Neutral Citation Number: [2020] EWHC 2851 (Comm)

Claim No. CL-2018-000706

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
Fetter Lane, London, EC4A, 1NL
Date: Friday 30 October 2020

BEFORE:
MR. ADRIAN BELTRAMI QC
Sitting as a Judge of the High Court

BETWEEN:

AEGEAN BALTIC BANK S.A.

Claimant

-and-

(1) RENZLOR SHIPPING LIMITED
(2) OCEANWIDE SHIPPING LIMITED
(3) MR. ALEXANDROS N. TRANOS

Defendants

Peter MacDonald Eggers QC and **Henry Moore**, instructed by Waterson Hicks, on behalf of the Claimant
The First and Second Defendants did not appear and were not represented
The Third Defendant appeared in person
Hearing dates 19, 20, 21 and 22 October 2020

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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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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 30 October 2020.

ADRIAN BELTRAMI QC:

INTRODUCTION

1. The Claimant in this action is Aegean Baltic Bank SA (the **Bank**), a bank incorporated in Greece. It claims in debt and damages under a loan agreement dated 15 October 2007, as subsequently varied by amendment (the **Loan Agreement**), and related security agreements (the **security documents**). Pursuant to clause 1.1 of the Loan Agreement, the Bank made available a loan of up to USD 9 million to finance the cost of repairs to and provide liquidity for the oil and chemicals tanker M/T "STARLET" (the **Vessel**).

2. The Defendants are, respectively:

    a. Renzlor Shipping Ltd (the **Owner**), a company incorporated under the laws of the Marshall Islands, the owner of the Vessel and the Borrower under the Loan Agreement.

    b. Oceanwide Shipping Ltd (the **Manager**), a company incorporated under the laws of the Marshall Islands, the manager of the Vessel.

    c. Alexandros Tranos (**Mr Tranos**), the managing director of the Manager.

3. The Loan Agreement is governed by English law. The sole contracting parties were the Bank and the Owner. It was amended on 5 occasions, most recently on 23 June 2015. The security documents include guarantees, dated 15 October 2007, provided by the Manager and Mr Tranos (respectively the **Corporate Guarantee** and the **Personal Guarantee**, and together the **Guarantees**). The Guarantees are governed by Greek law.

4. In this action, the Bank claims:

    a. Against the Owner under the Loan Agreement.

    b. Against the Manager under the Corporate Guarantee.

    c. Against Mr Tranos under the Personal Guarantee.

The claim is for the outstanding indebtedness under these agreements (the **outstanding indebtedness**). Save possibly for one point on default interest which I address below, the Defendants do not dispute the quantum of the claim, which is the same against each Defendant. As at 13 October 2020, this stood at USD 9,979,972.21, as certified by the Bank in accordance with clause 5.4 of the Loan Agreement.

5. The Statements of Case disclose no dispute as to the primary elements of the Bank's claim. The Agreed Case Memorandum records as common ground that the sums claimed by the Bank fell due under the terms of the Loan Agreement and the security documents and that the Defendants have failed to pay those sums. The foundation of the Defence is the contention that the Bank acted negligently or otherwise in breach of duty in its conduct of certain insurance claims following damage to the Vessel in July 2015. It is said that claims against the Bank in respect of such conduct provide a defence of circuity of action or set-off in favour of the Owner and that the Guarantees have been discharged under Greek law.

PROCEDURAL BACKGROUND

6. The Bank was represented at trial by Mr MacDonald Eggers QC and Mr Henry Moore, instructed by Waterson Hicks. The Owner and the Manager retain solicitors on the record, Trowers & Hamlins LLP (**Trowers**), but they did not attend the trial and were not represented. Pursuant to a Notice dated 16 October 2020, Trowers came off the record for Mr Tranos. Mr Tranos participated in the trial on his own behalf.

7. The procedural background may be summarized as follows. The Claim Form was first issued on 31 October 2018 and the Particulars of Claim are dated 17 January 2019. The Defendants served a joint Defence on 28 March 2019, which was amended on 17 July 2019. The Bank's Reply was served on 18 April 2019 and amended on 27 September 2019. On 6 September 2019, the Defendants provided a response to the Bank's CPR Part 18 request for further information.

8. The Defendants' further participation in the proceedings has been sporadic. Specifically:

    a. The CMC was a held on 19 July 2019 before Mr Christopher Hancock QC, sitting as a Judge of the High Court. The Defendants were legally represented by solicitors and Counsel and the parties had engaged in discussions about disclosure pursuant to CPR PD 51U. By Order dated 26 July 2019 the Judge

set a timetable for disclosure, with lists to be exchanged on 20 December 2019 and documents produced on 24 January 2020. He also approved the parties' costs budgets to trial.

b. The Bank complied with its obligations to provide disclosure but the Defendants did not. On the contrary, they produced no disclosure at all. On 21 February 2020, Butcher J ordered that unless the Defendants complied by 13 March 2020:

"*…the Defendants shall not be entitled to adduce or rely upon any witness evidence of fact or expert evidence in support of their Defence (as amended on 17 July 2019).*"

He also ordered that the Defendants pay the costs of the Bank's application, assessed at £40,000.

c. The Defendants did not attend and were not represented at the hearing before Butcher J. Nevertheless, the Judge was able to conclude that the Defendants' failure to comply with their obligations was deliberate:

> "*It is, in my judgment, reasonable to infer on the basis of the material before me at the moment that the defendants' failure to give disclosure to date is deliberate, apparently being a step taking in tandem with disengagement from these proceedings and pursuit of litigation in Greece*."

d. The Defendants did not provide disclosure by 13 March 2020, and have never done so. The sanction ordered by Butcher J has accordingly come into force. The default remains unremedied. Nor have the Defendants satisfied the costs order which was made.

e. On 21 September 2020, Trowers replaced Hill Dickinson LLP (**Hill Dickinson**) as the solicitors on the record for the Defendants. On 28 September 2020, the Court heard an application by a third party for joinder to the proceedings. The application was supported by the Defendants, who on this occasion did attend by solicitors and Counsel, and who also argued for a consequential adjournment of the trial. By Order dated 28 September 2020, Henshaw J dismissed the application and ordered the Defendants to pay a proportion of the Bank's costs. The transcript of the Judge's Ruling records that Counsel for the Defendants indicated (in the light of some doubt

apparently expressed by the third party) that their then current intention was to attend the trial.

f. As I have mentioned, Trowers came off the record for Mr Tranos on 16 October 2020. I have seen an email from Mr Ned Beale of Trowers to the Court office timed at 09.16 on 19 October 2020 requesting that a video link be sent to Mr Tranos so that he could participate. Mr Beale went on to say that, so far as Trowers were concerned, "*we will not be participating in the hearing."*

9. It was necessary for me to consider whether to proceed in the absence of the Owner and the Manager, noting that under CPR 39.3 this falls within the Court's discretion. These parties have at all times retained, and still retain, solicitors on the record. They are plainly aware of the trial date. I asked Mr Tranos why it was that the Owner and Manager were not attending the trial and he told me that they had determined that they would not have a full defence and therefore decided not to participate. In all the circumstances, I considered it appropriate to carry on with the trial notwithstanding their absence. Mr Tranos was able to conduct his own defence in person.

10. On the morning of the second day of the trial, just before the evidence was due to be heard, Mr Tranos applied for permission to deploy certain additional documents, most of which, he said, were in the Bank's possession and should have been disclosed by the Bank (although there had hitherto been no complaint about the Bank's disclosure). He was not, even at that late stage, purporting to comply with his own disclosure obligations. The application, which was opposed by the Bank, was in substance seeking relief from sanctions. I declined to permit Mr Tranos to introduce at the last minute what was no more than a selective cache of documents.

11. One of the self-inflicted consequences of the Order of Butcher J was that there were impediments to the presentation of Mr Tranos' case. In practical terms, it was almost impossible for Mr Tranos to avoid mixing his submissions, which he was entitled to make, with statements of evidence, which he was not. I allowed Mr Tranos to argue his case in the way that he wished. Nevertheless, as Mr MacDonald Eggers submitted, I can proceed only on the basis of the evidence which is properly admissible.

THE CONTRACTUAL DOCUMENTS

12. The Loan Agreement provided for repayment on the Final Maturity date which fell, following amendment, on 10 January 2020. So far as relevant, there were provisions for interest and default interest, information covenants and stated Events of Default, including the non-payment of sums due. By clause 9.9, upon an Event of Default, the

Bank was entitled to accelerate repayment of the outstanding indebtedness and to exercise its rights under the security documents.

13. In addition to the Guarantees, the security documents included:

    a. General Assignment of earnings, insurances and requisition compensation in respect of the Vessel dated 16 October 2007 (the **General Assignment**). The parties to this Assignment are the Bank and the Owner. It is governed by English law. By clause 4.2(b)(i), the Bank was entitled, upon an Event of Default under the Loan Agreement, to require that all policies relating to the insurances in respect of the Vessel be delivered to its brokers and to collect recover compromise and give a good discharge for all claims arising under those insurances. Clause 5 included a power of attorney in favour of the Bank, to this end.

    b. First Priority Maltese Mortgage dated 16 October 2007, together with a Deed of Covenant dated 16 October 2007 between the Bank and the Owner, governed by Maltese Law (the **Deed of Covenant**). The Deed of Covenant was amended twice. It was governed by Maltese law. Pursuant to clause 8, the Bank was entitled, upon an Event of Default, to collect, recover, compromise and give a good discharge for all claims under insurances in respect of the Vessel.

    c. Manager's Undertaking dated 16 October 2007 between the Bank and the Manager governed by English law. The Manager agreed, inter alia, to procure compliance by the Owner and Mr Tranos with their obligations in respect of the Loan Agreement and the security documents.

    d. First Preferred Liberian Mortgage dated 24 June 2015 (the **Liberian Mortgage**). By clause 10.1, the Bank was again granted powers to collect, recover, compromise and give good discharge for all claims on the insurances in respect of the Vessel. The Liberian Mortgage is governed by Liberian law.

