



Neutral Citation Number: [2022] EWHC 3166 (Comm)

Claim No: CL-2022-000301

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 8th December 2022

Before:

STEPHEN HOUSEMAN KC
(sitting as a Judge of the High Court)

Between:

(1) HAVILA KYSTRUTEN AS
(2) HAVILA KYSTRUTEN OPERATIONS AS
(3) HK SHIP III AS
(4) HK SHIP IV AS **Claimants**

- and -

(1) STLC EUROPE TWENTY THREE LEASING
LIMITED
(2) STLC EUROPE THIRTY FOUR LEASING
LIMITED **Respondents**

NICHOLAS VINEALL KC, EDWARD JONES and MARIA KENNEDY (instructed by
Wikborg Rein LLP) appeared for the **Claimants**

STEVEN BERRY KC and ANDREW LEUNG (instructed by **Tatham & Co**) appeared for
the **Defendants**

Hearing dates: 5 and 7 December 2022

Approved Judgment

STEPHEN HOUSEMAN KC SITTING AS A JUDGE OF THE HIGH COURT

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STEPHEN HOUSEMAN KC :

1. This hearing was fixed by the Judge in Charge of the Commercial Court, Mr Justice Foxton, for two days on Monday 5 and Wednesday 7 December to determine two applications: the claimants' application made on 22 July 2022 seeking summary judgment or various declarations on its pleaded claim, issued on 22 June this year; and the defendants' cross-application dated 18 November, as subsequently amended, seeking reverse summary judgment on key ingredients of that pleaded claim.
2. The dispute arises out of the cross-collateralised financing arrangements for four vessels built or being built by and at a Turkish shipyard that I refer to simply as "the Yard". The vessels were commissioned for use as coastal passenger transport service under long-term charters to the Norwegian Ministry of Transport.
3. The second claimant, referred to as "HKO", is the buyer under the relevant shipbuilding contracts which are all dated 31/12/19. It is part of the Havila Group based in Norway. HKO says it has invested substantial equity of just over €54 million in the new build project. The financing for the balance of the build cost was provided by indirect subsidiaries of GTLK, a Russian state-owned and controlled financing house. This was structured as lease financing with back-to-back sales and bareboat charters.
4. The present claim concerns two of the four vessels, known as 'Polaris' (NB 1103) and 'Pollux' (NB 1104). The earlier two vessels were 'Capella' (NB 1093) and 'Castor' (NB 1094) which are already in service. As regards 'Polaris', the first defendant in this action is the purchaser from HKO under the relevant memorandum of agreement or MOA, and is, therefore, the corresponding lessor under the relevant bareboat charterparty, the lessee being the third claimant. In relation to the 'Pollux', the position is that it is the second defendant who is the MOA purchaser and the lessor and the fourth claimant is the lessee under the charter. The first and second defendants are Irish-registered entities.
5. The primary security document for each vessel is a pre-delivery security assignment dated 25 January 2021, referred to as "PDSA". All relevant agreements are governed by English law. Their terms are materially identical across each vessel. It therefore makes sense just to refer to them in the singular for analytical purposes, but that includes the plural where necessary.
6. I do not repeat substantial background. The key event which dominates and indeed created this dispute is the imposition of sanctions against various Russian state-owned and associated persons and entities on 8 April of this year: see Council Regulations (EU) No. 269/2014 and No. 22/2850. The sanctions were immediately transposed into Norwegian law pursuant to arrangements between that country, a member of the EFTA, and the EU. This sanctions regime covers the first and second defendants as indirect subsidiaries of a Russian state emanation. Broadly speaking, this prohibits the transfer of economic resources to either of them.
7. I will attach to this judgment as edited and approved an appendix containing the material provisions of both the charters and the PDSAs, as extracted and provided to me by the parties at my request. This is **Appendix 1**.

8. The claimants obtained an interim injunction from this Court on 15 June this year. That was designed to hold the ring by preventing either defendant from taking any steps to enforce its security in respect of either 'Polaris' or 'Pollux' still under construction at the Yard, by stepping in or taking over the relevant shipbuilding contract. This was prompted by discovery of GTLK's attempts to find new buyers for the two vessels under construction. As a prelude to that occurring, both defendants had given (purported) notice to the Yard on 27/28 May pursuant to clause 7 of the PDSA, i.e. perfecting its assignment and activating its security rights in respect of the vessels pre-delivery. I refer to those as the "Clause 7 Notices".
9. As a matter of chronology overview, all four lessors gave notice pursuant to clause 28.1 of their charter on 29 April this year, demanding payment from the relevant lessee of specified Termination Sums. I refer to these as the "Clause 28 Notices". The Termination Event for 'Capella' related to its loss of insurance resulting from the EU sanctions. The Termination Event/s for 'Castor' related to the restructuring of the sale and finance effected in response to the sanctions, whereby a different SPV took delivery from the Yard with different financing arrangements and security.
10. Termination Events for 'Polaris' and 'Pollux' are parasitic via the cross-collateralisation provisions. The Clause 28 Notices each invoked the regime in clause 28.1(e) by demanding immediate payment of Termination Sums. Those notices were disputed on behalf of each lessee. The Clause 7 Notices were sent by each lessor as assignee under the PDSA and they were dated 27 May, but apparently received the following day. The premise was the existence of a Termination Event and hence an Enforcement Event as defined in the PDSA.
11. The first and second defendants then made further or fresh demands for payments of Termination Sums under clause 28.1(e) on 3 June, based on the same Termination Events notified in their Clause 28 Notice - also nominating JP Morgan, Dublin as the bank account for the purposes of clause 6.6 of the charter. I refer to this as the "Payment Account" or "Nominated Payment Account" depending on context below.
12. Despite at first accepting the existence of Termination Events, the claimants contested them in subsequent correspondence and do so now in this action on various pleaded bases.
13. Havila sought a licence from the Norwegian Ministry of Foreign Affairs to enable payment to be made to GTLK. This was granted in respect of the Payment Account held at JP Morgan Dublin on 6 September.
14. This action was commenced in mid-June. Expedition was resisted by the defendants. The claimants have explained in evidence, and I accept, that they have a 'Catch 22' or 'chicken-and-egg' problem, as it was described, in terms of raising finance to pay the Termination Sums in these circumstances, hence the need for a judgment and court order. Their proposed new lenders will not agree to advance finance unless they have an assurance that the vessels will be free of any security in favour of GTLK. That can only happen if this court declares the final position between the relevant contracting parties in the event that Termination Sums are paid in full into, for present purposes, the relevant frozen bank account in Dublin. The negative interim injunction has been continued until further order on this hearing. The claimants ask me to extend it to any trial. The defendants seek its discharge.

15. A list of issues was agreed for this hearing. It contains five primary issues, most with various sub-issues. I attach it as a further appendix to this judgment so as to contextualise the analysis below (**Appendix 2**).
16. The claimants say there is pressing urgency this week because the Yard has given notice of delivery of 'Polaris' which will take effect tomorrow, Friday 9 December. The claimants say they need an order of this court that is recognisable and enforceable in other jurisdictions, such as Ireland, where the defendants are registered and where they hold the Payment Account, i.e. an order that declares the legal position between each set of contracting parties in the event that payment is made into the relevant bank account of the Termination Sum as demanded by each of the defendants. Without such an order, the claimants say, they cannot raise finance needed to pay those Termination Sums, as demanded under the Clause 28 Notices. If they cannot raise finance, they cannot pay those sums, and hence the 'chicken-and-egg' conundrum.
17. I have prepared and given this judgment and will make an order in time to be of use to the parties against this perceived urgency. This inevitably means that my judgment is not as refined as it would otherwise have been, but it is hopefully clear and helpful to the parties and any third parties or foreign court.
18. The claimants do not seek summary judgment on the questions of whether, first, a Termination Event existed as at 29 April of this year, the date of the Clause 28 Notices, under the charters for 'Capella' or 'Castor', or, therefore, whether an Enforcement Event otherwise thereby existed as at 27 or 28 May, the date of the Clause 7 Notices, or any material time under the PDSAs for 'Polaris' or 'Pollux' via applicable cross-default provisions in the charters. The defendants do, however, seek reverse summary judgment on both these matters. They are Agreed Issues 1 & 4.
19. The claimants press their summary judgment application and seek corresponding declaratory relief in respect of two sets of issues, namely:
 - (i) First, the interplay between clause 28 of the charter and clause 7 of the PDSA. Specifically whether election by the defendants to invoke clause 28.1(e) precludes the effective exercise of their clause 7 rights under the PDSA, or at any rate has done so in the circumstances prevailing since 29th April. This corresponds to Agreed Issues 2 & 4.2.
 - (ii) Secondly, whether payment of the Termination Sum into a nominated bank account which is frozen, in the sense that the account holder or beneficiary may not operate it or take the benefit of any balance in it, constitutes good discharge for relevant liabilities under the lease financing arrangements. This corresponds to Agreed Issue 3.

