



Neutral Citation Number: [2022] EWHC 3129 (Comm)

Case No: CL-2021-000535

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/12/2022

**Before :**

**Mr Stephen Houseman KC**  
**Sitting as a Judge of the High Court**

-----  
**Between :**

**Angeliki Frangou**  
**- and -**  
**Ioannis (John) Frangos**

**Claimant**

**Defendant**

-----  
**Timothy Hill KC & Andrew Feld** (instructed by **Wikborg Rein LLP**) for the **Claimant**  
**Oliver Caplin** (instructed by **Waterson Hicks**) for the **Defendant**

Hearing dates: **28, 29, 30 November & 1 December 2022**  
Draft judgment provided on **6 December 2022**

-----  
**Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

.....  
**MR STEPHEN HOUSEMAN KC**

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 08 December 2022 at 14:00.

**MR STEPHEN HOUSEMAN KC :**

**Introduction**

1. By this action the claimant (“AF”) seeks payment of US\$11,866,844, alternatively damages, plus interest from the defendant (“JF”). JF and AF are brother and sister. They are part of a successful and prominent Greek ship-owning family founded by their late father, Captain Nikolaos ‘Nicos’ Frangos.
2. The claim is made pursuant to a written agreement stated to be concluded on 1 September 2011 between the two of them and their father. The agreement is governed by English law. Although Capt. Nicos did not counter-sign it as originally envisaged, JF’s challenge to its enforceability on this basis was dropped by amendment to his defence settled by new counsel a week before trial.
3. In a separate judgment [2022] EWHC 3031 (Comm) handed down on the morning of the second day of trial, I dealt with disputes concerning the scope of JF’s pleaded case and his contingent application for permission to re-amend the defence following exchange of opening submissions. The scope of the pleaded dispute remains a feature of the analysis below. I refer to the agreement as the “TTA” as it was defined in my procedural judgment.
4. The TTA concerned the fate of a vessel known as *m/v TAURUS TWO* (“TT” or “vessel”). The core dispute is about the duration or durability of a payment covenant in clause 5 of the TTA. AF seeks payment in respect of (a) capital shortfall and (b) accumulated trading losses for the vessel said to have arisen upon its sale at her direction in May-July 2020. JF denies liability and separately disputes quantum.
5. His primary defence is one of construction: the TTA did not contemplate an indemnity arising where the vessel was not sold or refinanced upon the maturity of its existing finance on 1 September 2015. The parties’ subsequent conduct and communications - and contextually conspicuous silence or omission - are appropriated by each side in support of extra-contractual doctrines which are said to define or redefine their original substantive rights. Witness evidence was largely directed at this aspect of the dispute.
6. This action and its trial take place in the shadow of prior and pending litigation in this jurisdiction and abroad involving the same or related parties and events. My summary of relevant background is subsidised with gratitude by the narrative set out in the judgment of HHJ Pelling QC (sitting as a judge of the High Court) following a five day trial in October 2020 in *Ferand Business Corporation & others v. Maritime Investments Holdings Limited & another* [2021] EWHC 40 (Comm). That said, and as explained below with one important exception, I do not regard factual matters as central to determination of the issues before me at this trial.
7. There is a separate action pending in the Commercial Court which is set down for trial in July 2023. In so far as witness testimony at this trial encroached upon issues in that pending matter, I avoid saying anything that may be taken as assisting one side or the other in those proceedings. I was treated by both camps to snippets of pleaded propositions in that action in support of their rival positions in this case. This provided further data to support the theory that frequency of inadvertent analytical hypocrisy tends to increase in proportion to the number of words used in commercial litigation. I hope to avoid adding further data within this judgment.

8. Another and far more important shadow is cast by the disputants' late father. Capt. Nicos passed away in December 2016 at the age of 90. Although each was a successful and experienced businessperson in their own right by the relevant period, it is clear that the mutual dealings between AF and JF were arranged with and sometimes by or through, and effectively subject to, their father's *imprimatur* on anything significant affecting their business. This was not formal. But it was pervasive.
9. The inter-personal cohesion and impetus for compromise imposed by *paterfamilias* dissipated following his passing. The siblings spiralled into bitter dispute and ratcheting mistrust. The pre-existing family dynamic supplies a feature of the matrix when seeking to ascertain the proper meaning of the TTA. It was not an arms-length bargain between independent commercial operators in the usual or purest sense.
10. There are complex emotions and grievances on the part of AF and JF towards and about one another. Both feel they are indisputably correct. Each one feels wronged by the other. This was most evident in their oral testimony. The parties' respective advocates were encouraged to filter this out of their analysis and did so in a commendable way for the benefit of the Court and in furtherance of their respective client's interests. The trial was conducted efficiently and courteously. I am grateful to both legal teams for all their assistance.

### **Relevant Background**

11. From July 2007, TT was owned by a company ultimately belonging to JF called Shipping Fortune Maritime SA. It was financed by lenders led by Hamburg Commercial Bank AG (formerly HSH Nordbank AG) to whom I refer as "HSH" irrespective of the precise identity of primary or additional finance parties. That original loan was secured by a mortgage over TT and a personal guarantee from JF. TT was managed by JF's company called Irika Shipping SA.
12. By mid-2011 the loan was deep into default. TT's trading income was insufficient to service the facility. HSH qua mortgagee arrested the vessel in August 2011.
13. An agreement was reached between JF and AF, at the insistence or interposition of their father, whereby TT would be sold to a company beneficially owned by AF called Brandon Maritime SA ("Brandon") and thereafter managed by another company which she beneficially owned and effectively controlled called Maritime Enterprises Management SA ("MEM"). The purchase price was US\$33.5m. Brandon's acquisition of TT was part-financed with a new facility (US\$26.8m) with HSH; whilst Capt. Nicos himself contributed US\$7.8m in cash. AF provided a personal guarantee in respect of Brandon's liabilities to HSH.
14. TT was about six years old at this time. It was worth substantially less than US\$33.5m - somewhere in the region of US\$22m. Brandon was, therefore, in negative equity from the outset to the tune of around US\$4-5m.
15. This new loan facility ("Brandon Loan") was for a four year term maturing on 1 September 2015. The balloon payment was payable on that date. The loan profile was 15 years, although the vessel may have had a projected maximum lifespan of another 19 years or so at this time. In parallel with this sale and fresh financing of TT, HSH agreed a restructuring of the original loan (reduced through receipt of the US\$33.5m

sale proceeds to about US\$14m) which deferred repayment until the same maturity date as the Brandon Loan. HSH therefore released TT from arrest.