14. The Vessel was insured in the name of the Owner and the Manager against hull and machinery risks for a total amount of USD 10.75 million, inclusive of Increased Value of USD 2.15 million (the **H&M insurance**). The risk was placed as follows:

    a. 20% of the total risk was placed in the Italian market and underwritten by Generali Italia SpA (**Generali**). The policy (the **Camogli Policy**) is contained in or evidenced by a Cambiaso Risso Marine SpA (**Cambiaso Risso**) cover note dated 23 July 2015 with reference No. 20151229-30. It is governed by

Italian law, save for the Institute Time Clauses incorporated into the policy, which were to be interpreted in accordance with English law.

b. The remaining 80% was placed in the London market and underwritten by various Lloyd's syndicates (the **Lloyd's underwriters**). The policy (the **Lloyd's Policy**) is contained in or evidenced by a Meridian Risk Solutions Ltd cover note dated 4 August 2015 with unique market reference No. B1000P021702015. It is governed by English law.

OUTLINE NARRATIVE OF EVENTS

15. The outline narrative of events is not controversial. The following is taken from agreed statements of common ground.

16. The Vessel suffered water ingress on 31 July 2015 at the port of Hodeidah, Yemen. Although salvage operations were attempted, these were not successful and the Vessel was abandoned. This constituted a loss for the purposes of the H&M insurance. The Owner served Notice of Abandonment (**NOA**) on Generali on 10 June 2016.

17. The Bank was entitled to and did negotiate the claim on the Camogli Policy. On 19 October 2018, the Bank entered into a settlement agreement with Generali (the **Generali Settlement**), which it signed under its own name and under the name of the Owner, by virtue of the Power of Attorney in the General Assignment. Pursuant to the terms of the Generali Settlement, the Bank agreed that the loss of the Vessel would be indemnified as a partial loss. The indemnity was agreed in the sum of USD 1.04 million, representing 20% of the depreciated value of the Vessel, which was calculated at USD 5.2 million (net of the USD 100,000 deductible under the Camogli Policy). This amount was applied by the Bank in partial satisfaction of the sums owed under the Loan Agreement.

18. The insurance claim under the Lloyd's Policy is still active. It is alleged in the Defence that the underwriters have stated that they intend to follow the Generali Settlement and that, accordingly, they consider their maximum liability, absent fraud, to be 80% of USD 5.2 million, namely USD 4.16 million.

19. There have been multiple breaches of the Loan Agreement since at least November 2013. Following the damage to the Vessel in July 2015, the Owner ceased to make the repayments due under the Loan Agreement. On 26 April 2018, the Bank sent a Notice of Defaults and Acceleration Notice, demanding full repayment under the Loan Agreement and/or the related security documents.

20. The Agreed List of Common Ground and Issues also records as common ground that:

    a. If the Defendants' defences with respect to the Bank's conduct of the insurance claims fail, then the Bank is entitled to recover the outstanding indebtedness owed to the Bank.

    b. A full recovery for a constructive total loss under the H&M insurance (**CTL**) would exceed the outstanding indebtedness.

    c. The Generali Settlement is not binding on the London market and the Bank and/or the Owner are entitled to maintain the full value of the insurance claim against the Lloyd's underwriters under the Lloyd's Policy.

THE ISSUES

21. The Bank claims in debt and damages in respect of unpaid principal due under the Loan Agreement, together with interest, default interest, emergency payments and costs. The sum claimed against each of the Defendants, as at 29 October 2018, was USD 8,919,527.62. As I have said, this stood at USD 9,979,972.21 on 13 October 2020.

22. The List of Issues, as agreed between the parties, is as follows:

> "*1. Was the First Defendant entitled to recover for a constructive total loss from Generali (including but not limited to the issue of whether the First Defendant served a valid Notice of Abandonment under Italian law as applicable to the terms of the [Generali] Policy)?*
>
> *2. Did the Claimant owe the Defendants (or any of them) any duty or duties as a matter of English law in the exercise of its rights under the Loan Agreement or the other Security Documents?*
>
> *3. If so, did the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of insurance claims under the Hull Policies, breach such duty or duties?*
>
> *4. Did the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of insurance claims*

under the Hull Policies, breach Articles 281 and 862 of the Greek Civil Code?

5. If so, are the Second and Third Defendants therefore released from their liability in respect of the Outstanding Indebtedness under the Corporate and Personal Guarantees?

6. Has the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of claims under the Hull Policies, prevented the Defendants (or any of them) from satisfying the Outstanding Indebtedness?

7. Is the Claimant entitled to Default Interest (as defined under the Loan Agreement) and, if so, in respect of which periods?

8. Is the Claimant entitled to recover the Outstanding Indebtedness from the Defendants (or any of them)?

9. If issue 3 above is answered affirmatively as regards the First Defendant, does the Claimant's action fail by reason of circuity and/or does it entitle the First Defendant to damages and/or payment on account which can be set off against the amount claimed in the Particulars of Claim?

10. Are Articles 288 and/or 330 of the Greek Civil Code, in principle, relevant to the Claimant's claims under the Corporate and Personal Guarantees?

11. Did the Claimant's conduct and/or negotiations leading to a settlement of insurance claims under the Hull Policies breach Articles 288 and/or 330 of the Greek Civil Code?

12. If issue 4 and/or 11 above is/are answered affirmatively, did any such breaches amount to gross negligence within the meaning of Article 332 of the Greek Civil Code?"

23. I shall endeavour to consider each of these Issues in turn. Before doing so, I must address first the evidence and then make findings of fact as to the conduct of the Bank and the Defendants in respect of the H&M insurance.

THE EVIDENCE

24. The Bank's sole factual witness at trial was Mr George Sakellaris. Mr Sakellaris is Head of the Credit Control – Insurance Department at the Bank and has been involved in the subject matter of this dispute for many years.

25. In addition, and pursuant to permission granted by Mr Christopher Hancock QC at the CMC, the Bank adduced expert evidence from the following witnesses:

    a. Professor Marco Lopez de Gonzalo, a Professor of Shipping Law at the University of Milan and a practising Italian lawyer. Professor Lopez de Gonzalo gave evidence on Italian law as to whether (a) the NOA was invalid; and (b) SCOPIC costs can be counted towards a total loss calculation (this latter point did not need to be determined).

    b. Professor George Georgiades an Associate Professor at the University of Athens Law School and a practising Greek lawyer. Professor Georgiades' evidence addressed the Greek law defences raised in relation to the Guarantees.

26. In the light of the Order of Butcher J, the Defendants were not able to tender any evidence of their own. The reason for that Order, as I have explained, was the Defendants' persistent failure to comply with their disclosure obligations. The result was that the evidential picture presented to the Court was unusually incomplete. Before considering the facts and the various issues, I need to determine my approach to the evidence, in two respects.

27. First, in terms of the issues before the Court, I derive these from the pleadings, as distilled into the List of Issues. Where the Bank bears the evidential burden of establishing any particular proposition then, to the extent that the proposition is put in issue, it must be established on the evidence in the normal way. Where, however, the Defendants bear the evidential burden of establishing contentions that they have raised in their Defence, more circumspection is required.

28. CPR 32.2(1) provides that the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public. The Bank referred me to *Kimathi v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) at [35], where Stewart J stated that:

> "*… the contents of a statement of case are not evidence in a trial, even though verified by a statement of truth. This is the effect of CPR rule 32.2 and CPR 32.6. In Arena Property Services Limited v Europa 2000 Limited Arden LJ said at [18]:*

> *"Mr Banning submits that there was an allegation of an easement in the Pt 20 claim, which was verified by a statement of truth. This does not assist since an allegation so verified is not evidence for the purposes of the trial (see CPR 32.6(2))*."'

29. As an application of the general rule, that must, with respect, be right. However, I do not read Stewart J as saying any more than that. In particular, I would not exclude the possibility that a pleading with an appropriate statement of truth could constitute hearsay evidence in accordance with CPR 33.2, and be subject therefore to questions of weight in the event that it is incapable of being challenged by cross-examination. The point does not arise in the present case as the possibility of adducing even hearsay evidence was precluded by the Order of Butcher J.

30. The end result is that no evidence has been adduced by the Defendants in support of the positive averments which they have pleaded. However, I will still need to consider those defences and, subject to the next point I mention, must have regard to such evidence as is in fact before the Court, which may include evidence supportive of one or more of the pleaded defences even if not adduced by the Defendants.

31. The second point is as to the state of the evidence itself. That evidence is materially incomplete because the Defendants have not complied with their disclosure obligations and have not themselves adduced oral evidence. The former was a deliberate choice by the Defendants in breach of two Court Orders. Whilst, following the Order of Butcher J, the Defendants are now unable to adduce their own witness evidence, that is an outcome that they have brought upon themselves by their failure to provide disclosure. Hence, as it seems to me, the absence of witnesses can also properly be seen as a voluntarily act by the Defendants.