I refer to these two construction issues as the substantive questions. The first of them I refer to loosely as the "election" issue. The second I refer to loosely as the "bank account" issue.

20. There is nothing between the parties on the test either for summary judgment or reverse summary judgment: see *Easyair Limited v. Opal Telecom Limited* [2009] EWHC 339 (Ch). It is well-established that a court faced with summary judgment or reverse summary judgment, and especially where there are cross-applications on the

same point, on questions of pure construction may “grasp the nettle” - as it is sometimes described - and resolve those disputes on a final basis. I have decided to do this on the two core construction issues I have identified.

21. At my invitation, the claimants provided a revised draft order after the first day of the hearing. A further revised draft order was provided after the second day of the hearing, following discussion of various points without prejudice to my pending decision. My conclusions and brief reasons are as follows.

(i) Interim Injunction

22. I deal firstly with the continuation of the injunction. I will extend the interim injunction until trial. The balance of convenience and associated relative remedial calculus remains as evaluated by HHJ Pelling QC (as then was) sitting as a judge of the High Court at the without notice hearing in mid-June. As regards threshold merits, I am persuaded that there is at least a real prospect of success at trial of Agreed Issue 4.2, which corresponds with Agreed Issue 2.4, that is to say the first of the two substantive questions I have described above; Agreed Issue 4.3, which broadly equates to public policy; and Agreed Issue 4.4, relief from forfeiture, as more fully defined in the Agreed List of Issues.
23. Thus, even if there was a Termination Event under the relevant charters via cross-default, and therefore and without more, an Enforcement Event for the purposes of clause 7 of the PDSA for each vessel, there is a sustainable legal basis for disputing the validity of the clause 7 notice as a matter of proper contractual analysis, or preventing steps being taken pursuant to such notice on the basis that they are, amongst other things, contrary to the public policy and will be harmful to the legal system in this jurisdiction.
24. I deal below with the proper contractual analysis of the interplay between clause 28 of the charters and clause 7 of the PDSA, i.e. the first substantive question. I have chosen to deal with that contractual issue on a final basis in this judgment, having heard full argument on the cross-applications.
25. In so far as matters in light of that conclusion, firstly as regards public policy, I am persuaded as was HHJ Pelling QC (as he then was) that there is a real prospect of this being established in circumstances where a sanctioned entity, or at any rate a wholly owned and controlled subsidiary of such entity, is seeking to invoke contractual rights so as to remove an asset or its economic equivalent from the applicability of an international sanctions regime. Here, the defendants are seeking to enforce security rights so as to take over the two vessels in Turkey outside the sanctions, and potentially sell them, presumably for profit, in circumstances also outside the sanctions regime.
26. As analysed below, the effect of this, if permitted, would be to defeat contingent contractual rights of redemption belonging to the third and fourth claimants as lessees under clauses 28.1(e) and 29 of the charters. If those rights were enforced and performed, the relevant transaction and economic transfer would remain within the bite of the sanctions regime as addressed further below. It is this circumvention that potentially engages public policy, at least on a sufficiently arguable basis to justify continuation of the protective interim relief.

27. As regards relief from forfeiture, while this may be a challenging objection for the claimants to run in the context of a commercial transaction, as submitted by Mr. Berry KC by reference to the Privy Council decision in *Cukurova Finance International Ltd and another v. Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2016] AC 923, I am not persuaded that it has no real prospect of success. There is reason to believe that the defendants may benefit by more than the extent of the security for their indebtedness in respect of each vessel if enforcement is permitted, for example by selling the vessels for profit to third party buyers outside the sanctions regime.
28. No explanation has been offered as to why GTLK waited four weeks after service of the Clause 28 Notices, which demanded payment of Termination Sums to enforce an accelerated redemption, before then serving the Clause 7 Notices seeking to enforce security and effectively take over the vessels. An inference may arise that they bought time to investigate more lucrative commercial options in response to the international sanctions regime. The fact that time is of the essence under the charters is not preclusive of this equitable doctrine protecting a party against foreclosure of secured property. On this basis, as to threshold merits on such issues, it follows that I refuse the reverse summary judgment on the pleaded allegations involved.

(ii) Termination Events / Agreed Issue 1

29. Secondly, I deal with the remainder of the reverse summary judgment application other than the substantive questions. This corresponds to Agreed Issue 1. I will give my decision now and then the reasons:
- (i) I refuse reverse summary judgment in respect of the existence of a Termination Event for the ‘Capella’ - which corresponds to Agreed Issues 1.1, 1.2 & 1.4 as applicable.
 - (ii) I grant reverse summary judgment in respect of the Termination Event for ‘Castor’ - which corresponds to Agreed Issues 1.3 & 1.4 as applicable.
30. I address the existence of an Enforcement Event under clause 7 PDSA, which is Agreed Issue 4.1, below in the context of the contractual analysis as to the interplay with an election by the lessor under clause 28.1(e).

Was there a Termination Event under the Capella Charter by reason of the withdrawal of insurance?

31. The defendants say there obviously was, and that the claimants have no real prospect of showing otherwise without prejudice to any burden of proof.
32. I am not persuaded that cancellation of insurance fell within the clause 25.16 of the charter. It occurred because the registered owner of the vessel, and hence primary assured under such policies, was a Russian-owned entity. It does not follow from this that the Capella Lessee failed or omitted to comply with any requirements of the insurers or underwriters. There was nothing that the lessee could do about the identity of the vessel's legal owner. There is no suggestion that the lessee had any responsibility or even ability to "*comply with*" any requirement imposed by the insurer as to the identity of the legal owner in light of sanctions. In so far as a requirement in this context presupposed a contractual obligation on the part of the Capella Lessee

under the relevant policy of insurance, no such obligation has been identified or alleged.

33. However, on the face of things, and subject to clause 4.3(a), the cancellation of insurance put the Capella Lessee in breach of its primary obligation under clause 20.1 of the charter to "*keep the vessel insured*" throughout the entire duration of the charter. That was a strict obligation. Cancellation of insurance would, without any contractual mitigation, put the lessee entity in instant breach of that clause.
34. On the assumption there was a breach of clause 20.1, this was a Termination Event under clause 25.3(b). It was or involved non-compliance by a Relevant Party with a provision of an Operative Document, i.e. the charter itself, other than one carved out of clause 25.3(a); and it was not remedied by the Capella Lessee within 14 business days, either on becoming aware of the non-compliance or, indeed, being notified of it.
35. Although the Clause 28 Notice in respect of the Capella did not allege a breach of clause 20.1 or invoke clause 25.3(b) as an additional or alternative Termination Event, it clearly notified the circumstances, i.e. loss of insurance cover, that constituted such non-compliance within the meaning of clause 25.3(b). The Capella Lessor's right to invoke clause 28.1(e) was dependent on it giving "*written notice*" to the lessee of "*the occurrence of*" a Termination Event having occurred and continuing. They clearly did this in the Clause 28 Notice in respect of 'Capella' even though no reference was made to breach of clause 20.1 or reliance upon 25.3 as a Termination Event.
36. However, the effect of clause 4.3(a) was arguably to excuse the Capella Lessee from compliance with clause 20.1 when maintaining the vessel's insurance "*would or might in its reasonable opinion constitute a breach of*" any of the applicable sanctions. On the evidence before me, this is enough to justify refusal of reverse summary judgment in favour of the defendants in respect of the Capella Termination Event as at 29 April or otherwise.
37. For these reasons, I refuse reverse summary judgment in respect of the existence of a Termination Event for 'Capella'.

Was there a Termination Event under the Castor charter by reason of its delivery to a different entity and associated arrangements?

38. I am satisfied that on the evidence before me no estoppel or waiver can realistically be made out by the claimants in respect of all four of the Termination Events notified for this vessel.
39. I regard the pleas of estoppel and waiver in POC 37.3.2 as lacking a real or reasonable prospect of success, essentially because no clear and unequivocal representation was made on behalf of the Castor Lessor (GTLK Asia) to the Castor Lessee to the effect that substitution of a new buyer by amendment to the shipbuilding contract with the Yard was or would be acceptable. The witness evidence shows that any confirmation as was given by GTLK was subject to relevant approvals. They were not provided at any material time.
40. The fact that the European parent entity was in a state of corporate trauma following impositions of sanctions on 8 April, if that was the case, does not render the stated

need for internal corporate approval less meaningful or thereby render a conditional assurance, if given, an unconditional one capable of founding a clear and unequivocal representation to feed an estoppel as pleaded. Any case to the effect that there was a settled understanding by 10 April 2022 is gainsaid by an e-mail between the parties the next day, which records delivery taking place to the original party, not a new SPV.