16. When speaking of beneficial ownership in this case, I refer to ultimate beneficial ownership. As a further shorthand, this is referred to simply as ‘owning’ or ‘controlling’ to reflect the functional or economic realities. Brandon is and has at all material times been legally owned by another Panamanian entity, Maritime Enterprises Holdings SA (“MEH”). MEH itself is and has at all material times belonged ultimately to AF. It is a holding company which owns the shares in Brandon and other single-vessel-owning entities with effective power to declare and distribute dividends or cash such as sale proceeds or operating profits.
17. The arrangement described above was a family-led ‘bail out’ for the benefit of JF. Some part of its impetus concerned protection of the family name and goodwill. It wasn’t a purely commercial or necessarily prudent solution to the problem of TT as an unprofitable or distressed asset. It was instigated as a form of parental intervention or mediation by Capt. Nicos.
18. This compromise solution imposed a burden upon AF. She took on and became personal guarantor of instalment payments under a new loan for a mortgaged vessel already in negative equity. This is not something she is likely to have undertaken as a matter of autonomous commercial judgement. Conversely, the deal provided a benefit to JF which he may not have been able to obtain from the ship-financing market at that time or in the foreseeable future. JF was nevertheless hurt by the loss of TT in this way. He wanted to buy it back from AF.
19. The above summary may be shorter and simpler than the parties expected. However, it constitutes the entirety of the admissible matrix against which the TTA falls to be construed. This reflects the pleaded position and what I consider pertinent, save to add that both sides were advised and assisted by their long-standing in-house lawyers who drafted the TTA for execution by the principals.
20. The precise drafting history is not material for present purposes. By way overview: draft text was provided on behalf of JF which covered only his buy-back option; additional text was inserted by hand on behalf of AF dealing with her rights in respect of TT if it was not bought back by JF, including being made whole in the event of a shortfall following sale or refinancing; JF then added a claw-back mechanism in the event that he overcompensated AF in light of the vessel’s trading performance during any refinancing. This process occurred over a few days.
21. The TTA was not fully executed on or by 1 September 2011. It is nevertheless common ground, so far as relevant, that it took effect on that date or at any rate that its only identified temporal marker (to use a neutral phrase) was maturity of the Brandon Loan *four years later* on 1 September 2015.
22. In essence the TTA contained two obverse and successive conditional options. First in both priority and time, it conferred a conditional buy-back option in favour of JF (clauses 1 to 3). Secondly and contingently, it conferred a conditional option in favour of AF as to what to do with the vessel if not re-acquired by JF within time, together with a payment covenant imposed upon JF in favour of AF in the event of sale or refinancing in accordance with her option. The latter was made subject to a conditional claw-back

in favour of JF in the event he overpaid on such covenant. The temporal circumscription and interaction of this package of sequential rights lies at the heart of the present dispute.

23. It is common ground that the conditions precedent to JF's buy-back option were not satisfied by or at 1 September 2015. It is also common ground that the vessel remained "*in the ownership of*" Brandon and under AF's effective ultimate control (via Brandon and/or MEM) on such date. As explained below, the vessel's financing with HSH was retrospectively restructured some time after the original maturity date of the Brandon Loan and then later sold at the direction of AF in May-July 2020. I refer to this as the "2020 TT sale".
24. By the time of the 2020 TT sale, Brandon and, therefore, TT was ultimately beneficially owned in equal half shares by AF and JF, via their respective corporate vehicles, pursuant to the so-called MEH Letter as defined and described below. This split ownership of the share capital of Brandon is treated as effective irrespective of which system of law applies on strict analysis. The parties differ as to when (and how) it occurred; but there is no dispute that such equitable state of affairs existed prior to the 2020 TT sale.
25. Returning to the narrative of events so far as material, it appears that AF and JF agreed at some point in the last quarter of 2012 to acquire another vessel and use its operating profits to service the financing of TT. A vessel called *m/v ORION III* was purchased in January 2013 by a company called Trinite Maritime Co. This vessel was delivered on 21 June 2013. It is common ground that the shares in Trinite were or became at some point held by MEH on behalf of Prosperity Overseas SA (owned by JF) and Sangamo Corporation (owned by AF) in equal proportion. From the date of delivery, *ORION III* was managed by AF's company, MEM.
26. There is a dispute between the parties as to when this arrangement was discussed or concluded. JF says it happened at a meeting at AF's offices on Monday 15 October 2012. Two days later, JF's lawyer (Vassilios Katsouris or "VK") sent a document purporting to be a draft addendum to the TTA to AF's lawyer (Vassiliki Papaefthymiou or "VP"). This was the second of two purported draft addenda to the TTA sent in this way, the first having been sent on or about 24 July 2012. Neither was signed by or on behalf of AF. No documentary reference was made to such draft addenda after they were sent in this way.
27. In circumstances where neither side has pleaded any reliance on either draft addendum in support of any extra-contractual doctrine - still less variation - and where the same is (by definition) immaterial to the proper meaning and effect of the TTA, I say no more about these documents. I observe only that the use of an addendum to an agreement to declare all of its operative provisions "*void*" and create a whole new set of forward-looking terms is somewhat unorthodox. The October 2012 draft addendum is the last recorded reference to the TTA made by anyone prior to the present dispute emerging and demand being made for payment under clause 5.
28. In these circumstances it is not necessary for me to resolve the factual issue of whether JF met with AF on 15 October 2012 or when and how the arrangements underpinning the acquisition of *ORION III* or the accounting treatment of its trading income or profits were discussed or concluded between AF and JF. Nothing turns on this for present purposes.

29. The financing of *ORION III* in June 2013 involved cross-collateralisation with TT. Each vessel stood as security for the finance obtained to purchase the other. It was understood that the income generated by each vessel could and would be used (amongst other things) to service borrowing related to the other.
30. Other vessels belonging to and operated by JF had already been or were migrated over or married together with AF during the following few years. The parties disagree as to the reasons for this occurring on each occasion. AF says that the relevant lenders in each case required the vessel to be transferred in this way and its management undertaken by or under her ultimate responsibility. These further vessels were or included: *m/v TITAN*, *m/v NIKOLAS III*, *m/v TINA IV* and *m/v ACHILLES II* (owned by a company called Whitney International).
31. By a letter dated 21 September 2017, MEH undertook to hold all the shares in six identified single-vessel-owning entities “*in equal parts for*” each of Prosperity (i.e. for JF) and Sangamo (i.e. for AF). The six vessels are the five identified in paragraphs 25 to 30 above plus TT. I refer to this as the “MEH Letter”. By its terms it is governed by English law and provides for the exclusive jurisdiction of the English High Court. There is a dispute as to whether it constitutes an agreement in an executory or bilateral/multilateral sense.
32. Paragraph (a) of the MEH letter records the existence of a trust and/or constitutes a declaration of trust in respect of the shares of the six identified shipowning entities. MEH confirms that “*we hold so far and shall continue to hold*” such shares on a 50:50 basis as described. The words “*hold so far*” tend to indicate a state of affairs that pre-exists the date of the letter itself. In so far as relevant shares were acquired by MEH prior to the date of the MEH Letter, that is consistent with such a reading of “*so far*”. There is, however, no prior written declaration to such effect by or on behalf of MEH in respect of the shares it received or held in any relevant corporate entity. It is not clear and, as explained below, I need not decide whether TT was devolved into joint ultimate ownership of AF and JF at the same time as *ORION III* was acquired or on another date. It is common ground that this was the case as from 21 September 2017.
33. Paragraph (c) of the MEH Letter contains or reaffirms an undertaking on the part of MEH to each of Prosperity and Sangamo as to provision of information (“*keep both of you fully posted*”) and its decision-making as regards the “*assessment and/or distribution of profits or losses*” from the operation of the six identified vessels. The gist of the latter undertaking is that all financial dealings between the two principals are to be accounted for and reconciled in future, irrespective of whether they concerned any of the six identified vessels. Such assessment and/or distribution by MEH is to be verified, so far as applicable, by “*independent auditors upon review of the financials and other records*” of the six shipowning entities. MEH does not undertake, however, to make any distributions or to do so on a 50:50 basis.
34. The MEH Letter was sent nine months or so after the death of Capt. Nicos in December 2016. It may be that the parties felt a need for more formalised arrangements at this time compared with the position when their father had been alive.
35. In the meantime, some years earlier, AF took steps through VP to seek an extension or restructuring of the Brandon Loan prior to its maturity on 1 September 2015. Indicative terms were obtained by 10 December 2015 and recorded more fully in March 2016. This was not formalised with paperwork, however, until December 2018. By a suite of

formal agreements dated 27 December 2018, the Brandon Loan was restructured with a maturity date of 1 September 2019. I refer to this as the “2018 Financing”.