32. Where a party is able to procure the attendance of relevant witnesses but chooses not to do so, the Court will be astute to ensure that any resultant gap in the evidence does not enure to that party's benefit. This will normally involve, as appropriate, the drawing of adverse inferences in areas where the evidence is incomplete, provided there is a case to answer on the issue in question: *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, at p 340 per Brooke LJ.

33. Similar considerations ought to arise in a case where the party has failed to provide disclosure. One remedy for such a failure may be to seek an order debarring that party, if a defendant, from defending the claim. In the present case, the Court instead ordered that the Defendants be precluded from adducing evidence in support of their Defence. But as Butcher J expressly recognised, it is inherently unfair to proceed to a trial in which only one party has made available its documents. To make one of several

obvious points, the Bank has not been provided with any adverse documents which the Defendants should have produced in the ordinary way but have not.

34. Given that the failure to provide disclosure is not just a voluntary act but a breach of an Order, the Court should be especially astute to ensure that the non-defaulting party is not put to a disadvantage. This, though, may be less straightforward than it sounds. It is one thing to draw an inference that the evidence of a missing witness would or might be adverse. It is another to speculate that there exists a document which is adverse. Absent at least a reason to believe that such a document does exist, this would be going too far. Nonetheless, in considering the documentary record in the trial bundle, I must always remember that that record is incomplete, that the Defendants have not furnished their disclosure and that the Bank and the Court have been prevented, by the Defendants' conduct, from finding out whether documents do exist which might be adverse to the Defendants' case. At the very least, I would expect the benefit of any doubt to be firmly in the Bank's favour.

35. The whole of the trial was conducted by Skype and each of the witnesses gave evidence from a remote location. This did not materially impede the process of examination and cross-examination. Each was able to give his evidence in fluent English, albeit that Mr Sakellaris did occasionally require the assistance of an interpreter.

36. I am satisfied that Mr Sakellaris' evidence was straightforward and honest. His testimony was supported by the documents which were referred to in his witness statement. It is possible that, in cross-examination, he became a little argumentative but I do not draw the conclusion that he was doing anything other than seeking to assist the Court.

37. Professor Lopez de Gonzalo's cv indicated that he had been a partner of Studio Legale Mordiglia since 1988. I was taken by Mr MacDonald Eggers in Closing to an email dated 20 November 2019 from Mr Aldo Mordiglia to Dr George Panagopoulos, a solicitor acting on behalf of the Bank. This email recorded legal advice apparently given to the Bank prior to the date of the Generali Settlement as to the validity of the NOA, in other words the very issue on which Professor Lopez de Gonzalo gave his expert evidence. Mr Mordiglia is also a partner at Studio Legale Mordiglia. Professor Lopez de Gonzalo had not expressly adverted to the fact that, as it became apparent, his own law firm had given the Bank such advice. This was regrettable, as it touched directly on the independence of Professor Lopez de Gonzalo's expert evidence, as it could be said that he was defending the advice given by his firm to the Bank and upon which the Bank acted. I am satisfied that, in line with the analysis of David Richards J in *Rowley v Dunlop* [2014] EWHC 1995 at [21], this was not such as to render the report inadmissible, but I should bear it in mind when considering the weight to attach to the report.

38. Professor Georgiades and Professor Lopez de Gonzalo are both distinguished lawyers and academics in their home jurisdictions. Their reports were clearly expressed and supported by materials exhibited to them. They provided helpful elaboration in cross-examination and in response to some additional questions from the Court. Mr Tranos sought to challenge their opinions in certain key areas but, in the absence of any contradictory expert evidence or even any materials to support a contrary view, it was in reality always likely to be a tall order to displace the stated opinions of the experts. I deal with some of the specific aspects below but, in broad terms, I accept the opinions of both experts, even allowing for the extra need to consider the weight of Professor Lopez de Gonzalo's evidence.

39. I should add that, as regards Professor Georgiades, the Bank also relied on previous decisions of this Court in *HSBC Bank plc v Antaeus Shipping Co SA* [2018] EWHC 1733 (Comm) (Mr Andrew Henshaw QC) and *HSBC Bank plc v Pearl Corporation SA* [2019] EWHC 231 (Comm) (Sir Ross Cranston). In both of these cases, and having heard evidence presented by Professor Georgiades as an expert witness, the Court made determinations on some issues of Greek law which are the same or similar to some of the issues in this trial. By section 4(2) of the Civil Evidence Act 1972:

> "*Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below, then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter)—*
>
> *(a) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and*
>
> *(b) if that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved:*
>
> *Provided that paragraph (b) above shall not apply in the case of a finding or decision which conflicts with another finding or decision*

> *on the same question adduced by virtue of this subsection in the same proceedings*."

40. The Bank submitted that the previous findings on Greek law in the earlier cases are themselves admissible in this action as proof of such law but I do not gain any real assistance from this. If no Greek law evidence had been adduced in this case, then the Bank might well have been advised to point to the findings in previous cases, insofar as there was an overlap. Applying the section, those findings would be admissible, subject to argument as to their relevance or correctness. But where Professor Georgiades has produced a report for the purpose of this action, and has given oral evidence, there is a limit to the assistance I am likely to gain from previous decisions. The best evidence before me is that adduced by Professor Georgiades in the present case.

FINDINGS OF FACT

41. The only oral evidence as to the conduct of the parties in respect of the H&M insurance was that given by Mr Sakellaris. That evidence was supported by the contemporaneous material referred to in his witness statement. As it is, I am content generally to accept the summary of facts provided by Mr Sakellaris and make findings, in accordance with that evidence, as follows.

42. The Bank first discovered the damage to the Vessel in late August 2015, through a published casualty report. The Defendants had failed to inform the Bank about it. On 8 September 2015, the Bank was told that a tugboat had arrived in Hodeidah on 17 August 2015 in order to tow the Vessel. The salvage operations commenced in mid-September and were suspended on 10 October 2015.

43. On 15 October 2015 Mr Tranos met with representatives of the Bank, accompanied by Mr Vassilis Polychronopoulos, an insurance broker or consultant. Mr Tranos informed the Bank about the water ingress and the various steps being taken. The meeting is evidenced by a letter of 19 October 2015 from the Bank's broker to the Bank.

44. Subsequently, and at Mr Tranos' request, the Bank paid the H&M insurance premia (in February, April, and July 2016) and also the War Risks and P&I insurance premia (in March and May 2016), each on an emergency basis. This and other expenditure has been claimed by the Bank as emergency expenditure (as enforcement expenses pursuant to clause 10.2(b) of

the Loan Agreement) and is reflected in the overall balance of the outstanding indebtedness.

45. From December 2015, the Owner was looking into the issue of the cost of repairs and whether the Vessel was a CTL. In approximately March 2016, Mr Tranos advised the Bank that the Defendants were considering bringing proceedings on the H&M insurance, although, in the event, they did not do so.

46. Notice of Abandonment was served on the London market on 3 June 2016 and on Generali on 10 June 2016. The NOA served on Generali was rejected by Generali on 22 June 2016. Between June 2016 and late 2017, the Defendants entered into discussions with Generali, through their brokers Cambiaso Risso. In an email dated 17 October 2017, Mr Apostolopoulos, the Bank's insurance broker, reported that Mr Tranos had obtained an offer at a possible settlement level of USD 4,225,000 (which at 20% would lead to a payment of USD 845,000). However, no settlement was in fact concluded at that time.

47. The Defendants were at all times legally represented by Hill Dickinson. Mr Sakellaris' evidence, which I accept, is that this firm indicated to the Bank on several occasions that the claim against Generali was "*particularly uncertain*" and "*would have small chances of success in litigation"*, for a number of reasons, including the absence of physical/survey evidence and the slow and unpredictable nature of litigation in Italy. By way of example, in a letter dated 17 March 2017 to Bankserve Insurance Services Ltd, the Bank's mortgagees interest insurance brokers, Mr Hawkins of Hill Dickinson expressed the view that:

    a. The merits of a CTL claim were "*in favour of the assured*", save in respect of the issue of cause of damage.

    b. Were litigation to be required in Italy in order to push for a full CTL payment, this was likely to be "*very slow"*, and perhaps between 4-5 years for a first instance decision.

    c. Generali's brokers had indicated a willingness to settle at a level of up to approximately USD 3 million;

    d. A settlement at a value figure of around USD 4.75 million would be a "*good deal*".

48. There was a meeting between representatives of the Bank and the Defendants on 1 September 2017, apparently to discuss all the claims on the H&M insurance. Mr Sakellaris recorded the content of this meeting in a Memo to the

files dated 5 September 2017. The Memo includes a proposal made by Mr Hawkins for a division of the proceeds of any litigation to be split between the Bank and the Defendants, as to 80/20 up to a recovery of USD 8 million and 50/50 beyond. The Bank made a counter-proposal at 90/10 up to its full satisfaction. However, no agreement was reached.

49. Thereafter, the Bank repeatedly requested from the Defendants information relating to the casualty. By way of example, in an email dated 21 December 2017, it requested "*all data, including the evidential material in support of the case*". Under the terms of the Loan Agreement and the security documents, the Defendants were obliged to provide all relevant information at the Bank's request. Although Mr Tranos sought to argue, in Closing submissions, that the Defendants provided all the information that was requested, Mr Sakellaris' evidence is that they did not. Further, there are numerous examples in the trial bundle of unanswered requests for information and complaints about the Defendants' failure. I am satisfied on the evidence before me that the Defendants did not comply with their obligation to make available the information sought by the Bank.