41. Clauses 36 and 37 of the charter make a pure waiver argument even more difficult as a matter of pre-determined common intention. S-called 'no oral modification' clauses of this kind, extended beyond the need for formalities in variation or amendment situations, have effect under English law. The claimants have evidenced their estoppel and waiver allegations fully, as might be expected, by reference to communications which crossed the line during the critical period. This will not be enough to make good an estoppel or waiver at trial. There is no other compelling reason to include this issue at trial.
42. I therefore grant reverse summary judgment in respect of such allegation, which is Agreed Issue 1.3.1.
43. With regards to the allegation in POC 37.3.1, which corresponds to Agreed Issue 1.3.2, I likewise do not regard this as having a real or reasonable prospect of success at trial. This was referred to as the 'cannot take advantage of your own wrong' point. It depends on showing either (i) that the Castor Lessor is seeking to take advantage of its own wrong by notifying all four Termination Events in its Clause 28 Notice and demanding payment of a Termination Sum pursuant to clause 28.1(e) or (ii) that the Polaris Lessor (the first defendant) and the Pollux Lessor (the second defendant) are seeking to take advantage of their own wrong by notifying the cross-default Termination Event in respect of the relevant vessel in their Clause 28 Notice.
44. However, the only wrong identified, other than that their parent company has been sanctioned - which seems far too remote or extraneous to engage this canon of construction - is an *anticipatory* breach by the Castor Lessor in its capacity as purchaser under the relevant MOA from HKO to pay a final instalment for such purchase. No authority has been identified to support the proposition, even by analogy, that the first defendant and second defendant cannot invoke the cross-default Termination Events under their charters in such scenario. They are different entities invoking rights under different agreements between different parties.
45. The Castor Lessor is not in any event seeking to rely on or take advantage of any non-payment on its behalf qua purchaser under the relevant MOA. The Termination Events all relate to the change in identity of the purchasing entity under the shipbuilding contract with the Yard and granting of security over the vessel to finance that purchase and delivery. The change in identity of the buyer of the vessel vis-à-vis the Yard was a response to sanctions. Any construction argument that seeks to preclude a Termination Event arising from such step would need to be consistent with the effect of clause 4.3(a), which is the specific provision governing the impact of sanctions on the parties' performance of the charter.
46. I do not regard it as sustainable to contend that all four Termination Events invoked in these circumstances are vitiated as a matter of contractual construction on this alleged basis. This leaves the clause 4.3(a) question in respect of the Termination Events for 'Castor'.

47. Whatever else it may do, clause 4.3(a) does not alter the existence of a state of affairs or deprive any steps actually taken by the Castor Lessee of their consequence under the charter. The four Termination Events relied upon for this vessel in the Clause 28 Notice all relate to positive acts done by the Castor Lessee. The fact that these may have been done in alleged reasonable mitigation of the problems created by the imposition of sanctions is not relevant to this analysis. Clause 4.3(a) cannot alter the position, except perhaps in respect of clause 25.12 which deals with repudiation. Clause 4.3(a) cannot preclude a Termination Event arising if it otherwise would, even if based on steps taken because of sanctions.
48. In these circumstances, I am satisfied to the reverse summary judgment standard that there was as at 29 April 2022 a Termination Event in respect of 'Castor' such that via the cross-default provisions a Termination Event existed and was validly notified in respect of all four vessels on that date. There is no compelling reason to include this issue at any trial. I therefore grant reverse summary judgment on it, i.e. as to the validity of the Clause 28 Notices.

(iii) First Substantive Question: Election Issue

49. I turn now to the first substantive question, the election question correlating to Agree Issues 2, 4.1 & 4.2.
50. What is the legal effect of the lessor giving written notice pursuant to clause 28.1(e) demanding payment of a Termination Sum in respect of a Termination Event? What is the legal effect of the lessee, as assignee, giving a clause 7 notice under the PDSA in the context of such a pre-existing demand under clause 28.1(e)?
51. The claimants contend, in effect, that clause 28 of the charter involves or requires an election between inconsistent regimes or consequences in the event of a Termination Event.
52. The lessor can, of course, choose to do nothing about a Termination Event if it so wishes. It could waive a Termination Event and thereby affirm and preserve the charter as is. The mere failure to invoke clause 28 would not, without more, constitute a waiver or affirmation: see clause 36.
53. Clause 25.1 of the charter makes it clear that the occurrence of any Termination Event constitutes a repudiation by the lessee of the charter. Clause 25.1(b) continues, "*entitling the Lessor to accept such repudiation and to exercise any of its rights under Clause 28 ...*" At first blush this appears to suggest that clause 28 operates after or upon or only consistent with an acceptance of repudiation at common law.
54. However, I am satisfied that the word "*and*" in this context is not intended as any form of nexus or gateway into or conditionality to clause 28. This provision is making it clear that the common law consequences of repudiation, itself a common law phenomenon, are preserved and may be stacked with - hence the word "*and*" - a contractual consequence as set out in clause 28.1, at any rate so far as consistent with an election under clause 28.1.

55. If the lessor chooses to avail itself of any of the clause 28.1 consequences, it must give "*written notice*" as the clause itself says. The contents of such written notice are therefore paramount.
56. The five sets of consequences in clause 28.1 each comprise a distinct contractual regime, activated by a written notice upon the occurrence and subsistence of a Termination Event. The lessor must expressly invoke or opt into or opt for at least one of them, and perhaps only one of them depending which is chosen. They are linked with "*and/or*" but they are clearly not all cumulative in the sense of being capable of invocation and operation in parallel with one another. Some are manifestly contradictory or mutually exclusive.
57. Clauses 28.1(a) and 28.1(b) could co-exist with one another, and perhaps with others. Neither is existential or fundamental to the fate of the lease financing.
58. Clause 28.1(d) contains its own "*and/or*" which means that the first option within it, namely "*inspect the vessel*", is a stand-alone right. That too is consistent with other options being exercised and operated in parallel.
59. Clause 28.1(c) contains a range of consequences to be chosen between. These include foreclosure. That option is not reflected elsewhere in clause 28 or the charter. A question therefore arises whether clauses 28.1(e) and 28.1(c), or at least the foreclosure option under that paragraph, are inconsistent with one another such that electing one precludes election for the other, absent a contractually sanctioned change of circumstances.
60. Clause 28.1(c) starts with the words "*accept the repudiation of this Charter by the Lessee*". It is clear that acceptance of repudiation, i.e. at common law, is a prerequisite of electing any of the options under this paragraph. Those options include but are not limited to foreclosure.
61. None of the other choices under clause 28.1 start with this wording. In particular, clause 28.1(e) involves keeping the charter on foot for the specific purpose provided for in that paragraph, i.e. mandatory early redemption. The demand to pay the Termination Sum creates a new primary obligation upon the lessee, i.e. to pay it immediately. That obligation arises in the legal moment of such demand: see the word "*whereupon*". If and when that is done, i.e. payment of the Termination Sum in full, the lessee then acquires the right to have the vessel transferred to it, pursuant to clause 29. That occurs when the Termination Sum is received in full by the lessor. The clause says "*upon receipt of the Termination Sum in full*". This corresponds with the phrase "*Immediately upon receipt by the Lessor...*" at the beginning of clause 29 itself.
62. "Termination Sum" is defined in the charter as the sum calculated in accordance with clause 28.2. For present purposes, i.e. absence a Total Loss, that means clause 28.2(b). The Termination Sum includes interest accruing on any outstanding capital Pre-Paid Purchase Price at the Default Rate: see clause 28.2(b)(iii). The cross-default and cross-collateralisation structure is reflected in the calculation of the Termination Sum: see clause 28.2(b)(vii).