36. JF appears to have acquiesced in AF arranging this restructuring of the Brandon Loan at all material times, i.e. prior to and since 1 September 2015. AF says he was consulted about the indicative restructuring terms in December 2015. Whether or not this occurred on a mutually understood basis as to his ongoing liability under clause 5 is fiercely disputed by the parties.
37. Both AF and JF signed a financial reconciliation as at 31 December 2018 (“2018 Reconciliation”). This recorded, amongst other things, an outstanding liability of US\$6,281,763 on the part of Brandon to MEM in respect of TT. That substantial figure impacted the bottom line figures as to the two principals’ state of account as between themselves vis-à-vis MEM. It recorded that JF owed US\$7,149,769 and AF owed US\$2,647,161. I proceed on the basis that the 2018 Reconciliation has a contractual status and effect: each side agreed to the financial balance recorded in it and (therefore) agreed not to contend that a different balance existed between them on the matters covered by it at the relevant date.
38. AF ultimately secured a substantial write down of the Brandon Loan by HSH as recorded in a settlement agreement involving herself (as personal guarantor), Brandon, Trinite and MEM dated 21 April 2020 as amended by side letter dated 15 May 2020 (“2020 Settlement”). The final/balloon payment was reduced to just US\$5.25m. AF also secured a release from her personal guarantee in respect of the instalment payments under the Brandon Loan.
39. TT was sold pursuant to a memorandum of agreement dated 8 May 2020. Delivery took place on 2 July 2020. The net sale proceeds were US\$4,606,000. AF was required to pay US\$644,000 to HSH by way of cash top up for the equity shortfall, as well as a release fee of US\$1,250,000 pursuant to the 2020 Settlement.

### **Terms of the TTA**

40. I attach the text of the TTA as an appendix to this judgment. Certain words or phrases are highlighted for emphasis. A number of features deserve attention at this point.
41. **First**, it was an interim arrangement on its face. It regulated the fate of TT during the ensuing four year period - referred to throughout as the “4 year[s] tenor” of the Brandon Loan. As noted above, it created a regime of successive and mutually exclusive conditional options in favour of each principal party:
  - (i) on the one hand, it gave JF a conditional right to buy the vessel back and thereby restore his personal esteem within that defined period subject to satisfaction of the matters identified in clause 3, including repayment of the US\$7.8m to his father; and
  - (ii) on the other hand, it gave AF a conditional right to sell or refinance the vessel at or after the end of such period and claim any financing shortfall (i.e. negative equity) and accumulated trading losses from JF pursuant to clause 5.

There is no overlap between these distinct conditional options. The dividing line between them is stated to be the date of maturity of the Brandon Loan, i.e. 1 September 2015.

42. **Second**, the TTA referred to and presupposed the concept of beneficial ownership of companies registered in foreign jurisdictions whilst also expressly providing for English law to govern the parties' contractual relationship (clause 6). Nothing turns on this in terms of legal analysis. The parties have proceeded on the basis that the *lex incorporationis* in each instance recognises or accommodates split ownership in the same way as English law. This contractual assumption is, therefore, taken to have been sound at the relevant time.
43. **Third**, and related to or perhaps in distinction to the previous point, Recital G of the TTA described Brandon as being "*beneficially controlled*" by AF whilst clause 1 used the phrase "*beneficially owned or controlled*" in another context. The parties have proceeded on the basis that this was intended to refer (at least) to *de facto* or effective/ultimate control by AF. This reflects the rationale of the tripartite rescue plan giving rise to the TTA whereby management of TT was to be assumed by AF. This contractual assumption is also, therefore, taken to be sound despite such phraseology.
44. **Fourth**, the payment covenant in clause 5 is conditional (among other things) upon AF either selling or refinancing TT in the event that JF himself has not validly opted to buy it back by or at the maturity date of the Brandon Loan. In either but no other event, JF becomes liable to pay to AF "*any such shortfall and accumulated losses*". I discuss these two concepts below. In my prior judgment I addressed the nature of the payment obligation itself. It is a primary liability on the part of JF. The middle sentence of clause 5 says "*hereby irrevocably and unconditionally guarantees*" to make such payments. This is not a 'see to it' covenant of suretyship. That case is not open to JF to run in light of my prior judgment. It also has intrinsic problems as a matter of analysis as touched upon in paragraphs [28] and [29] of that judgment. The payment obligation is in the nature of an indemnity, but it is not an indemnity in the pure sense because it doesn't respond to proof of a relevant loss or liability *incurred by* the indemnified party, here AF.
45. **Fifth**, it is clear that the second sentence of clause 5 is contingent upon the gateway or threshold set out in the first sentence. There has to be a sale or refinancing of TT at the relevant time to trigger such indemnity and the proceeds of either transaction have to be (at least) ascertained in order to crystallise a "*shortfall*" (capital loss) and/or "*accumulated losses*" (trading loss). The relevant time is stated to be "*at the end of the 4 year tenor*" of the Brandon Loan. There is a danger in taking this literally to mean the legal moment - or 24 hour period, as contractually defined in the Brandon Loan itself - where the first sentence speaks of a "*right to sell ... or to refinance*" and the second sentence contemplates ascertainment of a financial deficit calculable only by reference to "*the proceeds from the sale or refinancing*". I return to this issue below. I say nothing further at this stage about the concept of "*refinance*" / "*refinancing*".
46. **Sixth**, it is agreed that the phrase "*such shortfall*" in the second sentence refers to the first 22 words of that sentence ("*If the proceeds ... the new loan*"). The "*new loan*" is the Brandon Loan. Similar phrases appear in clauses 3.a., 3.c. and 4. The existence and quantification of any such "*shortfall*" may differ depending on whether there is a sale or re-financing of the vessel at the relevant time. If sold for less than the outstanding liability under the Brandon Loan, that is a classic or literal negative equity scenario.



However, if re-financed on terms requiring additional equity injection due to the value of the vessel impacting the amount capable of being borrowed that might involve other non-monetary factors such as additional security or covenants. Both scenarios nevertheless arise from the price (sale) or valuation (refinance) of the vessel.

47. **Seventh**, it is agreed that the phrase “*accumulated losses*” in the second sentence of clause 5 refers to the words “*any losses from the operation and management of the vessel from September 1, 2011*” in the first sentence. (Thus, the word “*and*” in this part of the second sentence reflects the word “*plus*” in the first sentence.) The same concept is referred to in clause 3.a. as “*any shortfall from the operation and management of the vessel from September 1, 2011*” - but all other references to “*shortfall*” denote a capital/financing deficit. No mechanism was provided for calculation of accumulated trading losses on the part of Brandon. This is a matter of proof in the ordinary way.
48. **Eighth**, any underlying liability in this regard would have been owed by Brandon (vessel owner) to MEM (vessel manager) rather than to AF herself. AF may feel such loss but only reflexively as ultimate beneficial owner of MEM. Since she was also ultimate beneficial owner of Brandon, however, it means she stood behind both entries on this notional or actual ledger. This position differs materially from that governing the capital deficit where AF was herself liable to HSH under a personal guarantee. This distinction adds a further difficulty to the putative characterisation of the clause 5 payment covenant as a ‘see to it’ guarantee. As already explained, I refer to it as an indemnity for convenience.
49. **Ninth**, nothing turns on whether “*such shortfall and accumulated losses*” is a composite phrase or comprises two separate sources of liability under clause 5. It is possible that a liability could have arisen for one but not the other, although as a matter of commercial reality if the vessel proved unprofitable over the relevant period (four years minimum) that would also suggest a capital deficit upon sale or refinancing at the end of the same period. At any rate, what matters for present purposes is that both types of loss are incurred by Brandon and neither can arise without the existence and identification of “*proceeds from the sale or refinancing*” of TT. In other words, Brandon’s receipt in a legal sense of such proceeds. That event crystallises any claim for payment under clause 5 and sets time running for limitation purposes.
50. **Tenth**, it is presumably implicit in this contractual scheme that AF in her capacity as *de facto* manager of the vessel (via MEM) for the relevant period would be required to keep the vessel in good working order and seek to utilise the asset to generate optimum operating profit. Clause 2 covers use of trading income. Whether these are best endeavours or good faith obligations does not matter. Without such responsibilities it might be unconscionable for AF to claim an indemnity from JF upon fulfilment of the conditions in clause 5, because any capital deficit from sale or refinancing and/or any trading losses since inception might be due to the fault of the management of the vessel during the relevant period. The same logic would apply to the management of the vessel during the period of any refinancing post-1 September 2015 in the context of the third sentence of clause 5. Brandon’s own loan covenants as to the vessel’s condition and operation would not necessarily preclude such implication into the TTA.
51. **Eleventh**, the only part of the TTA which looks materially beyond the maturity of the Brandon Loan is the third sentence of clause 5. This posits a situation in which TT has been refinanced rather than sold by AF at a permissible time not before maturity of the Brandon Loan (“*if the vessel will be refinanced*”) and JF has paid the capital shortfall