50. In the event, given the lack of apparent progress in the Defendants' negotiations with Generali and the failure to provide the requested information, the Bank took the view that it should conduct negotiations directly with Generali, as it was entitled to do under the terms of the security documents. It opened negotiations with Cambiaso Risso.

51. In an email dated 14 February 2018, sent to Mr Tranos, Mr Sakellaris advised that the Bank had received an offer on the basis of unrepaired damage at the level of USD 4.3 million and that this suggested that Generali would accept the cause of the damage as being covered under the Camogli Policy. Mr Sakellaris said that, before responding, the Bank considered it prudent to have a direct meeting with Cambiaso Risso and "*explore the possibility of obtaining"*:

    "*a. an increased "offer" to a more acceptable level;*

    b. An express admission from Generali as to the cause of the damage (crew negligence); and

    c. Express acceptance that the total repair cost of the Vessel would exceed its insured value."

Mr Sakellaris continued: "*In that regard, we invite you to co-operate with the Bank fully (as it is your obligation) for this matter to be favourably concluded for both parties without further delay and so that we may proceed as appropriate."*

52. One of the complaints made by Mr Tranos at the trial (though not in the Defence) was that the Bank did not insist that the Generali Settlement included the matters at (b) and (c). I consider the validity and relevance of that complaint below.

53. By 22 February 2018, the possibility of co-operation between the Bank and the Defendants in negotiations with Generali appears to have vanished. In his email to Mr Tranos of that date, and referring to an earlier email from Mr Tranos dated 20 February 2018, Mr Sakellaris wrote:

"*… it is clear that you refuse to participate in the settlement negotiations with the Italian H&M leaders, Generali. In such circumstances, in our capacity as your Lender under the [Loan Agreement and security documents], we have no option but to continue our efforts to settle this claim on the best possible terms and conditions."*

54. As reflected in Mr Sakellaris' record of the meeting on 1 September 2017, the parties were also considering the possibility of legal action, especially against the Lloyd's underwriters in London. The Bank was not necessarily averse to the taking of such a step but, in addition to its concerns over the lack of information, there was a sticking point over who should pay for it. The Bank's position was set out in an email to Mr Tranos dated 20 March 2018:

"As it has been made absolutely clear to you from the beginning, the Bank has always been willing to join you in any legal action you propose to take against the Vessel's Underwriters, provided the Bank shall have full access to the file of the case and shall have its own legal advisors, whilst you shall bear the full costs of the litigation, with no liability on the Bank's part whatever. However, you have always stated that you cannot bear the litigation costs. Hence, in meetings with your lawyers present, you have requested the Bank to undertake the costs of litigation. You and your lawyer also stated that litigation in Italy is hopeless and should be avoided. Your lawyer also made it clear to us that the hope would be for a recovery of not more than USD 8.2m; and moreover, that this shall be achieved via a settlement with all H&M and MII Underwriters. You now seem to ignore all of this. We do not accept the repetitive shifting of positions by you, which suggests to us that your views are formed not on the basis of objective criteria but on the basis of your motives from time to time."

55. In his Closing submissions, Mr Tranos denied that this email was accurate, though he did not go so far as to suggest that, in fact, the Defendants were prepared to pay for any litigation that proved necessary. At any rate, Mr Tranos replied to the email the next day, on 21 March 2018. Whilst he certainly argued that the Bank should be taking legal proceedings in London, there was no offer that this would be funded by the Defendants.

56. In the event, no litigation has been commenced against the Lloyd's underwriters, although there have been discussions and there is a current open offer to settle (at 80%) on a partial loss basis by reference to the sum assessed by Generali, namely USD 5,200,000 (net of the USD 100,000 deductible under the Camogli Policy).

57. Reverting to Generali, the Bank came to the view that there was no prospect of recovering for a CTL under the Camogli Policy and it proceeded to settle with Generali on a partial loss basis. The Generali Settlement was concluded on 19 October 2018. Prior to that date, on 15 June 2018, the Bank's lawyers provided a draft of the proposed agreement, as received from Generali, together with the Bank's suggested amendments, to Hill Dickinson. A copy was also sent to Mr Tranos. The Defendants made some comments on the text of the draft but did not otherwise participate in the settlement.

58. I have already referred to the evidence that the Bank obtained legal advice that the NOA was ineffective under Italian law, with the consequence that the Owner could not pursue a claim for a CTL against Generali. In his email dated 20 November 2019, Mr Mordiglia recorded the following:

> "*… we confirm, as discussed with the Bank prior to the finalisation of the settlement agreement with [Generali] that under Italian law the notice of abandonment in the case of a constructive total loss which took place outside the Mediterranean, is to be served on the Underwriters within four months from the casualty or from the date on which the Assured proves to have acquired knowledge. As the casualty occurred on 31st July 2015 in Yemen and the Notice of Abandonment was served on Generali on 10 June 2016 we advised the Bank that in our view the claim for CTL against Generali was time barred under Italian law."*

59. In arriving at the Generali Settlement, the Bank took into account the legal advice which it had received. As explained by Mr Sakellaris, it also took into account a range of other factors including the practical difficulties of obtaining

more from Generali than it was prepared to offer by way of settlement, namely the length of time and uncertainty of Italian legal proceedings.

60. The sum of USD 1.04 million received by the Bank pursuant to the Generali Settlement has been applied in part satisfaction of the Bank's claim as loss payee and assignee. The sum represented 20% of the depreciation in value of the Vessel, calculated at the level of USD 5.2 million (net of the USD 100,000 deductible under the Camogli Policy). It is Mr Sakellaris' view that "*This was the best possible outcome in relation to the Generali Policy since any attempt to claim for a constructive total loss under that policy was time barred and could not succeed."*

61. Finally, and for the sake of completeness, I should mention certain proceedings which have been instituted by the Defendants in Greece, namely:

    a. Proceedings commenced on 11 July 2019 by the Manager and Mr Tranos against the Bank before the multi-member Court of Piraeus. These proceedings were then re-issued and served on 30 October 2019. The relief sought includes declarations that the liability under the Guarantees has been extinguished by reason of Articles 862 and 863 of the Greek Civil Code.

    b. Proceedings commenced on 18 July 2019 by the Owner and Mr Tranos against the Bank before the multi-member Court of Athens. A claim is made for damages under, inter alia, Articles 919 and 932 of the Greek Civil Code.

    c. A criminal complaint filed by Mr Tranos, on his own behalf and on behalf of the Owner and the Manager, on 1 July 2019 before the Prosecutor of the Court of First Instance of Athens. Six defendants are named, including the CEO and Deputy CEO of the Bank. Various offences are alleged under the Greek Criminal Code including fraud under Article 386, slander under Articles 362 and 364 and breach of trust under Article 390.

62. Mr Sakellaris is of the opinion that the various proceedings are unjustified, unsubstantiated and inappropriate and that they demonstrate bad faith on the part of the Defendants. Save to note that, in line with the observations of Butcher J, these proceedings may indicate a perception on the part of the Defendants that they stand a better chance of success in Greece than in England, I make no comment on the intention behind them, their merits or their likely fate. This Judgment is concerned with the determination of the claims in the

present proceedings, in respect of which the English Court has undoubted jurisdiction.

THE ISSUES

Issue 1: Was the First Defendant entitled to recover for a constructive total loss from Generali (including but not limited to the issue of whether the First Defendant served a valid Notice of Abandonment under Italian law as applicable to the terms of the [Generali] Policy)?

63. The Defendants' pleaded case is that the Vessel was a CTL and that the Bank should on that basis have secured payments of the full value of the H&M insurance. As I read the Defence, this is the single premise upon which it is alleged that the Bank entered into a "*wholly unreasonable settlement*" with Generali. The substance of the case is that the Bank negotiated for and concluded a settlement of a partial loss when it ought to have either settled on the basis of a CTL or sued Generali to judgment. Although not pleaded as such, this would seem to be a case of alleged loss of a chance to obtain a better deal or litigation recovery.

64. Article 2 to the General Conditions of the Camogli Policy provides that the contract is governed by Italian law, albeit that the English Clauses attached to the Policy must be interpreted and applied as they are interpreted and applied in England. There are no relevant English Clauses for present purposes.

65. Article 9 is in the following terms, in translation:

"*The Assured may abandon the vessel to Underwriters and claim the total loss indemnity in the following cases:*

1. *Here the circumstances as provided by Article 540 a and b Code of Navigation apply*

2. *Where the circumstances as provided by the "Constructive Total Loss" Clause of the attached English Clauses apply*

3. *[…]*

The abandonment must be served to the form prescribed by Italian law."

66. The NOA was dated 2 June 2016 and was served on Generali on 10 June 2016. It was rejected by Generali by letter dated 22 June 2016. Generali stated that (a) the formal and/or substantive requirements of the law and of the policy were not present for the valid abandonment of the Vessel; and (b) the insured did not allow Generali to verify whether the incident was in accordance with the terms of the insurance contract.

67. The Defence is that the NOA was not served late "*as a matter of Italian and/or English law*", because it was served "*as and when the First Defendant had been in a position to ascertain with reasonable certainty the extent of the loss."* The immediate difficulty with this plea, as is submitted on behalf of the Bank, is that there is no evidence in support of the case that the NOA was indeed served as and when the Owner was able to ascertain the extent of the loss, with or without the gloss of reasonable certainty. I certainly do not assume that, just because the NOA was served in June 2016, the Owner had not until then been in a position to ascertain the loss and I note the evidence of Mr Sakellaris that Mr Tranos was discussing details of the casualty in October 2015. Accordingly, even on the Defendants' interpretation of the law, their case is unproved.