63. The lessor's election to operate clause 28.1(e) therefore keeps the charter alive and confers a contingent right to title in the vessel upon the lessee under clause 29. The contingency is immediate payment of the Termination Sum as demanded by the lessor, i.e. payment into the payment account in accordance with clause 6.6.
64. It is fair to speak of clause 28.1(e) as conferring upon the lessee both an obligation to make immediate payment of the Termination Sum and a contingent right of redemption under clause 29. The words in brackets at the end of clause 28.1(c) refer to the lessee's "*right to pay the relevant Termination Sum and take title to the Vessel in accordance with clause 29*". The parties thus saw clause 28.1(e) as conferring a right upon the lessee, albeit one conditioned by the primary obligation to immediately pay the Termination Sum. They even made provision for the survival of that right in certain circumstances.
65. It is beyond question to my mind that clause 28.1(c) and 28.1(e) contain inconsistent and mutually exclusive options, at least in so far as the former involves choosing foreclosure. It would not be possible to elect both foreclosure and redemption at the same time or in respect of the same Termination Event. Clause 28.1(e) involves an affirmation. Clause 28.1(c) expressly requires acceptance of the deemed repudiation. A lessor cannot do both in the same legal breath or episode. That is paradoxical and nonsensical. The parties cannot have intended to permit it, in my judgment.
66. Choosing clause 28.1(e) therefore precludes the choice of foreclosure under clause 28.1(c) in respect of the same Termination Event unless something were to occur that justified the lessor in re-electing.
67. The defendants contend that no such election exists. They say that the rights in clauses 28.1(c) and 28.1(e) are consistent and co-existent, both in principle and in practice, or at any rate the security rights granted under the PDSA are independent and co-exist with any choice made under clause 28.1 of the charter in respect of a Termination Event. It is common ground that those security rights cover all liabilities, and that includes a liability to pay a Termination Sum if validly demand pursuant to clause 28.1(e).
68. Mr. Berry KC argued this position with characteristic charm and guile. He submitted that whereas a choice of clause 28.1(e) does not preclude a parallel or subsequent choice of clause 28.1(c) for the same Termination Event or the giving of notice under clause 7 PDSA for the corresponding Enforcement Event, the converse does not hold good. The clause 7 security notice would, he submits, trump a prior choice of clause 28.1(e) for the same Termination Event, and therefore Enforcement Event. It would bring to an end whatever rights had been conferred upon a lessee under clause 28.1(e).
69. The basis for this analysis is that the two agreements form part of a unitary package or composite contractual scheme. They fall to be read together and their operability is co-dependent in this way. This basis itself is common ground. It is obviously correct.
70. As to this:
 - (i) The logic of the lessor's own position means that there is some form of contractual override mechanism if a clause 7 notice is given under the PDSA.

This operates as a form of ‘post-trumping’ of the clause 28.1(e) right, however defined.

- (ii) The logic of the lessee's position is that there is some form of contractual override mechanism if a clause 28.1(e) demand is made. This operates as a form of ‘pre-trumping’ of any clause 28.1(c) election or clause 7 notice under the PDSA.
71. Mr. Berry KC accepted, and indeed averred, that the logic of his case accommodated what he called a “maximal” position whereby his clients were free to do both things in the same legal breath, i.e. make a demand under clause 28.1(e) for payment of the Termination Sum and give a clause 7 notice under the PDSA perfecting security and activating their rights over the vessel vis-à-vis the Yard. Security covers an unpaid Termination Sum, after all.
72. This extreme but necessary position illustrates the vice in such construction, to my mind. The interdependence of the two sets of contradictory rights must be two-way. There cannot be a "*one-way inconsistency*" as the lessor submits.
73. The lessor's distinct security rights qua assignee under the PDSAs are not wholly independent and freestanding. They are not superior rights. They are contingent or parasitic upon the position under the charterer, at least in the sense that an Enforcement Event can only arise under the former if there is a Termination Event under the latter. If such rights, whether exercised via 28.1(c) or autonomously, can somehow displace a 28.1(e) regime, then the converse must hold good. This is all a matter of proper or purposive construction of the two financing documents read together as a sensible consensual scheme.
74. Thus, where the lessor elects to invoke clause 28.1(e) in respect of the Termination Event, it has no right to also or later elect to invoke clause 28.1(c) in respect of the same Termination Event absent a legally recognised change of circumstances. It has, in other words, agreed not to treat the relevant Termination Event as an Enforcement Event for the purpose of the PDSA or give notice under clause 7 in respect of it, at any rate for so long as performance of clause 28.1(e) remains live under the charter itself.
75. **What then if the lessee does not pay the Termination Sum immediately, as required by clause 28.1(e)?** Absent a legal excuse or accommodation for this default, it would by definition be a fresh Termination Event under clause 25.2 that deals with non-payment. I note here that clause 25.2 is carved out of clause 25.3(a), so such default cannot be a Termination Event under clause 25.3. This fresh clause 25.2 Termination Event is a deemed repudiation (see clause 25.1(b)) which gives rise to a new right of election for the lessor under clause 28.1. The lessor can at this stage and on this basis elect for clause 28.1(c) instead, i.e. accept repudiation and foreclose. That would also create a new Enforcement Event for the purposes of clause 7 of the PDSA, or otherwise pave the way for a security notice on the basis of such fresh Enforcement Event.
76. The effect of that occurring would be to repudiate or frustrate or discharge the executory regime under clause 28.1(e), activated on these facts on 29 April 2022. I did not use these concepts in their technical or common law sense. There is no self-standing contract being brought to an end, only a specific payment obligation and the

correlative contingent right of redemption arising upon a prior election in respect of the original Termination Event, save that an election under clause 28.1(c) is prefaced on acceptance of the deemed repudiation, which brings the whole charter to an end. The clause 28.1(e) election is superseded or revoked by a fresh Termination Event and election flowing from failure of performance of the clause 28.1(e) regime.

77. This is how the contractual scheme operates, in my judgment. The parties made provision for how to bring the clause 28.1(e) regime to an end in the case of default in immediate payment by the lessee. For this reason, I reject the contention made by reference to cases such as *Union Eagle Ltd v. Golden Achievement Ltd* [1997] AC 514, that the lessee has no right to make payment of the Termination Sum other than immediately. Here the parties have defined or delineated the duration or durability of that obligation and correlative right, including by calling it a “right” as observed above, through the mechanisms of clauses 25 and 28. Those clauses represent a sophisticated contractual scheme.
78. Put another way, the clause 28.1(e) right does not lapse when payment is not made immediately. It is brought to an end when a fresh contrary election is made under clause 28.1 on the basis of a Termination Event arising from such payment default. This is what the parties agreed as a coherent scheme of rights and obligations.
79. If necessary, I would go as far as to say that whereas there is a primary obligation to pay the Termination Sum immediately, there is a subsisting right to pay it non-immediately. That right is delineated in duration by the service of a fresh clause 28.1 notice for default. Non-immediate payment is a deemed repudiation of the whole charter. The only way to extinguish a lessee’s accrued rights under clause 28.1(e) is to accept repudiation and elect foreclosure under clause 28.1(c).
80. No fresh clause 28 notice has been sent on this basis. Could that be validly done at the present time?
81. I am satisfied that it could not, as explained next. If, however, I am wrong about this as a matter of final determination, I am nevertheless satisfied that the lessee has at least a real prospect of success on such analysis, and this in turn justifies interim injunctive relief to prevent the lessor serving a further clause 28 notice, if needed as a gateway to the clause 7 notice under the PDSA, in respect of the lessee's non-payment of the Termination Sum demanded on 29 April and further demanded on 3 June 2022. As it happens, I am satisfied that paragraph 1(a) for ‘Polaris’ and paragraph 2(a) for ‘Pollux’ in the interim injunction order made on 15 June this year prevent such a step being taken by the relevant lessor.
82. While the phrase “*shall immediately pay*” is clear and mandatory, and time is of the essence per clause 39, the context of clause 28.1(e) is the contemplated need for Havila to refinance the vessels in order to redeem the current lease financing with GTLK. The nature of this financing arrangement presupposes that Havila require financing for the vessels. The concept of immediate payment of a Termination Sum takes its meaning from that essential commercial context and impetus.
83. That aside, immediate payment does not mean instantaneous or even same day payment in this clause. In the absence of a nominated Payment Account at the time of a demand under clause 28.1(e), clause 6.6 contemplates nomination of a Payment

Account by written notice "*at least five (5) Business Days before the due date for payment*". That further conditions the immediacy of payment.

84. All that said, however, Havila have had since 29 April this year to make such payments. They have not yet done so. They have, therefore, not made immediate payment under clause 28.1(e) as a matter of ordinary language, even if that mandatory promissory wording is tempered by contextual factors.
85. The lessees have been unable to make payment of any part of the Termination Sum into the payment account, as nominated on 3 June, at any material time because they reasonably believed that doing so may breach the sanctions regime. The existence of and basis for this belief is explained in the witness statement of Stein Pettersen. There is no challenge to this evidence or its sufficiency as proof of a reasonable belief.
86. Havila only secured a licence from the Norwegian government to make payments into the nominated payment account on 6 September. JP Morgan had by then frozen the account for incoming payments pursuant to the OFAC / US sanctions regime biting during August.
87. Where the only account nominated for receipt of a Termination Sum has been blocked in this way, where payment into any other account, for example in Hong Kong, risks violation of international sanctions, the relevant lessees cannot be blamed for not having yet made payment of the Termination Sum.
88. They have not delayed in the commencement of these proceedings or pursuit of their application for summary determination of claims for certain declaratory relief. Indeed, their request for expedition was resisted by the defendants, resulting in the hearing of the application and subsequent cross-application being heard this week, just days before the notified date of delivery of 'Polaris' by the Yard.
89. The effect of clause 4.3(a) is, therefore, that the lessee is not in breach under clause 28.1(e), and there is no default that could constitute a non-payment Termination Event under clause 25.2. This means that the lessor could not, without more, serve a new notice under clause 28.1(c), electing to foreclose and enforce its security. The lessee's so-called clause 28.1(e) right is preserved because it need not make immediate payment by operation of clause 4.3(a).
90. Further, absent an effective revocation of the lessee's extant clause 28.1(e) contingent right to redemption, there is no Enforcement Event under the PDSA, or at any rate the lessor qua assignee had and still has no right to serve notice under clause 7 to take steps pursuant to such purported notice. The fact that no fresh notice, i.e. clause 28 notice, has been served is therefore not determinative.
91. I conclude that no fresh notice could validly be sent as matters stand. Come what may, as explained above, this position is at least seriously arguable and sustains the negative protective injunction in this regard.
92. In summary: the lessor's election under clause 28.1(e) on 29 April, as confirmed on 3 June, remains effective; the lessee has not breached or defaulted on its payment obligation under that clause due to the effect of clause 4.3(a) and there has, therefore, been no fresh Termination Event; the effect of this subsisting election is that the lessor

could not make a contrary election under clause 28.1(c) in respect of the same Termination Event, or give valid notice pursuant to any Enforcement Event under clause 7 of the PDSA; it has, in effect, agreed not to do so in such circumstances. The lessee's so-called clause 28.1(e) right is therefore preserved. I declare this to be the contractual position on a final basis.

