mare that "ALL documents which carry the name of fuel oil TO BE DESTROYED on board vessel once new set of documents is issued". On the same day the Charterers sent "DRAFT of new documents to be issued as sent by load port agent to Master." The drafts were dated 23 June 2011 and referred to bitumen mixture. Later that day Central Mare emailed the drafts to the master requesting him "to amend the cargo name".

581. Thus there is no doubt that there was a conspiracy between the Owner and Charterer to alter the description of the cargo in the bills from fuel oil to bitumen mixture. The master said in his oral evidence that he would not sign such false bills and counsel for the Bank have pointed out that on 4 July the master informed MSCHOA that the cargo was fuel oil. But it is apparent from the email correspondence that he had been instructed to sign replacement bills and it is more probable than not that he would do as instructed.

582. On 6 July Central Mare informed the Charterers what had befallen the vessel and referred to the cargo as bitumen mixture. Charterers replied and noted that the cargo was fuel oil. They referred to an email dated 4 July and attached a copy of it. That email said that there was no need to amend the cargo from fuel oil.

583. The authenticity of the email dated 4 July was challenged. The original had not been disclosed and the Charterers' brokers had not passed the email on to Owners on 4 or 5 July. There was no evidence from the Charterers on this issue, but counsel for the Bank submitted that it is unlikely that the Charterers assimilated the content of Central Mare's email on 6 July and fabricated a false email in the 44 minutes between Central Mare's email sent at 0912 and the charterers' response at 0956.

584. The Charterers were clearly willing to act dishonestly as the earlier emails show. A person willing to mis-describe cargo in replacement bills is probably able to fabricate a false email at short notice. I consider it more likely than not that the news of the event which had befallen the casualty caused the Charterers to rethink their plan to have the cargo mis-described. If the email of 4 July had been genuine I would have expected it to have been passed on that day. It was not. It is therefore more likely than not that the email had been falsely created on 6 July after the Charterers had received news of the casualty.

585. Those findings give rise to a further question, namely, whether there was a breach of the warranty of legality in section 41 of the Marine Insurance Act 1906. It is necessary to note both sections 3 and 41 of the Act.

586. Section 3 provides:

> Marine adventure and maritime perils defined.

> (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
>
> (2) In particular there is a marine adventure where-
>
> (a) Any ship goods or other moveables are exposed to Maritime perils. Such property is in this Act referred to as "insurable property" …..
>
> "maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

587. Section 41 provides:

> Warranty of legality
>
> There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

588. The implied warranty of legality extends only to the "adventure insured". It is therefore necessary to define the adventure assured in the present case. The policy was a time policy on the vessel and therefore covered the vessel against the stated perils on voyages during the period of the policy. The particular voyage was one carrying fuel oil from Kerch in the Ukraine to China. There was nothing unlawful about the carriage of fuel oil by sea from the Ukraine to China. There was therefore, in my judgment, no breach of the implied warranty that the adventure insured was a lawful one.

589. The Owner and Charterer had agreed to carry out that lawful adventure in a manner which I will assume to be unlawful, namely, by substituting false bills of lading for the true bills of lading in order to evade the duty on the import of fuel oil into China. The discharge of the cargo in China was part of the lawful adventure and it had been agreed that upon discharge the cargo would be described as bitumen mixture. There was therefore a breach of the warranty that the adventure shall be carried out in a lawful manner.

590. However, the Bank was a co-assured under the policy and there is no suggestion that the Bank had any control over the substitution of false for true bills of lading. Accordingly, the Bank's claim is unaffected by the unlawful manner in which the Owner proposed to perform the adventure insured. The Bank is protected by the words "so far as the assured can control the matter" in section 41.

591. It is therefore unnecessary to decide the further questions addressed by the parties, namely, whether section 41 referred only to lawfulness under English law (at present authority favours the view that it does, see *Sea Glory v Al Sagr* [2014] 1 Lloyd's Reports 14 at paragraphs 294-5), whether the agreement between the Owner and

Charterer was unlawful under English law (the Bank said it was not because the English court would have no jurisdiction, see *Board of Trade v Owen* [1957] AC 602, 633-634) and whether the agreement was lawful under Chinese law (a matter debated in writing between experts in Chinese law).

Other defences

592. Two further defences concern the amount recoverable by the Bank.

593. The first argument was that, pursuant to clause 4.3 of the War and Strikes clause, to the extent that there has been recovery under the MII policy (which there has, in the sum of US$64 million), there can be no recovery under the war risks policy. This raises two questions; the first is whether the MII policy is an "insurance on the vessel" within the meaning of clause 4.3 of the policy and the second is whether the MII policy and the war risks policy constitute double or co-ordinate insurance.

594. The second argument was that it was an abuse of process for the Bank to recover more than the debt owed by the Owner to the Bank. The debt owed to the Bank was US$64 million and yet the Bank seeks recovery of US$77 million in circumstances where the Owner's claim has been struck out. The question is whether the Court can and should prevent such recovery.

595. Since the Bank has not established a good claim it is unnecessary for the court to consider these two arguments of law which have been addressed at some length in the written submissions (see the Bank's submissions paragraphs 1561-1645 and the Underwriters' submissions paragraphs 1595-1630 and 1870-1882). To extend this already long judgment by considering and resolving the questions of law debated by the parties would serve no useful purpose (however interesting the exercise might be).

Conclusion as to the Bank's claim

596. The constructive total loss of BRILLANTE VIRTUOSO was caused by the wilful misconduct of the Owner, Mr. Iliopoulos. In those circumstances the Bank is unable to establish that the loss was caused by an insured peril. The Bank's claim must therefore be dismissed.

The Underwriters' counterclaim

597. The Underwriters have counterclaimed against the Claimants for declarations that they are not liable under the policy and as to the reasons why. Although the Owner's claim has been struck out the Owner remains a party to the proceedings but has decided not to defend the Underwriters' counterclaim. The declarations sought may be of use in circumstances where there is a risk of collateral proceedings in Greece. I shall therefore grant the declarations which have been sought.

598. I am very grateful to counsel and those instructing them for their unfailing endeavours to assist me to determine the issues in this case and, in particular, for responding to my requests for hard copies of documents. In this age of digital litigation I probably asked for too many such copies but I am grateful that counsel resisted the temptation to suggest that that was so.

Approved Judgment