68. In any event, I am satisfied that that is not the test under Italian law, which is the relevant law for these purposes, given the requirement under Article 9 for the notice to be served "*to the form prescribed by Italian law*". That means that the matter is governed by Article 543 of the Code of Navigation.

69. Professor Lopez de Gonzalo attached to his report a translation of Article 543 in the following terms:

> "*Art. 543 – Form and deadline of the notice of abandonment*
>
> *"The abandonment must be declared in writing to the insurer within two months or, if the casualty occurred outside Europe or the Mediterranean, four months f[ro]m the date of the casualty or the date when the insured proves to have become aware of the loss. … (omissis) … The notice of abandonment of the ship must be served upon the insurer; .. (omissis)* …"

70. In his oral evidence, the Professor explained that this translation was unfortunately not correct, in two respects. First, he indicated that the English word "*casualty*" is an imprecise translation of the equivalent Italian "*sinistro*" and that it should more accurately be reflected as "*accident*" or "*factual occurrence*". Mr Tranos suggested to him that the correct translation was "*catastrophe*" but he disagreed. I have no reason to believe that Professor Lopez de Gonzalo is wrong about this but I do not think that it especially matters.

Under apparently all views, the reference, in this context, is to the physical event which results in damage to the vessel.

71. The second error is potentially more significant. Under Article 543, the starting date from which time starts to run has an alternative. It is either the date of the "*casualty*", or (if later) it is a date triggered by the insured's knowledge. In the written translation attached to the report, the relevant knowledge is of the "*loss*", in apparent contradistinction to "*the casualty*". If that were so, then it would raise the question as to what is meant by the "*loss*" and, in particular, whether it signified something other than the event itself. However, Professor Lopez de Gonzalo confirmed that this is an error in the translation and that, in the original Italian, there is no alternative noun applied to the insured's knowledge. Instead, there is merely a pronoun which refers back to the "*casualty*". Whilst it is unfortunate that the translation appended to the report was not accurate, I do not doubt Professor Lopez de Gonzalo's correction, and nor was this challenged.

72. The result is that, on the face of the Article itself, time runs from the date of the casualty, or the date when the insured becomes aware of the casualty, and that since this occurred in Yemen, the relevant period is 4 months. Professor Lopez de Gonzalo explained in his report that there "*might be an argument*" that time starts to run from the date when the insured has investigated the casualty and ascertained that the repair costs are such as to make the vessel a CTL. However, he then pointed out that (i) there was no authority to support that argument; (ii) the most authoritative textbook took the opposite view; and (iii) the reference to "*the casualty*" was, as he put it "*rather unequivocal*". The Professor also emphasised the importance of certainty as a determining factor in the interpretation of the Article.

73. The textbook to which he referred is "*Le Assicurazioni Marittime*" by Sergio Ferrarini at pp 487-488:

"The deadline runs from the date of the casualty ["sinistro"] or from that when the insured proves to have had news thereof. The wording, substantially identical with that of art. 637 of the abrogated Commercial Code, is clear to the effect that the deadline starts to run from the moment the insured has news of the casualty. In the preceding case law and literature there was an attempt to insert a qualification to the effect that the insured can not be considered to be informed of the accident until he has precise knowledge of its entity; and this view has been proposed again in relation to art. 543 of Code of Navigation, diminishing its weight to the effect that it is necessary that the insured has news of a situation that can turn into the case contemplated by the law. This view has been criticized by legal literature, that pointed out that the deadline to declare

the abandonment is given to the insured to allow him to establish the entity of the casualty and accordingly the existence or not of the conditions for the abandonment (as it appears from the fact that the law provides different deadlines depending on the distance of the place of the casualty), so that the dies a quo is that when insured has news of the occurrence of the casualty."

74. Professor Lopez de Gonzalo accordingly concluded that, "*the time limit runs from the date of the casualty (or of the owner being informed of it) and not from the date when the owner has ascertained the casualty is a total loss."* And, on the facts of the present case, that "*the notice was served far beyond the four months time limit provided by Art 543 cn and is therefore ineffective."*

75. Mr Tranos sought to put the case to the Professor that, because a CTL can be declared only if the cost of the repairs exceed a stated percentage of the insured value, it makes no sense to start time running on mere knowledge of the casualty, as opposed to knowledge that the cost of repairs qualifies the casualty as a CTL. Further he suggested that there had been two Italian cases, one in Genoa in 1976 and a later one in, I think, Palermo, which supported the interpretation that he was advancing. Professor Lopez de Gonzalo said that he was aware of those cases but that they were irrelevant and did not affect his opinion.

76. As a matter of logic, I can see some sense in the argument advanced by Mr Tranos. However, I have no basis on which to gainsay the evidence of Professor Lopez de Gonzalo that that is not what the Article (when properly translated) says and nor is it the way that it has been interpreted in Italy. Nor am I assisted by the discussion, such as it was, about the two Italian cases. No reports were adduced in evidence, I have not read any judgments and have no clear understanding of what the cases decided (although I do observe that the Genoa decision is mentioned in a footnote to the Ferrarini textbook and so surmise that, whatever it did decide, this did not undermine the views expressed by that author).

77. On the basis of the evidence before me, I accept the interpretation of Article 543 as articulated by Professor Lopez de Gonzalo, with the consequence that the NOA was ineffective under Italian law and that the only valid claim against Generali was for a partial loss.

Issue 2: Did the Claimant owe the Defendants (or any of them) any duty or duties as a matter of English law in the exercise of its rights under the Loan Agreement or the other Security Documents?

78. The Defendants' pleaded case is that the Bank owed "*duties of care at law and/or equity*" towards the Owner to exercise its rights under the Loan Agreement and security documents "*to ensure a fair and reasonable recovery*" of insurance proceeds. These duties are said to arise (a) by way of implied term of the General Assignment; (b) as a duty of care at common law; and (c) as a duty in equity.

79. The Bank resisted the suggestion that it owed a duty on any of the bases alleged. In particular, it relied upon those provisions in the General Assignment which grant wide powers of enforcement to the Bank, namely clause 4.2(b)(i) and 9.3. Given the breadth of the express powers, the Bank submitted that the Defendants' case founders on the principle that a term will not be implied which is inconsistent with a term expressly agreed: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor (Rev 1)* [2015] UKSC 72, [2016] AC 742 at [28], per Lord Neuberger. And for largely the same reasons, it was submitted that there was no room for any duty of care or equitable obligation. Reference was made in this respect to *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] Bus LR Digest D67 at [132], per Gloster J and *Hall v Saunders Law Ltd* [2020] EWHC 404 at [51], per Mr Richard Salter QC, sitting as a Judge of the High Court.

80. I was not persuaded by these submissions. In my judgment, they emerge from the wrong starting point, namely the assumed need to imply a term into the contract to support the pleaded duty. I acknowledge that the implied term is the first way that the case is put in the Defence but I consider it more productive to address the alleged duty in equity at the outset.

81. As a matter of law, and by reason of its status as a security holder, a mortgagee owes certain duties in equity to the mortgagor and to others with an interest in the equity of redemption. In *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, at 312, Lord Templeman, giving the Advice of the Board, described the equitable duty in the following terms:

> *"Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee*

may be exercised although the consequences may be disadvantageous to the borrower."

And at 314:

"The general duty of care said to be owed by a mortgagee to subsequent encumbrancers and the mortgagor in negligence is inconsistent with the right of the mortgagee and the duties which the courts applying equitable principles have imposed on the mortgagee. If a mortgagee enters into possession he is liable to account for rent on the basis of wilful default; he must keep mortgage premises in repair; he is liable for waste. Those duties were imposed to ensure that a mortgagee is diligent in discharging his mortgage and returning the property to the mortgagor. If a mortgagee exercises his power of sale in good faith for the purpose of protecting his security, he is not liable to the mortgagor even though he might have obtained a higher price and even though the terms might be regarded as disadvantageous to the mortgagor. Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch. 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition."

82. These passages identify two separate albeit related facets of the equitable duty owed by the mortgagee, at any rate over property. First, it must exercise its powers in good faith and for a proper purpose. Second, if the mortgagee exercises a power of sale, it must take reasonable care to obtain a proper price. As to what is a proper price, other epithets used are "*the fair"* or "*the true market"* value at the date of the sale: see *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997 at [19]. As is clear from a number of authorities including *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, the mortgagee does not owe a duty as to when to exercise its rights, even if the timing of the exercise or non-exercise may occasion loss or damage to the mortgagor. Ultimately, the recourse of the mortgagor is to redeem the mortgage if it wishes to prevent the mortgagee from exercising, or not exercising, the rights conferred upon it.

83. Even where the mortgagee does choose to exercise its powers, for example to sell a mortgaged property, the duty which it owes is not an absolute one.

It is only a duty to take reasonable care and it is entitled to look after its own interests. There is no reason to think that this is an especially onerous duty, though its satisfaction will depend on an assessment of the facts of any particular case. When considering, in *General Mediterranean Holding SA SPF v Qucomhaps Holdings Ltd* [2018] EWCA Civ 2416 at [26], the related duty to preserve or maintain a security, Newey LJ observed that a creditor would not be obliged to incur any sizeable expenditure or to run any significant risk to preserve or maintain a security. I would expect that, the same ought to apply in respect of any duty attendant upon the enforcement of a security.