(iv) Second Substantive Question: Bank Account Issue

93. Turning then to the second and shorter substantive question, the bank account issue, which corresponds to Agreed Issue 3. Would payment of the Termination Sum into the Nomination Payment Account, if accepted, provide a good discharge of the lessee's liability vis-à-vis the lessor?
94. This is a short point and I consider the answer to be Yes. The question of construction concerns the proper meaning of the words "*upon receipt of the Termination Sum in full*" in clause 28.1(e) and therefore the phrase "*upon receipt by the lessor*" in clause 29.
95. Clause 6.6 is headed "*Manner of payment*". It says that all sums payable by the lessee "*shall be made*" to the Payment Account "*or such other account as the lessor may notify in writing at least five (5) Business Days before the due date for payment*". It follows that payment made into such an account, even if frozen, constitutes receipt by the lessor, and hence a good discharge of the clause 28.1(e) obligation triggering the regime in clause 29. The fact that an account is frozen in the functional sense described above does not alter this position in my judgment.
96. The defendants argue that the concept of payment, or indeed receipt, requires that the payee or recipient has a right to the immediate use of the funds. Reliance is placed upon *The Brimnes* [1973] 1 WLR 386. The answer to this lies in what the parties agreed here. They agreed that payment into the bank account described in clause 6.6(b) was required. They agreed nothing else about what payment or receipt meant or required. They therefore agreed that if such payment was made, this was sufficient for all contractual purposes, which envisaged receipt of payment.
97. Whether or not the payee, here the lessor, has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial to this contractual analysis. This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor, i.e. the lessee, which is what matters most.
98. If I am wrong about this, I am not presently persuaded that any other bank account would work for such matters, unless contractually nominated by the relevant lessor. Nor I am persuaded as things currently stand - although this may require further analysis, if it arises - that a payment into Court Funds would constitute receipt by the defendants for contractual purposes.
99. I will grant liberty to apply in the event that payment into the Nominated Payment Account, i.e. JP Morgan Dublin, remains impossible upon the raising of fresh finance by Havila.

Form of Order

100. I turn to the form of order. Subject to further discussion, I am satisfied that the revised draft order contains declaratory relief that it is appropriate to order in favour of the claimants in all circumstances. It is not hypothetical. It reflects the contractual position and serves an important practical purpose in the context of this dispute.
101. I have separately found that the interim injunction was properly granted and ought to be continued until trial and that its substantive basis does not assume or depend upon the absence of a Termination Event via cross-default in respect of either 'Polaris' or 'Pollux'. Both injunctive relief and declaratory relief are, therefore, consistent with the existence of such Termination Event.

Next Steps

102. I will hear and work with counsel now to finalise a form of order reflecting this outcome so that it can be sealed without delay in the morning. In the meantime, and given the urgency in play, I authorise the parties to show to any affected party, firstly, a faithful if not agreed note of this judgment and/or any unapproved transcript of it in the meantime and/or, secondly, an agreed or approved, even if unsealed, order so as to progress the raising of fresh finance without further delay.
103. I will edit the transcript of this judgment when it is sent to me and issue an approved judgment as soon as possible, which will attach the two documents I have referred to as attachments.
104. All other consequentials such as costs, including those reserved from prior hearings, will be dealt with at a further short remote hearing to be fixed next week. In accordance with modern practice in the Commercial Court, that hearing will be listed without reference to the availability of leading counsel. It will take place soon. It will not require more than an hour. Skeleton arguments will be guillotined in length.
105. Any party wishing to claim its own costs on any issue or seek to reduce the costs claimed by the other side, either as a proportion by reference to issues won or lost, or in terms of quantification, must file and serve a costs schedule by no later than 10.30 a.m. on Monday 12 December. Failure to do so will mean that such arguments are not admissible unless I allow otherwise.
106. That concludes my judgment. It was handed down between 3pm and 4pm via MS Teams on Thursday 8 December 2022.

Appendix 1

MOA

3.10 Buyer's further conditions precedent

The obligation of the Buyer to purchase the Vessel from the Seller under this Agreement is subject to the further conditions that:

[...]

(e) Delivery shall have occurred on or prior to the Cut-off Date (unless otherwise agreed by the Buyer); and

(f) all of the documents received by the Buyer as contemplated in Clause 3.9 (*Conditions Precedent*) are in full force and effect.

2.2 Delivery

(b) The Vessel shall be delivered by the Seller, with full title guarantee, to the Buyer on the Scheduled Delivery Date, or such other date (not later than the Cut-off Date), each being a Business Day, as may be agreed upon between the Seller and the Buyer (the "**Delivery Date**"), free and clear of all Liens.

10.2 Miscellaneous

(b) The rights and remedies of each of the parties under this Agreement are cumulative and are in addition to any rights or remedies that any party may otherwise have at law or in equity. This Agreement may be amended, superseded, modified, supplemented or terminated, and the terms hereof may be waived, only by a written instrument signed by the parties or, in the case of a waiver, by the party waiving compliance. No delay on the part of any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof. No waiver on the part of any party of any such right, power or privilege, nor any single or partial exercise of any such right, power or privilege, shall preclude any further exercise thereof or the exercise of any other such right, power or privilege.

BBCPs

1.1 Definitions

In this Charter:

"**Cut-off Date**" means the date falling 270 days after the Contractual Delivery Date (as defined in the Memorandum of Agreement) or such other date as the Lessor and the Lessee may agree in writing.

"**Payment Account**" means the account (or any sub-account or sub-division thereof) as notified by the Lessor to the Lessee (and any renewal or re-designation thereof) maintained with the Lessor Account Bank by the Lessor to which all amounts due and payable to the Lessor by the Lessee under this Charter are to be paid, details of which will be notified in writing to the Lessee by the Lessor.

"**Lessor Account Bank**" means the bank or financial institution with which the Lessor's Payment Account is at any time held.

"**Lien**" means any mortgage, charge (whether fixed or floating), pledge, lien, encumbrance, hypothecation, assignment or security interest of any kind securing any obligation of any person or any type of preferential arrangement (including, without limitation, conditional sale, title transfer and/or retention arrangements having a similar effect), in each case howsoever arising.

"**Primary Secured Obligations**" means all present and future obligations and liabilities at any time due, owing or incurred by any Relevant Party to the Lessor under or pursuant to the Operative Documents, whether actual or contingent, whether originally incurred by the Lessor or by any other person and whether incurred solely or jointly and as principal or surety or in any other capacity, except for any obligation or liability which, if it were included, would cause that obligation or liability or any of the Liens in respect thereof, to be unlawful, prohibited or invalid by or under any applicable law.

"**Relevant Party**" means each of:

- (a) the Seller;
- (b) the Lessee; and
- (c) Havila Holding,

and "**Relevant Parties**" means all of them.

"**Secondary Secured Obligations**" means all present and future obligations and liabilities at any time due, owing or incurred by any Relevant Party (as defined in each Other Bareboat Charter) to any Other Lessor under or pursuant to any Other Agreement, whether actual or contingent, whether originally incurred by that Other Lessor or by any other person and whether incurred solely or jointly and as principal or surety or in any other capacity, except for any obligation or liability which, if it were included, would cause that obligation or liability or any of the Liens in respect thereof, to be unlawful, prohibited or invalid by or under any applicable law.

"**Secured Obligations**" means the Primary Secured Obligations and the Secondary Secured Obligations.

"**Sanctions**" means any trade, economic or financial sanctions, laws, regulations, embargoes or restrictive measures administered, enacted or enforced by (i) the United States Government, (ii) the United Nations Security Council, (iii) the European Union or its member states, including without limitation, the United Kingdom, (iv) the Flag State (being Norway at the date of this Charter), or (v) the respective governmental institutions and agencies of any of the foregoing, including without limitation, the Office of Foreign Assets Control (OFAC), the United States Department of State, and Her Majesty's Treasury (HMT) (each, a "**Sanction Authority**").