(“*the above shortfall which would in the meantime have been paid to [AF]*”) pursuant to his indemnity in the middle sentence. The third sentence provides an adjustment or restitution mechanism in this scenario if it turns out that “*the proceeds of [TT’s] employment during the course of such refinancing will be able to accumulate profits*”. On the face of things this refers to the initial agreed term of any refinancing of TT pursuant to the first sentence of the clause. It gives JF credit against his capital deficit liability (as paid to AF) for trading profits generated in a subsequent period of refinancing. This is the claw-back which JF insisted on adding to what became clause 5, as described above.

52. *Twelfth*, the parties did not make provision for what might occur if the ultimate beneficial ownership of Brandon (and hence TT itself) ceased to belong to AF, or indeed became shared between AF and JF, during the four year term of the Brandon Loan or at any material time thereafter. Nor did the agreement cater explicitly for a situation in which the Brandon Loan was restructured at or following its original maturity date and then later sold by AF, as occurred in the present case. That said, the agreement is brief and imperfect. Implication in this context may be justified in the interests of business necessity.

### Rival Positions

53. AF seeks reimbursement, alternatively damages, for two separate but cumulative amounts arising upon or out of the 2020 TT sale:
- (i) the sum of US\$1,894,000 as the capital/financing “*shortfall*” comprising (a) US\$644,000 paid by AF to HSH to cover the negative equity in TT at such time; and (b) US\$1,250,000 paid by AF to HSH as a release fee under the 2020 Settlement (“*Shortfall Claim*”); and
  - (ii) the sum of US\$9,770,290 incurred or suffered by Brandon as “*accumulated losses*” from the operation and management of the vessel between 1 September 2011 and 2 July 2020 (“*Trading Losses Claim*”).
54. JF denies liability to pay anything. He says that the payment liability under clause 5 was limited in duration to the four year original term of the Brandon Loan, such that a valid election needed to be made by AF at that time (and no later) to either (a) sell or refinance the vessel and then claim any indemnity by reference to the proceeds due to Brandon or (b) retain and operate the vessel from that point without any future recourse to JF. This was described as the ‘use it or lose it’ construction of clause 5. Although introduced by way of clarification in the context of JF’s ill-fated amendment application (see paragraphs [22] and [23] of my prior judgment) it is, logically speaking, JF’s primary case on construction.
55. JF further contends that his liability under clause 5 expired upon the happening of two other post-contractual events: first, the splitting of beneficial ownership of Brandon (and hence TT) on an equal basis between himself and AF; secondly, the restructuring of the Brandon Loan undertaken post-1 September 2015 resulting in the extension of its maturity date by a further four years to 1 September 2019 pursuant to (what became) the 2018 Financing. The parties disagree as to when the former occurred as a matter of legal analysis. The latter argument blends into the duration-based primary defence outlined above. Both amount to saying that clause 5 expired if AF did not elect to sell or refinance TT on 1 September 2015.

56. These construction arguments are themselves inter-dependent. If JF prevails on his primary case (“duration analysis”) then he doesn’t need either of the other two points (“durability analysis”) in so far as distinct and independent on proper analysis. On this basis clause 5 would have expired on (or perhaps shortly after) 1 September 2015 and AF thereupon lost her right of indemnification in the absence of relevant “*proceeds*” flowing from an election to sell or refinance TT. Indeed, on this analysis, the TTA as a whole expired or fell away in that moment, as there were no other substantive terms capable of surviving or operating.
57. It is possible, however, that the split-ownership point alters the time of such expiration. JF argues that Brandon was settled or transferred into equal beneficial ownership with effect from 21 June 2013, the date of delivery of *ORION III*, as later recorded in the declaration of trust contained in the MEH Letter: see paragraphs 31 to 34 above.
58. AF’s firm position forming the basis of her pleaded claim is that the restructuring of the Brandon Loan through (what became) the 2018 Financing was not “*refinance*” or “*refinancing*” within the meaning of clause 5. AF held this position throughout trial and eschewed any putative alternative claim based upon there having been a valid election to refinance on or around 1 September 2015, subject to issues of amendment within the limitation period (if proceeds were deemed received by Brandon pursuant to the 2018 Financing or thereafter) or outside the limitation period if the relevant claim were treated as arising on or around 1 September 2015.
59. In response to these construction arguments, AF pleaded an estoppel by convention in her Amended Reply shortly before trial. This is to a large extent ‘equal and opposite’ to the estoppels advanced in the alternative by JF. They overlap factually and analytically. As I said above, both sides seek to appropriate the mass of post-contractual circumstances to feed extra-contractual definitions or redefinitions of their original substantive rights.
60. In so far as JF fails on any of his existential positions, such that he would otherwise have remained liable under clause 5 at the time of (Brandon’s receipt of proceeds from) the 2020 TT sale, it is said that the TTA was impliedly rescinded in the meantime by the parties through a series of dealings of an independent contractual nature. JF’s estoppel arguments hang off implied rescission, as does a further and final allegation of last resort to the effect that AF waived her rights under clause 5 through the same set of circumstances.
61. Neither side says that the TTA was varied. Subjective intention, understanding or belief - and hence the vast majority of witness evidence, written and oral, in this case - is immaterial to any of the legal concepts put in play. Neither side alleges sharp practice or bad faith.
62. If JF emerges from this analytical forest with a subsisting liability under clause 5 in respect of (i.e. by reference to the proceeds of) the 2020 TT sale, he takes various points as to the recoverability of or AF’s burden of proof on both the Shortfall Claim and the Trading Losses Claim. These were referred to at trial as ‘quantum’ issues. They involve points of construction about “*such shortfall and accumulated losses*”.

## Analysis

63. The positions summarised above break down between contractual and extra-contractual inquiries. The proper meaning and effect of the TTA, including any necessary implication, is the primary and dominant area of dispute. The extra-contractual doctrines - implied rescission, estoppel and waiver as alleged by JF - are only engaged if he is otherwise liable under clause 5; AF's converse estoppel case is only engaged if JF is not liable under clause 5 as a matter of primary contractual analysis.

(i) *Duration of the TTA*

64. The starting point must be the words of the TTA itself. The agreement makes multiple references to the "4 years' tenor" / "4 years tenor" / "4 year tenor" of the Brandon Loan as highlighted in the appended version. Clause 1 speaks of "the maturity of the 4 years tenor" whilst clause 5 (first sentence) refers to "at the end of the 4 year tenor". No other markers of duration or temporal applicability exist in the agreement, save for "during the course of such refinancing" in the third sentence of clause 5.