84. Nor is the duty immutable. It is capable of amendment and constriction by contractual agreement. In *Lightman & Moss, "The Law of Administrators and Receivers of Companies (6th ed)* at [13-019], it is confirmed that, "*as with the common law duty, the equitable duty of care may be modified, and accordingly enlarged or reduced by contract."*

85. The duty which the mortgagee owes lies in equity and not at common law. And, given the existence of that duty, there would in the normal course seem to be no reason of necessity to imply a term to the same effect into the contract. The remedy for breach of the equitable duty is not common law damages but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what it actually received but for what it should have received: *Silven Properties* at [19].

86. As it seems to me, the position of the Bank under the security documents is, for these purposes, akin to that of a mortgagee seeking to exercise its rights over security, and the Bank's enforcement of the Owner's claim under the H&M insurance is analogous to the exercise of a power of sale over a mortgaged property. The foundation of the equitable duty, as explained by Patten LJ in *Purewal v Countrywide Residential Lettings Ltd* [2015] EWCA Civ 1122, [2016] 4 WLR 31 at [17]-[18], is the mortgagor's continued interest in the equity of redemption. The duty to take account of its interests, accordingly, stems from the fact that it retains the right either to receive the property back free from the charge on payment of what is due to the mortgagee or to any surplus proceeds of sale in the event that the security is realised. Under the terms of clause 2.6 of the General Assignment the Owner's entitlement to the re-assignment of all insurance policies upon the discharge of the outstanding indebtedness is set out as a matter of contract. In *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 at [74], Mance LJ described such a provision as creating an equity of redemption.

87. Mr MacDonald Eggers accepted that the Bank owed a duty of good faith in the exercise of its powers under the security documents. As I understood it, what he had in mind was a limitation by implied term on the exercise of a contractual discretion, as explained in cases such as *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558. He did not accept that the Bank owed any wider duty. He advanced 5 arguments.

88. First, he pointed to the fact that clause 4.2(b)(i) of the General Assignment permitted the Bank to act in its "*absolute discretion*". At the same time, however, he accepted that this did not mean "*unfettered discretion"*, because the Bank did, at least, owe the duty of good faith I have referred to. In my view, in accordance with the analysis I have set out above, the relevant question is not whether it is appropriate to imply a contractual term which is inconsistent with an express term, but whether the terms of the contract, on their true construction, operate so as to reduce or even eliminate the duty otherwise owed in equity. I do not read clause 4.2(b)(i) as having that effect.

89. Second, he said that there is no express reference in the documents to a duty of care. That is correct so far as it goes but does not counteract the equitable obligation.

90. Third, he said that the security documents gave the Bank the power but not the obligation to enforce its security. Again, correct, but not in my judgment relevant to this point.

91. Fourth, he said that there was a distinction in principle between the position of an assignee of an insurance policy and that of a mortgagee of property, submitting that there has been no previous case in which the equitable duty was held to apply to such an assignee. That said, he directed me to no case in which the point has been considered. It is obviously right that the legal characteristics of a contractual assignment differ from those of a mortgage over land but the question for present purposes is whether those differences are such as to affect the incidence of the equitable duty. The particular point advanced by Mr MacDonald Eggers was that, in the case of an equitable assignment, which he said this was, the assignor retained legal title and so could by itself commence legal proceedings on the policy even without the involvement of the assignee, whereas a mortgagor can do nothing without the consent of the mortgagee. As I suggested in argument, this strikes me as a rather hollow point. Even if, technically, an equitable assignor retains legal title sufficient to commence proceedings, this would in practice be subject to the control of the assignee. But in any event, even if there were a real

distinction here in the precise delineation of an assignor's residual powers, I cannot see that this has any relevance to the existence of an equitable duty in respect of the exercise by the mortgagee or assignee of its own powers.

92. Fifth, Mr MacDonald Eggers submitted that the terms of the relevant contracts did in fact exclude either the equitable duty or any liability for breach of the equitable duty. There are various overlapping and not wholly congruent provisions in the Loan Agreement and security documents describing the scope of the Bank's powers and its liability for losses caused by the exercise of those powers. I do not see any provision which either purports to or does exclude the duty itself. However, clause 9.12 of the Loan Agreement (which by clause 14.9 is given primacy in the event of any conflict) is in the following terms:

"Exclusion of Bank's liability

Neither the Bank nor any receiver or manager appointed by the Bank shall have any liability to the Borrower or any other Security Party:

a. for any loss caused by an exercise of rights under, or enforcement of an Encumbrance created by, a Security Document or by any failure or delay to exercise such a right or to enforce such an Encumbrance; or

b. as mortgagee in possession or otherwise, for any income or principal amount which might have been produced by or realised from any asset comprised in such an Encumbrance or for any reduction (however caused) in the value of such an asset,

except that this does not exempt the Bank or a receiver or manager from liability for losses shown to have been caused by the wilful misconduct of the Bank's own officers and employees or (as the case may be) such receiver's or manager's own partners or employees."

93. This clause purports to limit the extent of the Bank's liability in the exercise of its rights under the security documents (the term "*Encumbrance*" includes any mortgage charge or assignment). On its face, any liability of the Bank is excluded, save to the extent caused by its wilful misconduct. There has been no argument that the clause is ineffective or otherwise inapplicable.

94. In conclusion, I find that the Bank did owe the duties I have described in equity in respect of the exercise of its relevant rights under the Loan

Agreement and security documents, though not at common law or by way of implied term. The duty was owed as a matter of English law to the Owner, but the parties have by contract restricted the Bank's liability for breach of duty to losses caused by the wilful misconduct of its officers and employees. The rights as between the Bank and the guarantors arise under Greek law and are considered below.

95. There is also a related, or potentially related, point which I can briefly address at this stage. It is pleaded in the Defence to have been "*common ground*" that the outstandings owed to the Bank under the Loan Agreement could only be repaid out of the collection of the insurance proceeds. It is not entirely clear what is meant by this, or its intended significance, albeit that it may be thought to support the case on duty. Mr Sakellaris stated in terms in his witness statement that there was no such agreement or understanding. There is nothing to suggest otherwise in the contemporaneous material which, if anything, confirms the position as expressed by Mr Sakellaris. Accordingly, I reject that pleaded contention.

Issue 3: If so, did the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of insurance claims under the Hull Policies, breach such duty or duties?

96. The breaches of duty which are alleged by the Defendants are most fully articulated in their response to the Bank's CPR Part 18 request and may be summarised as follows:

    a. The Bank entered into a "*wholly unreasonable settlement*" with Generali. The settlement was unreasonable because (i) it was for less than 50% of the CTL value notwithstanding that "*a full recovery was proper*"; and (ii) it contained various admissions which were false and unreasonably made, in particular the admission that the NOA was time barred.

    b. In respect of the Lloyd's policy, the Bank (i) failed to make any recovery of insurance proceeds; (ii) failed to make a recovery within a reasonable time; and (iii) entered into a wholly unreasonable settlement with Generali which "*may hinder*" a full and proper recovery under the Lloyd's Policy.

    c. In respect of both policies, the Bank excluded the Owner from participation in negotiations with the insurers.

97. These allegations fall to be considered in the context of the pleaded case as a whole. Specifically:

    a. There is no allegation that the Bank did not exercise its powers in good faith. On the contrary, in their response to the Bank's CPR Part 18 request, the Defendants expressly disavowed such an allegation.

    b. There is no allegation that the Bank acted with wilful misconduct. Instead, the allegations are on their face allegations of breach of objective standards of conduct.

    c. So far as concerns the interaction between the Generali Settlement and the claim on the Lloyd's Policy, paragraph 11 of the Agreed List of Common Ground and Issues reads:

    "*The Generali Settlement is not binding on the London Market, and the Claimant and/or the First Defendant are entitled to maintain the full value of the insurance claim against the London market under the Lloyd's Policy.*"

98. On the latter point, and for the avoidance of doubt, nothing in this Judgment is intended to or could affect the rights of the Owner, or indeed the Lloyd's underwriters, under the Lloyd's Policy. Specifically, I make no findings as to whether or not the terms agreed as part of the Generali Settlement have any relevance to the Lloyd's Policy. The ambit of this Judgment is confined to the issues between the parties in this action, in respect of which I proceed on the basis of the agreed position stated above.

99. In the light of my findings as to the duty owed by the Bank, and especially the operation of clause 9.12 of the Loan Agreement, it must follow that the Bank can have no liability in respect of the allegations which have in fact been made. Clause 9.12 restricts that liability to wilful misconduct but no allegation of wilful misconduct has been advanced. As a result, and because the allegations made do not engage with the scope of the Bank's true liability, the Defence must necessarily fail.

100. Nevertheless, and in case I am wrong about that, I will proceed to consider this Issue on its own terms, setting the allegations made against the equitable duty I have described. I will take each in turn.