"**Security Documents**" means:

- (a) the Pre-delivery Security Assignments [...]

"**Termination Event**" means any event or circumstance described in Clause 25 (*Termination Events*).

"**Termination Sum**" has the meaning given to it in Clause 28.2 (*Payments on a Termination Event or a Total Loss*).

4.2 Lessor's further conditions precedent

The obligation of the Lessor to charter the Vessel to the Lessee on the Delivery Date under this Charter is subject to the further conditions that:

[...]

(e) Delivery shall have occurred on or prior to the Cut-off Date (unless otherwise agreed by the Lessor); and

Clause 4.3(a) Sanctions

Notwithstanding any other provision of this Charter or any other Operative Document to the contrary, neither the Lessor nor any Relevant Party is obliged to do or omit to do anything if it would, or might in its reasonable opinion, constitute a breach of any Sanctions or any laws and regulations relating to anti-money laundering, counterterrorism financing or economic and trade sanctions applicable to it.

6.5 Payment unconditional

(a) The Lessee's obligation to pay Rent and other payments on a "hell and high water" basis in accordance with this Charter and any other amounts payable by the Lessee under the other Operative Documents shall be absolute and unconditional irrespective of any matter or contingency, including:

6.6 Manner of payment

All payments of the Rent, the Balloon Amount, any Purchase Option Price and any other amounts payable by the Lessee under this Charter and any other Operative Document shall be made:

(a) in full, without any set-off or counterclaim and, subject as provided in Clause 10.1 (Withholding Taxes), free and clear of any deductions or withholdings; and

(b) in Euros, in same day funds before 11:00 a.m. (London time) on the due date for payment, to the Payment Account or such other account as the Lessor may notify the Lessee in writing at least five (5) Business Days before the due date for payment.

It shall be a condition of this Charter that the Lessee performs its obligations to make any payment under this Charter or the other Operative Documents in the time and manner stipulated in this Charter or in the relevant Operative Document, as applicable.

11. ILLEGALITY

11.1 Consequences of illegality

(a) If, in any applicable jurisdiction, it becomes unlawful for the Lessor to perform any of its obligations or to exercise any of its rights under any of the Operative Documents or any of the Finance Documents to which it is a party, the Lessor, as the case may be, shall be entitled, by giving written notice to the Lessee:

(i) if any such event occurs prior to Delivery, to cancel the obligations of the Lessor under the Memorandum of Agreement to pay any Instalment and to buy the Vessel and to cancel the obligations of the Lessor to lease, and of the Lessee to hire the Vessel pursuant to this

Charter; or

(ii) if any such event occurs on or after Delivery, to terminate the Charter, in each case, immediately or, of later, upon the date upon which the relevant illegality will become effective.

(b) If, in any applicable jurisdiction, it becomes unlawful for a Finance Party to perform any of its obligations or to exercise any of its rights under any of the Finance Documents to which it is a party, the Lessor will promptly notify the Lessee of such event.

11.2 Termination following illegality

(a) On the date of the termination referred to in Clause 11.1(a)(i) above, the Lessee shall pay to the Lessor:

(i) the aggregate amount of the Prepaid Purchase Price advanced on such date by the Buyer under the Memorandum of Agreement;

(ii) any interest on the Prepaid Purchase Price due or accrued but unpaid on such date;

(iii) any Break Costs;

(iv) any fee and any other amount then due and payable but unpaid by any Relevant Party to the Lessor under any of the Operative Documents;

(v) any additional costs incurred by the Lessor under the Finance Documents which directly result from the repayment at such time of funds raised to finance or refinance the Vessel as a result of the occurrence of the termination of this Charter; and

(vi) any out of pocket costs (including legal costs) incurred by the Lessor in connection with the termination.

(b) On the date of the termination referred to in Clause 11.1(a)(ii) above, the Lessee shall pay to the Lessor:

(i) any Rent due or accrued but unpaid on such date;

(ii) the Outstanding Charter Hire Principal on such date (without doublecounting in relation to the Fixed Rental Amount component of Rent under paragraph (b)(i) above);

(iii) any interest accrued on any unpaid and overdue Rent, the Balloon Amount and any other Outstanding Charter Hire Principal on such date at the Default Rate;

(iv) any Break Costs;

(v) any fee and other amount then due and payable but unpaid by any Relevant Party to the Lessor under any of the Operative Documents;

(vi) any additional costs incurred by the Lessor under the Finance Documents which directly result from the repayment at such time of funds raised to finance or refinance the Vessel as a result of the occurrence of the termination of this Charter; and

(vii) any out of pocket costs (including legal costs) incurred by the Lessor in connection with the termination.

(c) Upon receipt by the Lessor of the sums set out in paragraph (a) or (b) above, the Lessor shall:

(i) procure the release of all Liens created by the Lessor on the Vessel and the other security created pursuant to the Operative Documents; and

(ii) if Delivery of the Vessel has already occurred, transfer title to the Vessel to the Lessee or its nominee pursuant to the terms set out in Clause 29 (*Transfer of title*).

15.1 General negative pledge

(a) No Relevant Party shall create or permit any Lien (other than a Permitted Lien and for the avoidance of doubt in the case of the Operating Account and the Earnings Account, banker's lien or right of set off) to exist, arise or be created or extended over the Vessel or any other property assigned or charged to the Lessor or any Finance Party under any Security Document or Finance Document.

20. Insurance

The Lessee shall bear all risks howsoever arising whether of use, navigation, operation, possession and/or maintenance of the Vessel for the duration of the Charter.

20.1 Scope of Insurance

Subject to Clause 20.13 (*Modification to Insurance*), the Lessee shall, from the Delivery Date until the end of the Charter Period, insure and keep the Vessel insured, free of cost and expense to the Lessor, in the joint names of the Lessor and the Lessee (but without liability on the part of the Lessor for premiums or calls) against:

(a) fire and usual marine risks (including excess risks and terrorism cover) and war risks, on an agreed value basis, in such amounts (but not in any event less than whichever shall be the greater of:

(i) the market value of the Vessel for the time being (as determined by the Lessor on the basis of a valuation obtained from an Approved Valuer); and

(ii) such amount which shall be equal to one hundred and fifteen per cent (115%) of the Outstanding Charter Hire Principal),

and upon such terms as shall comply with this Clause 20.1 or be otherwise from time to time approved in writing by the Lessor;

for the purpose of this clause, the fire and usual marine risks shall at least be equivalent to the ITC (Hulls) 1.10.83 and shall, unless otherwise covered by the protection and indemnity cover pursuant to paragraph (b) below, include 4/4 Running Down Clause and 4/4 fixed and floating object risks;

(b) protection and indemnity risks at the highest amount available from (and in any event not less than \$1,000,000,000 or such other amount of cover against pollution risks as shall at any time be comprised in the basic entry of the Vessel with, and including pollution risks for the highest amount in respect of which cover is or may be available for ships similar to the Vessel), and upon such terms as shall from time to time be approved in writing by the Lessor, including, *inter alia*, (i) war, strikes, riots, piracy and terrorism risks, (ii) 4/4 Running Down Clause and 4/4 fixed and floating object risks, (iii) pollution risks, (iv) the proportion of loss not recoverable under the running-down clause of the hull policy of the Vessel in case of collision, (v) claims of any persons (including, but not limited to crew and passengers) whomsoever against the Vessel, any managers or demise charterers of the Vessel, or their agents or servants, who may suffer or allege they suffer damage or injury to or death of or loss of person or property, and (vi) such other risks as may be required by any regulations of the Flag State and of any other jurisdiction in which the Vessel may from time to time be registered, operated, chartered and/or maintained; and

(c) such other matters of any nature arising in respect of which insurance would be maintained by a prudent owner and/or lessor of the Vessel.

25.1 Fundamental term and condition

The Lessor and the Lessee agree that from the date of this Charter:

(a) it is a fundamental term and condition of this Charter and any other Operative Document that none of the events set out in this Clause 25 shall occur after the date of this Charter or at any time during the Charter Period; and

(b) the occurrence of any such event shall constitute a repudiatory breach of this Charter by the Lessee, entitling the Lessor to accept such repudiation and to exercise any of its rights under Clause 28 (*Rights following a Termination Event*).

25.2 Non-payment

Any Relevant Party does not pay on the due date any amount payable pursuant to an Operative Document to which it is a party at the place at and in the currency in which it is expressed to be payable unless payment is received within three (3) Business Days of its due date.

25.3 Other obligations

(a) Any Relevant Party does not comply with any provision of the Operative Documents to which it is a party [...]

(b) No Termination Event under paragraph (a) above will occur if such non-compliance is capable of being remedied to the satisfaction of the Lessor and is remedied within fourteen (14) Business Days of the earlier of (i) the date on which the Lessee becomes aware of the non-compliance, and (ii) the date on which the Lessee is notified of the non-compliance.