65. The TTA thus mentions and accommodates the existence of three distinct and avowedly successive periods:

(i) The first period covers the four year term of the Brandon Loan. JF's conditional buy-back option has to be exercised within this period.

(ii) The second (and contingent) period commences on the date of maturity (aka "at the end of") the four year term of the Brandon Loan. AF's conditional option to sell or refinance TT arises on this date if subsisting in light of (i) above. JF's liability to compensate or indemnify AF arises upon receipt (by Brandon) of "the proceeds from the sale or refinancing" pursuant to the prior exercise of such option by AF.

(iii) The third (and also contingent) period spans "the course of such refinancing" of TT in the event that AF validly elects to refinance the vessel pursuant to (ii) above. Since the duration of any potential refinancing was unknown at the time of the TTA, this period is defined functionally rather than by reference to a known term.

66. The conceptual crucible is the end-point of period (ii) above. JF says that was 1 September 2015 irrespective of any restructuring or extension to the Brandon Loan, absent a consensual extension of both parties' options under the TTA. AF says it was open-ended to accommodate any such restructuring or extension which was itself reasonably foreseeable at the time of the TTA. With one wrinkle about timing, the choice is between these two interpretations. Each party's case can be said to inflict some degree of unfairness - and, no doubt, much unhappiness - on the counterparty.

67. I prefer the interpretation advanced by JF, subject to one temporal mitigation.

68. The first sentence of clause 5 confers a conditional option upon AF as to the future fate of the vessel. That option involves an election to be made on the face of things on the date of maturity of the Brandon Loan, i.e. 1 September 2015. It is expressed as a "right to sell the vessel [...] or to refinance..." on certain conditions. That right is capable of being exercised by election being made on the relevant date itself. Such election is irrevocable by its nature. That is the essence of election.

69. If AF elected to sell, she need not *by that date* have concluded a sale contract for the vessel. Likewise if AF elected to refinance, she need not *by that date* have concluded refinancing terms with a (new) lender. But the election between these options, and indeed between either of them and neither of them, needed to be made by that date on the face of things. It is, after all, just an election. It need not even be written.
70. The alternative for AF was to choose neither of the steps that would trigger her right of indemnity in clause 5. She was free to keep the vessel, negotiate extended financing terms from HSH and seek to trade through to potential profitability under her ultimate control via MEM. That was a commercial call for her to make on 1 September 2015 if otherwise free to do so. She might get that call right or wrong as matters turned out. But it was her call to make.
71. If she decided to keep the vessel without refinancing it and claiming any shortfall from JF, she did so at her own risk from that moment. She forfeited the clause 5 indemnity. In so far as this may operate harshly by requiring an irrevocable election to be made by AF on a specific date - which is a difficult premise to accept given the sophistication of the parties and the clear words of their agreement - any such harshness would be mitigated by *de minimis* allowance or a period of reasonable time in which to exercise such option/election. This is the temporal mitigation or wrinkle alluded to above. It makes no difference in the present case because AF did not purport to exercise her option/election until 2020. I nevertheless use the phrase "on/about 1 September 2015" to reflect this point in so far as it matters.
72. The contrary construction is that JF's indemnity was applicable or extendable for the operational lifetime of the vessel (a further 15 years or so by 1 September 2015) and/or outstanding loan profile (a further 11 years by that date) at AF's unilateral election. This would mean that JF's financial covenant would hang over him for a very long period of time into the future notwithstanding the fact that TT itself was under the sole operational control and direction of AF throughout such period. Against that, it would also mean - by reciprocity or symmetry of treatment - that his own buy-back option was extended in the same way and to the same extent.
73. In so far as considerations of relative or disproportionate unfairness matter in this context, especially given the family dynamic which brought about this imperfect agreement in the first place, I am satisfied on balance that such risk falls upon AF:
- (i) If she had wanted to keep her options open on the same basis beyond the four year period referenced throughout the TTA she could and should have stipulated for that in its wording. That would have been a simple task as a matter of language.
  - (ii) Although the outlook for TT's future trading health, and hence equity prognosis at maturity of the Brandon Loan, was far from optimistic in August 2011, the uncertainties inherent in such prognostic evaluation were known to both parties as experienced maritime businessfolk and reflected in the claw-back provision within clause 5 itself. The fact that AF regarded both the buy-back option and claw-back mechanism as 'pie in the sky' does not alter this objective risk profile. If anything, it put the onus on adding some words of extension or extendability into the TTA.

- (iii) JF undertook to repay the US\$7.8m injected as cash by their father as a condition (if itself triggered) under clause 3.e. of the TTA. However, AF undertook no such or similar obligation as the vessel's new ultimate owner and operator. AF thereby took the benefit of this cash injection as a parental gift, albeit taking on a personal guarantee for a much larger amount. The whole deal was a family-led and father-inspired bail out for JF. It involved mutual compromise and sacrifice.
  - (iv) AF's personal guarantee is something Capt. Nicos presumably felt was acceptable subject to the siblings agreeing some form of mechanism for the fate of the vessel and allocation of any shortfall as and when such fate was determined at the end of the new financing cycle. It is far from inconceivable that any shortfall not remedied through that chosen mechanism, i.e. what became clause 5, might itself be compensated by Capt. Nicos himself. It is far from clear whether the clause 5 indemnity was something either side expected to see contested or enforced *inter se* during their father's lifetime. That never transpired because he passed away a year or so after the initial contemplated term of the TTA at a time when there was no crystallised shortfall or demand for payment under clause 5.
  - (v) Although not relevant to proper construction, the deal struck in October-December 2012 which led to the acquisition of *ORION III* in June 2013 and use of its trading income to service the cross-financing put in place, might be said to contemplate expiration of the TTA on 1 September 2015. It is not in itself inconsistent with the subsistence of the TTA through until 1 September 2015; but it suggests a recognition of the need for additional trading income within that four year period to facilitate JF's prospects of buying TT back *within that timeframe* and, come what may, reduce his financial exposure to AF if then sold or refinanced within the near future.
  - (vi) There is no evidence or suggestion that JF sought a longer period to buy back TT. Clause 5 operates only where the buy-back option has not been exercised by JF. In a sense it is a consequential or secondary feature of the TTA. If JF did not want or expect longer than four years for his buy-back option, it is unclear why (or how) AF could legitimately expect an indefinite indemnity in respect of her unencumbered decision as to the fate of the vessel after such four year period. This feels the wrong way round in terms of the genesis of the bargain.
  - (vii) The third sentence of clause 5 of the TTA contemplates that JF's payment liability would crystallise at a time that was proximate to 1 September 2015, i.e. when "*the proceeds from the sale or refinancing*" were received to the credit of Brandon and any "*such shortfall or accumulated losses*" could then be quantified. The former would depend on completion under a relevant capital transaction. The latter would depend upon some form of reliable or verified trading accounts for TT. In either case, however, payment by JF was contemplated as made ("*would have in the meantime paid to [AF]*") so as to engage any claw-back mechanism "*during the course of [any] refinancing*". AF would need to have elected to refinance TT on - or within a reasonable time of - 1 September 2015 in this scenario even on her own case.
74. Ultimately this comes down to the words in the TTA. Those words contemplate its expiration on 1 September 2015 and crystallisation of any payment liability under clause 5 referable to an election being made on/about that identified date. No other date or time

marker appears in the agreement. It would require something strong in the admissible matrix or an intolerable commercial injustice or absurdity to modify the meaning of those express words. As explained above, I find neither impetus in the context of this family-led arrangement.