101. In respect of the Camogli Policy, the first and principal allegation is that the Generali Settlement was "*wholly unreasonable*" because it was for less than 50% of the value of the policy rather than the full CTL value. In my judgment, there are a number of reasons why this core allegation of breach of duty must fail:

    a. I have already concluded that, as a matter of Italian law, the NOA was ineffective and so there was no valid CTL claim. Accordingly, the premise upon which the allegation is made is unfounded. I reject any contention that the Bank breached its equitable duty in failing to secure a recovery on a basis which was legally unavailable.

    b. Even leaving aside my findings on Italian law, the Defendants' case has no substance. As a matter of fact, Generali had rejected the NOA and was refusing to pay on the basis of a CTL. It is not alleged that the Bank failed in some negotiating strategy to cause Generali to change its mind. The allegation instead has to be, and Mr Tranos confirmed to me that it was, that the Bank should have sued Generali to judgment in Italy. However, I do not accept that compliance with its equitable duty required the Bank to engage in such litigation at its own financial risk. That is especially so, in circumstances in which (i) the Bank had received legal advice that the NOA was ineffective under Italian law and thus that the claim for a CTL would fail; and (ii) the Defendants and their lawyers had themselves disparaged the prospect of litigation, describing it as slow and unpredictable.

    c. The allegations of breach also have to be considered in the light of the progress achieved by the Defendants in their own negotiations with Generali. The indicative offer which the Defendants had managed to achieve, at USD 4.225 million, was substantially below the level of the Generali Settlement. And as early as March 2017, Hill Dickinson were advising that an offer at a USD 4.75 million level would be a "*good deal*". In such context, the allegation that the Bank's settlement with Generali based on a total figure of USD 5.2 million was "*wholly unreasonable*" is unrealistic.

    d. The above conclusions are reached on the basis of the evidence before the Court. However, I remind myself at this point that the Defendants have not produced their disclosure, so that I have no first hand material evidencing the Defendants' own negotiations with Generali or their internal considerations of the progress or likely outcome of those negotiations or of the prospects, benefits or risks of

> legal proceedings. Whilst I do not need to infer that the Defendants' disclosure would have been adverse to their case, I am certainly not prepared to assume that there was some obviously better solution of which the Defendants were aware but which the Bank wrongly failed to pursue.

102. The further pleaded allegation in respect of the Camogli Policy is that the Generali Settlement wrongly contained the admission that the NOA was time-barred. Given my finding that the NOA was indeed time-barred, I reject the contention that any such admission was "*false and unreasonably made*". In any event, in the light of paragraph 11 of the Agreed List of Common Ground and Issues, there is no relevance to this point, as there is no case that the admission did have or might have an effect on the claim under the Lloyd's Policy.

103. Although not expressly pleaded, Mr Tranos did make further criticisms of the Bank's failure to include, as he saw it, in the Generali Settlement two of the "*conditions"* referred to in Mr Sakellaris' email of 14 February 2018, namely "*an express admission from Generali as to the cause of the damage (crew negligence)"* and *"express acceptance that the total repair cost of the Vessel would exceed its insured value."* Mr Sakellaris' evidence was that the Bank did seek the inclusion of these terms but that Generali were not willing to agree, although Mr MacDonald Eggers also submitted that the substance of the first "*condition*", namely that the casualty was an insured peril, was part of the Generali Settlement. Whether that is right or not, I find no merit in these further complaints. There is nothing to suggest that the Bank should have insisted on the inclusion of these terms, or indeed that they could have done so. And, in any event, given the agreed position of the parties in this action, there is no relevance to the point.

104. Turning now to the Lloyd's Policy, the main complaint is that the Bank has failed to make a recovery either at all or within a reasonable period of time. When I asked Mr Tranos what it is that, on his case, the Bank ought to have done, the answer was that it ought to have sued the Lloyd's underwriters to judgment in England. I disagree:

    a. As I have described the equitable duty, although the creditor must exercise its powers in good faith and for a proper purpose, it does not owe a duty as to when to exercise its powers, even if the timing of the exercise or non-exercise may occasion loss or damage to the mortgagor. Hence the complaint that the Bank has not or has not yet sued the Lloyd's underwriters is legally incoherent.

b. In any event, and in line with my conclusions in respect of the Camogli Policy, I do not accept the contention that the Bank ought to have commenced litigation at its own risk. Whether the equitable duty could ever require this of a creditor is not something I need to consider because I am in no doubt that there was no obligation in this case. It is apparent from the terms of the open offer which has been made by the Lloyd's underwriters that any litigation would be far from straightforward. The Bank has, as I have explained, expressed a willingness in principle to participate in litigation provided this were funded by the Defendants and provided it was given access to full information. These are by no means unreasonable conditions yet they have not been satisfied. And whether it would now be advisable to commence litigation when there is an open offer would require a careful balance of competing considerations, none of which have been explored before me. I find no failure in the Bank's approach to date and no breach of any equitable duty, if engaged.

105. The further pleaded complaint in respect of the Lloyd's Policy arises from the "*wholly unreasonable settlement*" with Generali which, it is alleged, may hinder a full and proper recovery under the Lloyd's Policy. I have already addressed, and rejected, this complaint.

106. Finally, there is the allegation that the Bank excluded the Owner from participation in the negotiations with the insurers. This sparked what appeared to be, at least in part, a linguistic dispute. The Bank pointed to various emails in which it sought, but did not obtain, the Defendants' "*co-operation*", by which it largely meant the provision of information. Mr Tranos argued that this was not the same as encouraging or permitting the Defendants' "*participation*" in the negotiations. This is one of the areas where Mr Tranos' submissions merged with attempts to adduce evidence. Even assuming that the Bank did not invite the Defendants' "*participation*", or indeed did not permit it, neither of which is to my mind established on the evidence, I do not see where the point would go. There is nothing in the Loan Agreement or security documents requiring the Bank to call for, or permit, the active participation of the Defendants in any negotiations it chose to conduct. Nor, was there any evidence to suggest, and I am not prepared to assume, that the Defendants' participation would have had a beneficial effect in persuading Generali to accept that which they had already rejected, namely the CTL claim; the previous history of negotiations rather suggests the contrary. There is nothing in this complaint.

Issue 4: Did the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of insurance claims under the Hull Policies, breach Articles 281 and 862 of the Greek Civil Code?

107. The following provisions of the Greek Civil Code have been pleaded by the Defendants:

    a. Article 281: this provision restricts the exercise of a creditor's rights if such exercise would exceed the limits imposed by good faith, morality or the purpose of the rights.

    b. Article 288: is a general provision concerning the requirements of good faith. Professor Georgiades explained that, at least in the context of the exercise of a creditor's rights, this Article adds nothing to Article 281.

    c. Article 862: this provides for release of liability under a guarantee where fault of the creditor leads to an inability of the debtor to pay. It is informed by the standards of fault set out in Article 330, and there are certain limitations on waiver in Article 332.

    d. Article 863: provides for the release of guarantees in the event of the creditor resigning securities. There is no allegation of breach of this Article, but it has relevance to an argument about waiver.

108. Dealing first with Article 281, this is in the following terms, as translated:

> "***Abuse of right***. *The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by the good faith or morality or by the social or economic purpose of the right*".

109. The allegation made by the Defendants is that the manner in which the Bank has dealt with the claims on the H&M insurance amounts to an abuse of right. However, according to the evidence of Professor Georgiades, the concept of the Article embraces the following aspects (a) good faith; (b) generally accepted morality of society; and (c) the social and economic purpose of the right. Further, Greek case law and legal theory have formed certain categories of behaviour which constitute typical abuse of right, namely (a) the malicious exercise of a right; (b) the weakening of a right; and (c) contradictory behaviour.

110. According to Professor Georgiades' expert evidence, the mere exercise by a bank of its rights under security agreements could not amount to an abuse of right for the purpose of Article 281, at least without some additional and blameworthy feature, such as malicious intent or long-term inaction creating the justified belief that the right will not be exercised. Nothing of that nature is alleged by the Defendants. Professor Georgiades' evidence in respect of this Article was not challenged by Mr Tranos in cross-examination and I accept it. I find that there has been no contravention of Article 281.

111. Turning to Article 862, the translation of the text is as follows:

> "***Extinction of guarantee.*** *The guarantor is released, if by reason of fault of the creditor the satisfaction of his claim by the debtor has been rendered impossible*."

112. Professor Georgiades explained that three conditions must be established for this purpose: (a) satisfaction of the claim by the creditor must be impossible; (b) the creditor is at fault; and (c) there must be a causal link between the fault and the impossibility of payment. As to the first condition, this normally requires the insolvency of the debtor to be established. Professor Georgiades indicated that "*mere financial difficulty*" is not sufficient. On the contrary, the burden of proof is on the guarantor and case law requires the provision of specific financial information on the debtor's assets and their change in value. The second condition is addressed by reference to Article 330 and is assessed on the facts. Fault involves the failure to take all reasonable steps that would be taken by a diligent person in the circumstances. Professor Georgiades described this as acting on a "*best efforts*" basis. The third condition involves a broad test of causation.

113. In my judgment, none of the elements of Article 862 has been established. I am unable to find that it is impossible for the Owner to pay the outstanding indebtedness. It may well be the case that the Owner is indeed insolvent but that is not a matter on which there is any evidence before the Court. For largely the same reasons as I have found that the Bank did not breach any English law duty which it owed, I am satisfied that it did not act in fault, by reference to Article 330, in that it did not fail to take all reasonable steps that would be taken by a diligent person in the circumstances. It follows that the requirement of causation is equally unsatisfied.

Issue 5: If so, are the Second and Third Defendants therefore released from their liability in respect of the Outstanding Indebtedness under the Corporate and Personal Guarantees?