25.12 Repudiation

Any Relevant Party by its action either repudiates any Operative Document to which it is a party or evidences an intention to repudiate any Operative Document.

25.16 Compliance with insurance requirements

The Lessee fails or omits to comply with any requirements of the Vessel's insurance companies and/or underwriters and/or protection and indemnity association or an insurance company as a result of which any cover is liable to be cancelled or excluded at any time.

25.19 Material Adverse Change

Any event or circumstance occurs that has or, in the opinion of the Lessor (acting reasonably), is likely to have a Material Adverse Effect.

25.26 Breach, termination, cancellation or repudiation of the Shipbuilding Contract or insolvency of the Builder

(d) Any payment term or any grace period provided under the Shipbuilding Contract or any Refund Guarantee is amended or other terms of the Shipbuilding Contract or any Refund Guarantee is amended materially, in each case, without the consent of the Lessor.

25.34 Termination Event under any Other Bareboat Charter

A Termination Event (as defined in each Other Bareboat Charter) has occurred and is continuing under any Other Bareboat Charter.

26. LATE DELIVERY

(a) If, for any reason other than a breach by the Lessor of any of its obligations under the Memorandum of Agreement which is not attributable to any Potential Termination Event or Termination Event, the Vessel shall not have been delivered to and accepted by the Lessee in accordance with Clause 3.1 (*Delivery*) on or before 11:59 p.m. (London time) on the Cut-off Date, then the Lessor may, without prejudice to any other rights or remedies which the Lessor may have at law, in equity or otherwise, cancel the obligation contained in the Memorandum of Agreement to buy the Vessel and this Charter to charter the Vessel to the Lessee by giving notice to the Lessee or the Seller to that effect, whereupon the Lessor's obligation to buy the Vessel or to pay any Instalment of the Purchase Price under the Memorandum of Agreement and/or to charter out the Vessel under this Charter shall immediately terminate, and the Lessee shall immediately procure the Seller's acceptance of any such termination in relation to the Memorandum of Agreement.

(b) On the date of the termination referred to in paragraph (a) above, the Lessee shall pay to the Lessor:

- (i) the aggregate amount of the Prepaid Purchase Price advanced on such date by the Buyer under the Memorandum of Agreement;
- (ii) any interest on the Prepaid Purchase Price due or accrued but unpaid on such date;
- (iii) any relevant Break Costs;
- (iv) any fee and other amount then due and payable but unpaid by any Relevant Party to the Lessor under any of the Operative Documents;
- (v) any additional costs incurred by the Lessor under the Finance Documents which directly result from the repayment at such time of funds raised to finance or refinance the Vessel as a result of the occurrence of the termination of this Charter; and
- (vi) any out of pocket costs (including legal costs) incurred by the Lessor in connection with the termination.

(c) Upon receipt by the Lessor of the sums set out in paragraph (b) above, the Lessor shall procure the release of all Liens created by the Lessor on the Vessel and the other security created pursuant to the Operative Documents.

28.1 Rights on Termination Event

If a Termination Event occurs and is continuing, the Lessor may, by written notice to the Lessee:

[...]

(c) accept the repudiation of this Charter by the Lessee, and cancel the Memorandum of Agreement and/or terminate the leasing of the Vessel under this Charter with immediate effect (but without prejudice to the continuing obligations of the Lessee under this Charter and the other Operative Documents), and/or require the Lessee to purchase the Vessel or redeliver the Vessel to the Lessor in accordance with Clause 24 (*Redelivery*) **provided that** if the Lessee does not purchase the Vessel upon first demand of the Lessor, the Lessee's right to purchase the Vessel thereafter shall not be exclusive and for such purposes, the Lessor confirms that it will keep the Lessee informed of the process of any firm offer of sale of the Vessel, following the completion of which all rights of the Lessee under this Charter (other than its right to pay the relevant

Termination Sum and take title to the Vessel in accordance with Clause 29 (*Transfer of Title*) will cease; and/or

[...]

(e) notify the Lessee of the occurrence of the same and demand the payment of the Termination Sum by the Lessee, whereupon the Lessee shall immediately pay the Termination Sum to the Lessor (and upon receipt of the Termination Sum in full, the Lessor shall sell, transfer and redeliver, at the cost and expense of the Lessee, the Vessel to the Lessee in accordance with Clause 29 (*Transfer of Title*)).

28.2 Payments on a Termination Event or a Total Loss

Upon termination of the leasing of the Vessel pursuant to Clause 28.1(c) (*Rights on Termination Event*) (the "**Termination Sum Payment Date**") or upon occurrence of a Total Loss Payment Date, the Lessee shall immediately pay to the Lessor by way of agreed compensation for loss of bargain and as a genuine pre-estimate of damages and not as a penalty (each, a "**Termination Sum**"): [...]

(b) in case of a termination due to the occurrence of a Termination Event that occurs before Delivery, the aggregate of the following:

(i) the aggregate amount of the Prepaid Purchase Price then advanced by the Buyer under the Memorandum of Agreement;

(ii) any interest on the Prepaid Purchase Price due or accrued but unpaid;

(iii) any interest accrued on any unpaid and overdue Prepaid Purchase Price at the Default Rate;

(iv) any relevant Break Costs;

(v) any additional costs incurred by the Lessor under the Finance Documents which directly result from the repayment at such time of funds raised to finance or refinance the Vessel as a result of the occurrence of the cancellation or termination of this Charter;

(vi) any fee or other amount due and payable but unpaid by any Relevant Party to the Lessor under any of the Operative Documents;

(vii) any amounts due and payable but unpaid by any Relevant Party (as defined in any Other Agreement) to any Other Lessor under any of the Other Agreements; and

(viii) out of pocket costs (including legal costs) incurred by the Lessor in connection with the early termination hereunder,

in each case on the Termination Sum Payment Date;

29 Transfer of Title

Immediately upon receipt by the Lessor of the sums referred to in Clause 11 (Illegality), Clause 12.3 (Payment of Increased Costs, indemnity sum or voluntary termination), Clause 27 (Voluntary Termination and Purchase Obligation) or Clause 28.2 (Payments on a Termination Event or a Total Loss) (as applicable), the Lessor shall:

(a) procure the release of the Mortgage (if any) and all other Liens created by the Lessor on the Vessel and the other security created pursuant to the Operative Documents;

(b) save where the Vessel is a Total Loss, transfer all its right, title and interest in the Vessel to the Lessee or its nominee on the terms set out in this Clause;

36. Remedies and Waivers

No failure to exercise, nor any delay in exercising, on the part of the Lessor, any right or remedy under this Charter shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Charter are cumulative and not exclusive of any rights or remedies provided by law.

39. Time of the Essence

Without prejudice to any grace periods contained in this Charter, the time stipulated in this Charter for all payments payable by either Party, and for the performance of either Party's obligations under this Charter, will be of the essence of this Charter.

41. Entire Agreement

This Charter and the other Operative Documents constitute the sole and entire agreement between the Lessor and the Lessee in relation to the leasing of the Vessel and supersedes all previous agreements in relation to that leasing. Any amendments to this Charter must be in writing and signed on behalf of the Lessor and the Lessee.

44.1 Jurisdiction of English courts

(a) Subject to paragraph (c) below, the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with this Charter (including any dispute relating to any non-contractual obligation arising from or in connection with this Charter and any dispute regarding the existence, validity or termination of this Charter) (a "**Dispute**").

(b) The parties to this Charter agree that the courts of England and Wales are the most appropriate and convenient courts to settle Disputes and accordingly no party to this Charter will argue to the contrary.

(c) This Clause 44.1 is for the benefit of the Lessor only. As a result, the Lessor shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lessor may take concurrent proceedings in any number of jurisdictions.

PDSAs

1. DEFINITIONS

1.1 Terms not otherwise defined herein shall have the meanings given thereto in the Charter (including by reference to another document or otherwise). In addition:

1.2 In this Deed, unless the context otherwise requires: [...]

"Assigned Contract" means the Shipbuilding Contract and any other guarantee or security given to the Assignor by any persons for the Builder's obligations under the Shipbuilding Contract and includes any change order or other deed, document, agreement or instrument amending, varying or supplementing any of the foregoing documents or any of the terms and conditions thereof.

"Enforcement Event" means the occurrence of a Termination Event under the Charter. [...]

"Security Period" means the period beginning on the date of this Deed and ending on the date on which the Assignee is satisfied that the Secured Obligations have been irrevocably and unconditionally paid or discharged in full and the Assignee is not under any further actual or contingent obligation to provide financial accommodation to any Relevant Party under any of the Operative Documents.

"Shipbuilding Contract" means the shipbuilding contract dated 31 December 2019 and addendum no.1 to the shipbuilding contract dated 2 June 2020 (and any subsequent amendments, novations or supplements thereto) in relation to the construction and delivery of the Vessel entered into between the Builder as builder and the Assignor as buyer.