75. I reach this conclusion on primary construction without resort to *contra proferentem* or any canon of construction that might apply to an indemnity in the pure legal sense. My conclusion is based on general principles of construction applied in this family context. To accede to AF's construction would involve a re-writing of the parties' imperfect bespoke bargain, in my judgment.

**(ii) Durability of the TTA**

76. The above conclusion makes it unnecessary to determine the durability analysis. Nothing turns on whether JF's payment obligation fell away in June 2013 as distinct from expiring when no election was made by AF to sell or refinance the vessel on/about 1 September 2015. I return to the basis of acquisition of *ORION III* and the MEH Letter further below.

77. That said, I see force in the split-ownership point advanced on behalf of JF. The premise for the TTA was Brandon's (and, therefore, AF's) acquisition of the vessel pursuant to the family rescue plan:

- (i) This formed the material basis recited in the TTA. The reference in Recital G to "*beneficially controlled by*" can only sensibly have been understood to include AF's beneficial ownership of Brandon as well as her effective control over its affairs.
- (ii) This position underpinned the buy-back option in clauses 1 to 3. Why would Brandon need to sell the vessel to *another company* if it was itself in the joint ultimate ownership of JF and AF? The obvious transfer mechanism would be a further settlement into JF's full ownership via MEH without the need for any additional capital transaction.
- (iii) The same premise is baked into the concepts of "*shortfall*" and "*accumulated losses*" which are the subject-matter of the indemnity in clause 5 itself. Brandon suffers both categories of loss. The indemnity does not expressly permit a 50:50 split or 50% discount in respect of either. JF is obliged to pay the full amount for both. The premise for this liability is that AF fully owns Brandon. Brandon's loss is treated as her loss as a contractual fiction or shorthand. If this ceases to be the case, the premise for the indemnity is vitiated. This analysis underpins some of the 'quantum' points arising from the construction of clause 5 addressed briefly in paragraph 81 below.
- (iv) Finally, AF's sole ultimate ownership of TT appears to underpin the first sentence of clause 5. However, it is conceptually possible that a 50% owner of an asset can obtain and retain a unilateral option vis-à-vis its co-owner to determine the future usage or fate of such asset.

78. I would, therefore, have accepted the proposition advanced by JF that even if his clause 5 liability survived beyond the absence of an election by AF on/about 1 September 2015 to sell or refinance the vessel, it nevertheless expired or was otherwise discharged when

the ultimate ownership of Brandon (and hence TT) was split equally between JF (via Sangamo) and AF (via Prosperity) on 21 September 2017 at the latest. JF's payment covenant would not, therefore, have subsisted at the time of the 2020 TT sale.

**(iii) Quantum**

79. I mention these points briefly in light of the conclusions set out above.

80. As regards the Shortfall Claim: If JF was liable under clause 5, I would be satisfied that "*such shortfall*" included the release fee paid by AF to HSH pursuant to the 2020 Settlement. To isolate and ostracise this payment from the net economic burden of, i.e. what was required in order to discharge, the financing of TT would be a triumph of form over substance. As a matter of economic reality it represented part of or a proxy for "*the outstanding indebtedness to HSH*" under the relevant financing for TT.

81. As regards the Trading Losses Claim:

(i) Even if JF was liable under clause 5, I would have doubts about whether such liability could or should be 100% of the net trading loss sustained by Brandon in circumstances where JF was ultimate co-owner of that entity for some part of the relevant trading period. This feeds more properly into the durability analysis covered in paragraphs 76 to 78 above.

(ii) Brandon's net trading losses would not, however, be reduced to reflect any income received (if indeed so received or credited) from *ORION III* after its delivery in June 2013. Such income was not generated by TT. It did not arise from the "*operation and management of the vessel*" but from a collateral arrangement between ultimate principals as to mixed allocation of and accounting for trading income.

(iii) On the assumption that JF has lost on the duration and durability analyses, such that his liability under clause 5 endures by reference to an election that AF could have made and did make materially later than 1 September 2015, there is no reason to cap the relevant trading losses at 1 September 2015.

82. This disposes of all issues of construction in respect of the TTA.

**(iv) Counter Estoppel**

83. I refer to AF's estoppel as the 'counter estoppel' given its procedural context. JF's estoppels were pleaded first in time and formed a more dominant feature at trial. AF pleaded her estoppel case by way of consequential amendment shortly before trial. Paragraph 20.2 of the Amended Reply responds to paragraph 32.b. of the Amended Defence which also includes JF's allegation of implied rescission. In light of my conclusions above, it is this estoppel advanced by AF that now matters.

84. AF contends for an estoppel by convention. It is said to be responsive to an adverse primary construction based upon the duration analysis and that aspect of the durability analysis that effectively corresponds with it. AF's closing submissions made it clear that the estoppel does not respond to the split-ownership aspect of the durability analysis as addressed above - although it is not clear why it would not and my treatment of it below draws no such distinction.



85. The pleaded focus of the estoppel is a discussion in December 2015 between AF and JF about an initial proposal from HSH to extend the Brandon Loan. As noted above, AF's lawyer (VP) had commenced such negotiations a year earlier in anticipation of the maturity date on 1 September 2015. JF is said to have agreed in this discussion that extending the Brandon Loan was the "*only way forward*" for the TT at that time.
86. AF alleges that the "*fundamental premise*" of this discussion in December 2015 was that JF remained and would remain liable to indemnify her under clause 5 of the TTA in the event that she later sold the vessel during or after the proposed extended term of the Brandon Loan. AF alleges that both parties acted on this common assumption in their respective commercial interests by AF not selling the vessel and thereby protecting JF from a crystallised loss under clause 5. The common assumption is said to have permeated and underpinned the 2018 Financing which formalised the extension of the existing finance through to 1 September 2019.
87. As described above, no mention was made of the TTA in any document at any point after the second draft addendum sent on 17 October 2012 (see paragraph 26 above).
88. I am not satisfied that any common assumption arose in December 2015 to the effect alleged by AF in this context. If the parties wished to (in effect) retro-extend the effect of clause 5 of the TTA, and thereby inevitably extend the buy-back option in clauses 1 to 3, I would have expected to see that documented in some way. I would also have expected to see evidence of JF requesting an extension to his buy-back option (prior to its lapse) given its centrality to the TTA. As noted above, the short agreement is replete with references to the initial four year term of the Brandon Loan maturing on 1 September 2015 and makes no express reference to the consequences of AF choosing to neither sell nor refinance the vessel upon that maturity date.
89. I am unable to find as a matter of fact that the subsistence of JF's liability under clause 5 was discussed orally between the parties, still less acknowledged by JF, when they met during December 2015. This was a year before their father's death. In particular:
- i. JF denies any mention of the TTA in the context of the proposed restructuring of the Brandon Loan or otherwise.
  - ii. The alleged discussion of the TTA lacks any contemporary documentary support.
  - iii. AF was pressed on this during cross-examination: Transcript Day 2, pp.41-42. She was unable to state with any specificity what JF said to her or when in this regard.
  - iv. I found AF to be belligerent, evasive and unclear on this important issue. She insisted on what she said JF knew, rather than anything he had said to her. She referred to conversations during or since August rather than in December 2015. She said the TTA was "*the elephant in the room*" which suggests the opposite of it being mentioned or acknowledged.
  - v. There is no allegation that JF acted in bad faith or with sharp practice in taking advantage of a known or suspected state of subjective understanding on the part of AF. The estoppel is based on an alleged common assumption.
  - vi. AF fails to discharge her burden of proof on this factual matter.