114. The consequence of a contravention of Article 281, if established, is not the release of the underlying contract. The Article merely provides that a right may not be exercised in a contravening way. Professor Georgiades explained that the enforcement of Article 281 does not lead to the loss or extinction of the right. If, however, the conditions of Article 914 or 919 are satisfied, there may be a claim for damages. No such claim is made. In contrast, a contravention of Article 862 will on its terms lead to a release of the guarantee, to the extent that the fault of the creditor has rendered satisfaction of the claim impossible. However, none of this has been established on the facts.

115. Although it does not therefore require determination, I should mention a further point which was argued, as to whether the right to rely on Article 862 had in any event been waived by clause 2.14(a) of the Corporate Guarantee or clause 2.14 of the Personal Guarantee, which read as follows:

"*Without prejudice to the generality of any waivers included in the preceding Clauses the Guarantor hereby specifically waives without reservation, absolutely and unconditionally:*

(a) The benefit of discussion and any other rights, benefits or privileges granted to the Guarantor by articles 853, 855, 858, 860, 862, 863, 864, 867 and 868 of the Greek Civil Code…,"

116. Article 332 limits the ability of parties to contract out of liability for fault. In translation:

"*Agreement for waiver of liability arising from fault.*

Any agreement made in advance, restricting or excluding liability arising from wilful misconduct or gross negligence is considered null and void. As null and void is also considered any in advance agreement that the debtor shall not be liable even for minor negligence, if the lender is at the debtor's service… Same applies if the waiver clause is included in a term of an agreement that was not subject to personal negotiation…"

117. It was not suggested that the relevant clauses in the Guarantees were subject to "*personal negotiation*" and so my starting point is that Article 332 is potentially engaged, not just in respect of wilful misconduct and gross negligence but also even minor negligence. Professor Georgiades pointed in his evidence to the fact that Article 332 does not preclude waiver of Article 863, the terms of which in translation do not refer expressly to fault:

"*The guarantor is released if the creditor has resigned from securities that existed solely for the purpose of its claim, for which the guarantee has been provided, thereby causing harm to the guarantor."*

118. Professor Georgiades went on to explain that there is a "*long established*" view of the Supreme Court in Plenary Session that, where a guarantor waives reliance on the benefit of Article 863, he cannot rely on the same facts to raise a defence under Article 862. However, a more recent decision of the First Division of the Supreme Court has taken a different view. Professor Georgiades considers that this latter case is incorrect but, as I understand it, the question remains unresolved. In any event, it seems to me far from obvious that, in this case at any rate, there is a complete factual overlap between Articles 863 and 862: the Defendants' complaint is not so much that the Bank "*resigned from securities*", rather that it was at fault in the manner in which it enforced its security. Hence, even assuming that the guarantors had waived any entitlement to enforce rights arising from conduct described in Article 863, I do not immediately see why that should mean that that there was a waiver of an entitlement to enforce rights, if they existed, arising from different conduct falling within Article 862. Ultimately, this is not a matter on which I need to make a decision (as even minor negligence has not been established), and I do not do so. I only observe that the point is not straightforward.

Issue 6: Has the Claimant's conduct in relation to the Hull Policies, including negotiations leading to a settlement of claims under the Hull Policies, prevented the Defendants (or any of them) from satisfying the Outstanding Indebtedness?

119. This is an allegation of causation, said to apply in respect of all of the Defendants, though there is a direct overlap in the case of the Greek law defences I have just considered.

120. Given my findings that the Bank was not in breach of duty as a matter of English law or at fault as a matter of Greek law, separate issues of causation do not strictly arise. However, to the extent that the abstract question falls to be considered, I do not accept that the Bank's conduct in respect of the H&M insurance has "*prevented*" the Defendants from satisfying the outstanding indebtedness. There are two aspects to this:

    a. I do not accept that the Bank has prevented the Defendants from pursuing their own settlement negotiations, or indeed their own litigation, against either Generali or the Lloyd's underwriters. They commenced the negotiations with Generali but did not achieve a resolution. And, as I have explained, the Bank has in principle been willing to support the Defendants in litigation but subject to conditions which have not been satisfied.

    b. There is no basis on the evidence before me to find that, even absent recoveries on the H&M insurance, the Defendants are unable to pay the outstanding indebtedness, as must be the premise of the "*prevention*" contention. There is simply no evidence to that effect.

Issue 7: Is the Claimant entitled to Default Interest (as defined under the Loan Agreement) and, if so, in respect of which periods?

121. The Bank's entitlement to default interest arises pursuant to clause 3.4 of the Loan Agreement. It is not apparent that there is an independent defence to this claim. The Defendants plead by way of Defence a denial of the Bank's entitlement "*due to the Claimants' [sic] conduct in relation to the insurance proceedings."* Given my rejection of the complaint in that respect, no additional reason is advanced to resist the Bank's claim.

Issue 8: Is the Claimant entitled to recover the Outstanding Indebtedness from the Defendants (or any of them)?

122. I have rejected the Defences advanced by the Defendants. There is no separate dispute as to the quantum of the claim, and the numbers have been certified by the Bank in accordance with clause 5.4 of the Loan Agreement. The only further issue to mention is that it became apparent during the course of the evidence that some of the monies claimed by the Bank as part of the outstanding indebtedness represented legal fees incurred in this action. It seems to me that these sums ought to be dealt with as costs rather than as part of the debt, especially as costs budgets have been approved, and so I invite the Bank to provide a revised schedule which strips them out of the debt, albeit that they will no doubt re-appear in any schedule of costs.

Issue 9: If issue 3 above is answered affirmatively as regards the First Defendant, does the Claimant's action fail by reason of circuity and/or does it entitle the First Defendant to damages and/or payment on account which can be set off against the amount claimed in the Particulars of Claim?

123. Given my findings under Issue 3, this question of causation does not arise. However, even leaving aside breach of duty, there is nothing on the evidence to suggest (and indeed the evidence points strongly in the other direction) that the Bank had any realistic chance of recovering "*full value*" on the Camogli Policy. So far as the Lloyd's Policy is concerned, I accept the Bank's submission that, on the agreed basis on which this action proceeds, the rights under that policy have not been impaired and so no loss can have been incurred.

124. In such circumstances, there is no circuity of action and no set-off. Even had there been a claim, or a potential claim, then the Defendants would have faced the further difficulty of the anti-set-off provisions in the Loan Agreement.

125. Clause 5.1(a) of the Loan Agreement is the following terms:

> *"The Borrower acknowledges that in performing its obligations under this Agreement, the Bank will be incurring liabilities to third parties in relation to the funding of amounts to the Borrower, such liabilities matching the liabilities of the Borrower to the Bank and that it is reasonable for the Bank to be entitled to receive payments from the Borrower gross on the due date in order that the Bank is put in a position to perform its matching obligations to the relevant third parties. Accordingly, all payments to be made by the Borrower under this Agreement and/or any of the other*

> *Security Documents shall be made in full, without any set-off or counterclaim whatsoever and, subject as provided in Clause 5.3, free and clear of any deductions or withholdings or Governmental Withholdings whatsoever…"*

126. The Defendants have not pleaded or advanced any counterclaim. The Defence, as I have described it, arrives at the conclusion of set-off or circuity of action, which in the circumstances of this case I see as much the same thing. Had I been satisfied that the Defendants had a legitimate complaint of breach of duty on the part of the Bank, and that there was a sufficient case on causation, then the operation of clause 5.1(a) would have precluded its efficacy as a defence to the Bank's claim under the Loan Agreement for the outstanding indebtedness.

Issue 10: Are Articles 288 and/or 330 of the Greek Civil Code, in principle, relevant to the Claimant's claims under the Corporate and Personal Guarantees?

127. This is a curiously expressed Issue. If these Articles are relevant, then that relevance will emerge from the substantive issues in which they are engaged. The utility of a distinct Issue expounding on the abstract relevance of the Articles is not readily apparent. Be that as it may, the Issue may be dealt with shortly.

128. Article 288 reads in translation as follows:

> "A *debtor shall be bound to perform the undertaking in accordance with the requirements of good faith taking also into consideration business usages*".

129. There is no allegation on the pleadings that the Bank did not act in good faith or that it contravened this Article. Hence it is not relevant to the defences which are pleaded. As I have mentioned, Professor Georgiades' evidence was in any event that Article 288 had on the facts of this case, at least, no separate application beyond Article 281.

130. Article 330 is in the following terms:

> *"Responsibility arising from fault.*
>
> *Subject to any differing provision, a debtor shall be responsible for any default in the performance of his obligation resulting from wilful misconduct or negligence imputable to the debtor or to his legal representatives. Negligence exists when the diligence required in transactions is not provided*."

131. As explained by Professor Georgiades, this is an Article with no remedial consequences. Hence it cannot be relied upon as a free-standing defence but must always be raised with a specific provision that grants a remedy. Accordingly, I do not say that Article 330 is necessarily irrelevant to the defences which have been pleaded. But I do conclude that it has no independent relevance and certainly does not provide a self-standing defence.

Issue 11: Did the Claimant's conduct and/or negotiations leading to a settlement of insurance claims under the Hull Policies breach Articles 288 and/or 330 of the Greek Civil Code?

132. For the reasons given above, I find there was no breach of Articles 288 and 330.

Issue 12: If issue 4 and/or 11 above is/are answered affirmatively, did any such breaches amount to gross negligence within the meaning of Article 332 of the Greek Civil Code?"

133. This Issue does not arise.

DISPOSITION

134. I grant judgment in favour of the Bank against each of the Defendants on the outstanding indebtedness, subject to a revision in respect of the legal fees I have referred to.