3. ASSIGNMENT

3.1 For the due and punctual payment, performance and observance of the Secured Obligations, the Assignor, with full title guarantee, hereby assigns, mortgages and charges to and in favour of the Assignee, absolutely all of the Assignor's rights, title and interest in and to the Assigned Property and all its benefits and interests present and future.

7. POWERS OF ASSIGNEE ON AN ENFORCEMENT EVENT

Upon the occurrence of an Enforcement Event, the Assignee shall as and when it may see fit, be entitled to put into force and exercise all or any of the rights, powers and remedies possessed by it as the Assignee of the Assigned Property or otherwise (whether at law, by virtue of this Deed or otherwise) and in particular (without limiting the generality of foregoing):

- (a) to exercise any right forming part of the Assigned Property, including any right to implement any of the Assigned Contract or to agree with any of the Counterparties to terminate any of the Assigned Contract on such terms and conditions as the Assignee and the relevant Counterparty may mutually agree and/or to make a claim under the Builder's Risks Insurances;
- (b) to vary the terms of the Assigned Contract, to enter into any arrangement of any kind connected with the Assigned Contract, to replace, novate or terminate any Assigned Contract and to release any person liable under the Assigned Contract and/or any security relating to any person's obligations or liabilities under the Assigned Contract;
- (c) exercise any of the Assignor's rights under the Assigned Contract or Builder's Risks Insurances, including any right to terminate or rescind the Assigned Contract or Builder's Risks Insurances;
- (d) implement the Shipbuilding Contract and take delivery of the Vessel;
- (e) undertake the further supervision of construction of the Vessel;
- (f) assign or otherwise dispose of the Assigned Property;
- (g) enforce all or any part of the security created hereunder and exercise its rights as assignee of the Assigned Property (at the times, in the manner and on the terms it thinks fit, including without limitation, to prosecute, defend or abandon any action suit or proceedings relating to the Assigned Property) and appropriate, hold, sell, invest, mortgage, exchange, terminate, rescind or otherwise dispose of all or any part of the Assigned Property (at the time, in the manner and on the terms it thinks fit (including whether for cash or non-cash consideration));
- (h) on or after the Delivery, sell the Vessel at such time, in such manner and upon such terms as the Assignee considers appropriate, with power to postpone any such sale and without being answerable for any loss occasioned by such sale or resulting from its postponement (other than as a result of its gross negligence or wilful misconduct) and with power to purchase the Vessel or any part of the Assigned Property itself and set off the sale price against all or any part of the Secured Obligations in accordance with the Charter and this Deed;

14.2 Cumulative rights

The Transaction Security created by or pursuant to this Deed, and any of the rights, powers and remedies of the Assignee provided by or pursuant to this Deed or by law, shall be cumulative, in addition to and independent of every other Transaction Security which the Assignee may at any time hold for the Secured Obligations or any other obligations or any rights, powers and remedies provided by law and shall operate as an independent Transaction Security notwithstanding any receipt, release or discharge endorsed on or given in respect of or under any such other Transaction Security.

14.7 Waiver of defences

The obligations assumed, and the Transaction Security created, by the Assignor under this Deed, and any of the rights, powers and remedies of the Assignee provided by or pursuant to this Deed or by law, will not be affected by any act, omission, matter or thing which, but for this Clause 14.7, would reduce, release or prejudice any of its obligations under, or the Transaction Security created by, this Deed (whether or not known to the Assignor or the Assignee) including:

- (a) any time, waiver or consent granted to, or composition with, any Relevant Party or other person;
- (b) the release of any other Relevant Party or any other person under the terms of any composition or arrangement with any creditor of any member of the Group;
- (c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or Transaction Security over assets of, any Relevant Party or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any Transaction Security;
- (d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of, any Relevant Party or any other person;
- (e) any amendment, novation, supplement, extension, restatement (in each case, however fundamental and whether or not more onerous) or replacement of an Operative Document or any other document or Transaction Security or of the Secured Obligations including, any change in the purpose of, any extension of or any increase in any facility or the addition of any new facility under any Operative Document or other document or Transaction Security;
- (f) any unenforceability, illegality or invalidity of any obligation of any person under any Operative Document or any other document or Transaction Security or of the Secured Obligations; or
- (g) any insolvency or similar proceedings.

14.11 Additional Security

The Transaction Security created by the Assignor under this Deed and any of the rights, powers and remedies of the Assignee provided by or pursuant to this Deed or by law are in addition to and are not in any way prejudiced by any other guarantee or Transaction Security now or subsequently held by the Assignee.

18.1 Release of Security

Upon the expiry of the Security Period, the Assignee shall, at the request and cost of the Assignor, release and cancel the Security constituted by this Deed and procure the reassignment to the Assignor of any property assigned to the Assignee pursuant to this Deed, in each case subject to Clause 18.2 (*Clawback*) and without recourse to, or any representation or warranty by, the Assignee or any of its nominees.

23.1 Discretion

Any liberty or power which may be exercised or any determination which may be made under this Deed by the Assignee or any Receiver may be exercised or made in its absolute and unfettered discretion without any obligation to give reasons.

Appendix 2

List of issues for determination at the December Hearing

1. **Issue 1. Has a Termination Event occurred under all the BBCPs because of events in relation to Capella and/or Castor? See POC in action 301 [37]-[38]; POC in action 323 [29.1].** The sub issues are:
 - 1.1. Was there a Termination Event under clauses 25.3(a) and/or 25.16 of the Capella BBCP by reason of withdrawal of insurance? See POC in action 301 [37.2].
 - 1.2. Is it open to the Defendants to rely on a Termination Event under clause 25.3(a) of the Capella BBCP (breach of clause 20.1) by reason of withdrawal of insurance?
 - 1.3. Was there a Termination Event under clauses 25.3(a), 25.12, 25.19 and/or 25.26(d) of the Castor BBCP by reason of delivery to HK Ship V and the associated arrangements? see POC in action 301 [37.3.1].
 - 1.3.1. Did the Defendants or the Lessor of the Castor acquiesce in the delivery of the Castor from the Yard to HK Ship V AS and have they thereby waived any right to assert a Termination Event in relation to the foregoing? Alternatively, are they estopped by representation from doing so? see POC in action 301 [37.3.2].
 - 1.3.2. Does the alleged Termination Event arise from a breach of contract by GTLK such that it cannot be relied upon by the Lessor of the Castor and therefore the Defendants? POC [37.3.1]
 - 1.4. Did no Termination Event occur because all events relied on are excused by clause 4.3(a) of the Capella and Castor BBCPs? see POC in action 301 at [37.4].
2. **Issue 2. Is the relevant Havila Claimant entitled to pay the Termination Sums under the BBCPs? See POC in action 301 [42.1-42.2].** The sub issues are
 - 2.1. What is the nature of the entitlement or obligation to pay the Termination Sums?
 - 2.2. If the entitlement and obligation to pay the Termination Sums arose what if any legal consequences result from delay in payment?
 - 2.3. Is any delay excusable by reference to clause 4.3(a) of the BBCPs, and if so with what if any legal consequences?
 - 2.4. What if any legal consequences for payment of the Termination Sums result from the purported exercise by the Defendants of rights under clause 7 of the PDSAs?

- 3. Issue 3. Is the relevant Havila Claimant entitled to pay the Termination Sums into Court or into a frozen account in either the EU or Norway, so as to get good discharge? see POC in action 301 [42.2].**

- 4. Issue 4. Have the Defendants validly exercised, and are they entitled to enforce, rights under clause 7 of the Polaris and Pollux PDSAs? (POC in action 301 at [33]).**
The sub issues are
 - 4.1. Have there been any Enforcement Events under the PDSAs? (see issue 1 above)

 - 4.2. Have the Defendants irrevocably elected to demand the Termination Sums such that they are now prevented from exercising rights under clause 7 of the PDSAs? If not, what consequences flow therefrom? see POC in action 301 [40].

 - 4.3. Are the Defendants precluded from relying on those Enforcement Events or enforcing rights under the PDSAs by operation of the illegality principle in *Patel v Mirza*? see POC in action 301 [39].

 - 4.4. As to relief from forfeiture (see POC in action 301 [41]), whether relief from forfeiture is precluded and/or unavailable because:
 - 4.4.1. Time of payment of the Secured Obligations is of the essence;

 - 4.4.2. Enforcement of the clause 7 rights will not provide any benefit other than payment of the Secured Obligations; or

 - 4.4.3. The Claimants are not entitled to pay or cannot pay the Secured Obligations?

- 5. Issue 5 – Relief: In view of the answers to issues 1-4:**
 - 5.1. to what relief are the Claimants or Defendants entitled?

 - 5.2. should the injunction dated 15 June 2022 be discharged?