90. The protagonists ignored the existence and effect of the TTA at all material times. Their reasons for doing so need not have been aligned, could have changed after their father's death and may never be understood. No document passing between them acknowledged the existence of a contingent liability on the part of JF to cover any capital deficit or net trading losses of TT whether accrued or accruing in future. The TTA fell into a black hole in the scheme of their interpersonal dealings over many years spanning the death of their father.
91. The 2018 Reconciliation is not itself fatal to the existence of the alleged estoppel. It is, however, a material contra-indicator as to the existence and operation of a common assumption as alleged by AF. Whilst I am not persuaded that the 2018 Reconciliation would found a converse estoppel in favour of JF, as explained below, accounting for TT on the same basis as eight other vessels in that signed statement of account would tend to suggest - if it were a straight choice between polar positions - that no such indemnity was in play in respect of TT rather than the opposite assumption: see paragraphs 101 & 102 below. There is no stark choice in play. Each side has the burden of proving the ingredients of estoppel as alleged by them and in the premises so alleged. The 2018 Reconciliation is neutral or equivocal in this juridical context.
92. It is also difficult to see how the parties operated on the basis of such common assumption as they are alleged to have done from December 2015 onwards:
- (i) On the premise for this estoppel arising, clause 5 had lapsed months earlier when AF did not elect to either sell or refinance the vessel and thereafter seek her indemnity by reference to the proceeds received by or to the credit of Brandon.
  - (ii) An estoppel based upon a conventional accord created after lapse or discharge of the relevant substantive right or agreement would amount, in effect, to a retrospective variation of the agreement (if still on foot) or a novation between the same parties (if it had expired). Any such novation would either be on the terms of clause 5 alone or on the basis that the whole agreement was resurrected without specific reference to the original four year term - and, at the relevant time, still the only formalised term - of the Brandon Loan. This would require specific agreement between the parties.
  - (iii) Neither of the above contractual phenomena is pleaded. The natural necessity for one or other of them illustrates the difficulty of using a post-expiration estoppel by convention to resurrect or retro-vary a spent promise or contract. At the very least, it underscores the need for something clear and compelling in the parties' mutual dealings from which to infer a common assumption with such a powerful legal effect. Whilst that may not require documentary proof, its absence is telling.
  - (iv) So far as relevant, AF had her own incentive not to crystallise and enforce a clause 5 claim against her brother in/after December 2015. It was an unsecured claim with questionable commercial value. A fight of this kind is unlikely to have met with their father's pleasure or blessing.
93. For these reasons, I reject the 'counter estoppel' contended for by AF.

(v) ***Implied Rescission, Estoppel & Waiver***

94. In light of my conclusions above, it is not necessary or desirable to determine JF's alternative suite of extra-contractual solutions. Each is designed to achieve the same contractual position as has been accepted above on a primary basis, namely the expiration or extinction of JF's liability under clause 5 in the absence of an election by AF to sell or refinance on/about 1 September 2015.
95. If I had been against JF on primary construction, I do not regard any of these doctrines as operating to achieve the same result extra-contractually. The less said about them the better given that such events appear to be involved in proceedings pending in the Commercial Court.
96. The pleaded case for all three doctrines is set out in paragraphs 20 to 28 of the Amended Defence. The period covered by such events starts in December 2012 (paragraph 20) and ends in May 2020 (paragraph 28). It does not, therefore, include any communications or circumstances such as the draft addendum in October 2012.
97. Implied rescission could only occur where the same contracting parties had engaged in further contractual relations on a basis so inconsistent with the subsistence of their original contract that they are to be taken as having discharged it by implied consent. Such implied consent is conceptually akin to a distinct implied contract by which the parties agree that the relevant prior contract is discharged in full: see *Cobalt Data Centre 2 LLP v. Revenue & Customs Commissioners* [2022] EWCA Civ 1422; *Chitty on Contracts* (34th ed. 2021) at 25-030 - 25-031.
98. I deal below with the three (sets of) subsequent contractual relations said to comprise implied rescission of the TTA.
99. **Post-21 June 2013.** The arrangements surrounding acquisition and co-ownership of and use of income generated by *ORION III* did not impliedly rescind the TTA. Even if amounting to a fresh legal relationship between AF and JF, the income-mixing and cross-financing of the two vessels from June 2013 was not necessarily and fundamentally inconsistent with or preclusive of the survival of clause 5. Even if ownership of TT was split as early as 21 June 2013, as it may have been treated as by the principals (see paragraphs 29 & 32 above), on the current premise that would not have vitiated clause 5 as a matter of organic construction or necessary implication. AF's conditional option in the first sentence could sit with such arrangements, as could JF's concomitant or consequential liability in the second sentence. This may be an uneasy fit, involving some conceptual friction; but it can be forced together to work in practice. The indemnity could survive albeit waiting in the wings and not recorded in any accounting records that reflected this new cashflow or accounting arrangement as between AF and JF.
100. **MEH Letter.** The MEH Letter is not an agreement between AF and JF at all. It is a unilateral undertaking by MEH to their respective corporate vehicles: see paragraphs 31 to 34 above. In so far this is an admissible contractual arrangement for the purposes of implied rescission, I do not consider it to be necessarily or fundamentally inconsistent with survival of the TTA. The fact that MEH undertook certain things in relation to its "*assessment and/or distribution of profits or losses*" relating to TT and five other vessels is not anathema to the survival of the TTA as a whole or (if relevant) clause 5 itself. It is an arrangement governing the calculation and distribution of profits or proceeds by a shareholder qua trustee to its corporate beneficiaries. It is legally possible for clause 5 to subsist in parallel with such arrangements.

101. **2018 Reconciliation.** Even if the 2018 Reconciliation constitutes a legally binding agreement between AF and JF, it is not necessarily or fundamentally inconsistent with the survival of the TTA as a whole or (if relevant) clause 5 itself: cf. paragraph 91 above. The 2018 Reconciliation records a substantial liability owing (i.e. from Brandon) to MEM in respect of TT as at 31 December 2018. That liability in turn impacted the relative position of AF and JF vis-à-vis MEM at such date. In so far as this was a cashflow snapshot of the principals' relational state of account, it is uninformative. The fact that TT is treated in the same way as eight other vessels does not mean that AF and JF were impliedly agreeing that the TTA (if otherwise subsisting on its own terms) was thereby or had already been discharged. This document is silent as to any collateral arrangements existing between the two principals. It records a state of account between each of them and MEM. It is legally possible for clause 5 to subsist in parallel with such accounting treatment.
102. For similar reasons, the estoppels alleged by JF by reference to the same circumstances during December 2012 to December 2018 would not operate to extinguish what was otherwise a subsisting obligation of indemnity under the TTA. Something much more specific would be needed to have that extinctive effect - whether for estoppel by convention or any doctrine based upon representation and reliance. It is common ground that no mention was made of the TTA itself throughout this period. JF's attempts to secure agreement that the operative provisions of the TTA were "*void*" in July and October 2012 fell on deaf ears, as described above.
103. If implied rescission did not occur and no estoppel operates to achieve this substantive redefinition of the clause 5 indemnity, there is no hope for waiver operating to such effect in the same factual circumstances. Waiver appears to have been included as a pleading stalwart. It could never have worked as an alternative extra-contractual solution in this cadence.

### **Disposition**

104. For the reasons given above, I dismiss this claim in its entirety. I will address costs and consequential matters at a further short hearing. That hearing will be convened in the very near future without recourse to the availability of leading counsel and subject to guillotined skeleton arguments in accordance with the modern practice in such matters in the Commercial Court. The costs of JF's unsuccessful amendment application will be dealt with at that time.

## **APPENDIX**

*This agreement has been made this 1st day of September 2011 by and between:*

- a. Ioannis Frangos, son of Nikolaos*
- b. Angeliki Frangou, daughter of Nikolaos and Nikolaos Frangos, son of Ioannis as third party*

### **BACKGROUND**

*A. On 23rd July 2007 Shipping Fortune Maritime S.A., of Panama, a company beneficially owned by Mr. Ioannis Frangos acquired title and interest on the M/V DELZOUKRE by virtue of sale and purchase agreement made between Shipping Fortune Maritime S.A. as buyers and Grandteam Navigation Limited of Marshall Islands as sellers. The vessel which has been subsequently renamed **TAURUS TWO** has been registered as property of Shipping Fortune Maritime S.A. with the Panamanian registry of ships with official number 33284-07-A (the vessel).*

*B. By a loan agreement dated 12 June 2008 (the "Loan Agreement") made between (i) Shipping Fortune Maritime S.A. and others as joint and several borrowers, (ii) certain banks and financial institutions as lenders, (iii) HSH Nordbank AG (HSH) as bookrunner, (iv) HSH as arranger, (v) HSH as swap bank, (vi) HSH as agent and (vii) HSH as security trustee, those lenders agreed to make available to the Borrowers a term loan facility which has been secured inter alia with a first preferred Panamanian mortgage on the Vessel and a personal guarantee of Mr. Ioannis Frangos.*

*C. The vessel is in Singapore where she completed a special survey necessary to comply with the applicable rules and regulations of her classification society.*

*D. The Borrowers have failed to pay certain repayment installments and other amounts payable pursuant to, and to perform certain obligations under, the Loan Agreement and the other security documents as a result of which on 19 August 2011 HSH, as agent, served on the Borrowers a notice of default, acceleration, cancellation ad demand, pursuant to which HSH demanded, inter alia, the repayment of certain amounts from the Borrowers. HSH also proceeded to arrest the Ship in Singapore on 22 August 2011 (the "Arrest") by exercising its enforcement rights under (inter alia) the Mortgage.*

*E. On August 26, 2011 and pursuant to discussions held between HSH and Mrs Angeliki Frangou in Hamburg all matters related to the current outstanding indebtedness of Shipping Fortune Maritime S.A. and of the other security parties have been sorted out in accordance with the attached message sent on the same date from HSH to Mrs Angeliki Frangou (Attachment No. 1).*

*F. By way of implementation of the above agreement a formal settlement agreement has been made on August 31, 2011 between HSH Nordbank AG and the security parties to the Loan Agreement, a copy of which is hereby attached (Attachment No.2).*

*G. On September 1, 2011 the Vessel has been sold by Shipping Fortune Maritime S.A. and delivered to Brandon Maritime S.A. of Panama, **a company beneficially controlled by** Mrs Angeliki Frangou at the price of US\$ 33,500,000 partly with funds drawn under the terms of a new loan agreement made between the buyers and HSH which has been*

secured, inter alia, by a personal guarantee of Mrs Angeliki Frangou. The proceeds of the new loan were USD 26,800,000 - **with a 4 years tenor** and 15 years profile.

H. At the same time Mr. Ioannis Frangos signed, executed and delivered an acknowledgement of debt towards HSH in the sum of USD 14,004,766.40 and in the attached form (Attachment no.3).

I In order the settlement agreement to materialize the sum of USD 7,800,000 has been paid to HSH by funds provided by the father of Ioannis and Angeliki Frangou, Captain Nikolaos Frangos.

J. Subsequent to all above HSH has agreed to release the Vessel from the Arrest so that she will be able to continue her interrupted employment with Messrs Cargill International S.A. of Geneva.

K. With effect from the date of her sale the Vessel which retained her name, class and registry was vested to the management of Messrs Maritime Enterprises Management S.A.

**IT IS AGREED AS FOLLOWS:**

1. Mrs Angeliki Frangou hereby irrevocably agrees, subject to fulfillment of the conditions stipulated herebelow **upon maturity of the 4 years tenor of the loan** made between Brandon Maritime S.A. and HSH to consent the Vessel to be sold by Brandon Maritime S.A. (which will remain the registered owner of the Vessel until such time) to a company to be indicated to her by Mr. Ioannis Frangos or by his heirs, as the case may be, either of his or his family control or **beneficially owned or controlled by** a third party.

2. . It is specifically noted that the earnings of the Vessel **during the 4 years' tenor of the new loan** will be disbursed so that to meet her running costs, management fees, the capital and interest repayments and any balance will apply **at the end of the 4 year tenor**, towards repayment of the equity contribution of Captain Nikolaos Frangos under item I above.

3. The conditions precedent to be fulfilled so that the above consent be granted by Mrs Angeliki Frangou are the following:

a. The sale price of the Vessel will be at minimum the **then current outstanding indebtedness of Brandon Maritime S.A. to HSH** which will be the beneficiary of that portion of the proceeds of the sale, taking also into account the equity kicker agreed between HSH and Brandon Maritime S.A. **plus any shortfall from the operation and management of the vessel from September 1, 2011 until the date of the sale** that will be paid to Brandon Maritime S.A. or Angeliki Frangou.

b. The consent of the Bank will be obtained in accordance with the terms of new loan if the vessel is sold **prior to its maturity**.

c. If the proceeds of such sale will exceed the **then outstanding indebtedness of Brandon Maritime S.A. to HSH** plus the amount corresponding to the application of the equity kicker and **any losses from the operation and management of the vessel**, the excess will be utilized against the then outstanding balance of the

*obligation of Mr. Ioannis Frangos to HSH under the terms of his personal guarantee or his above acknowledgement of debt.*

*d. The personal guarantee of Mrs Angeliki Frangou will be formally cancelled so that she will be released from all her obligations whatsoever under such instrument.*

*e. The sum of US\$ 7,800,000 or any balance thereof subject to 2 above, shall be returned by Mr. Ioannis Frangos to Captain Nikolaos Frangos*

*4. Should the Vessel become in the meantime an actual or constructive total loss, the proceeds of the indemnity to be collected from the underwriters concerned shall be utilized firstly for prepayment of all of **the outstanding indebtedness of Brandon Maritime S.A. to HSH and any losses from the management or operation of the vessel** and of Mr. Ioannis Frangos to HSH whilst the balance will be placed to the order of Captain Nikolaos Frangos to the extent it is sufficient to meet repayment of the balance of his equity contribution and if a further balance exists will be placed to the order of Mr. Ioannis Frangos.*

*5. If the conditions under 3 above have not been met and the vessel **remains in the ownership of Brandon Maritime S.A. at the end of the 4 year tenor**, Angeliki Frangou has **the right to sell the vessel at fair market value or to refinance at best possible available terms at the time in order to cover the then outstanding indebtedness to HSH under the new loan**. If the proceeds from the sale or refinancing are not sufficient to cover **the outstanding indebtedness to HSH under the new loan plus any losses from the operation and management of the vessel from September 1, 2011, Ioannis Frangos hereby irrevocably and unconditionally guarantees the payment to Angeliki Frangou of any such shortfall and accumulated losses**. However if the vessel will be refinanced and the proceeds of her employment during the course of such refinancing will be able to accumulate profits, then Mr. Ioannis Frangos will be entitled to receive back in full or in part **the above shortfall which would have in the meantime** paid to Mrs Angeliki Frangou.*

*6. Any dispute arising in relation to the interpretation of enforcement of this agreement will be referred to the exclusive jurisdiction of the High Court of Justice in London. English law shall apply. Mr. Ioannis Frangos hereby appoints Waterson Hicks as his agents to receive service of process and Mrs Angeliki Frangou hereby appoints Messrs as her agents to receive service of process.*