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Case No: A3/2014/3710 (A)
A3/2014/3710

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR STEPHEN HOFMEYR QC (Sitting as a Deputy High Court Judge)
2013 FOLIO 1270

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 13/07/2016

Before:

LORD JUSTICE KITCHIN
LORD JUSTICE HAMBLEN
and
SIR TIMOTHY LLOYD

Between:

(1) MITSUI & CO LTD **(2) THAI PLASTIC AND CHEMICALS PUBLIC COMPANY LIMITED** **(3) STEPHEN REDMOND** **(4) RSA INSURANCE GROUP PLC**	**Appellants**
- and -	
(1) BETEILIGUNGSGESELLSCHAFT LPG TANKERFLOTTE MBH & CO KG **(2) LPG CARRIERS LTD**	**Respondents**

Simon Croall QC and Paul Toms (instructed by **Salvus Law Ltd**) for the **Appellants**
Stephen Kenny QC and Richard Sarll (instructed by **Stephenson Harwood LLP**) for the **Respondents**
Hearing dates: 28 and 29 June 2016

Approved Judgment

Lord Justice Hamblen:

Introduction

1. On 29 January 2009 the chemical carrier m.v. "LONGCHAMP" ("the vessel") was transiting the Gulf of Aden on a voyage from Rafnes, Norway, to Go Dau, Vietnam, laden with a cargo of 2,728.732 metric tons of Vinyl Chloride Monomer in bulk ("the cargo").

2. At 06.40 that day seven heavily armed pirates boarded the vessel. The pirates commanded the Master to alter course towards the bay of Eyl, Somalia, where she arrived and dropped anchor at 10.36 on 31 January 2009.

3. At 14.05 on 30 January 2009 a negotiator for the pirates boarded the vessel and demanded a ransom of US$6 million. The vessel's owners ("the owners") had meanwhile formed a crisis management team who had set a target settlement figure of US$1.5 million. On 2 February 2009 an initial offer of US$373,000 was put to the pirates.

4. Negotiations between the pirates' negotiators and the owners' crisis management team continued over the following days and weeks with various offers and counter-offers being made. Eventually on 22 March 2009, after a negotiation period of 51 days, a ransom was agreed in the amount of US$1.85 million.

5. On 27 March 2009 the ransom sum was delivered by being dropped at sea. At 07.36 on 28 March 2009 the pirates disembarked and at 08.00 that day the vessel continued her voyage.

6. The essential issue on appeal is whether the vessel operating expenses incurred during the period of negotiation ("the negotiation period expenses") are allowable in General Average. The cargo was carried under a bill of lading dated 6 January 2009 which stated on its face that "General Average, if any, shall be settled in accordance with the York-Antwerp Rules 1974".

7. It is accepted that the ransom payment itself can be so allowed under Rule A of the York-Antwerp Rules. The main dispute between the Appellant cargo interests and the Respondent owners is whether the negotiation period expenses can be allowed as substituted expenses under Rule F. We are told that this is the first time that this Rule has been considered by the English courts.

The Rules

8. As stated in *Scrutton on Charterparties* (22nd edition) at 12-043, at common law: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred in the preservation of the ship or cargo comes within the general average, and must be borne proportionately by all who are interested".

9. Nowadays rights in General Average are almost invariably governed by the York-Antwerp Rules, as made applicable by the contract of carriage. The York-Antwerp Rules date back to 1877 and there have been various versions of those Rules over the intervening period. The latest version of those Rules are the 2016 Rules, although it is the 1974 Rules which were made contractually applicable in this case.

10. The York-Antwerp Rules 1974 ("the Rules") comprise a Rule of Interpretation, seven lettered Rules (A-G) of general application, followed by 22 numbered Rules (I-XXII) dealing with various specific matters.

11. The Rules most relevant to the present case are the following:

> "**Rule of Interpretation**
>
> In the adjustment of general average the following lettered and numbered Rules shall apply to the exclusion of any Law and Practice inconsistent therewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules.
>
> **Rule A**
>
> There is a general average act, when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.
>
> ….
>
> **Rule C**
>
> Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently … shall not be admitted as general average.
>
> ….
>
> **Rule E**
>
> The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.
>
> **Rule F**
>
> Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

12. The Rule of Interpretation, which was introduced in 1950, makes it clear that if the numbered rules provide that an expense or loss is either to be allowed or not be allowed then it does not matter whether the requirements of the lettered rules are also met - see *Lowndes and Rudolf, The Law of General Average and the York-Antwerp Rules*, 14th Ed ("*Lowndes*") at PRE.08.

13. However, the Rules are to be construed as a whole so that the numbered rules should be construed taking into account the general principles of the Rules stated in the

lettered rules and the numbered rules shall override the lettered rules only to the extent that there is inconsistency - see *Lowndes* at PRE.09-10.

14. As to the lettered Rules, the scheme may be summarised as follows:

(1) Rules B and G address how the average adjustment is to be performed and not the circumstances in which there has been a General Average expenditure or sacrifice.

(2) Rule D makes clear that the adjustment should be performed without regard to the fault of any of the parties to the adventure and preserves the right of any party to rely upon that fault in defence to a claim for contribution.

(3) Rule E provides that the burden of proof is on the party claiming in General Average to show that the loss or expense claimed is "properly allowable" as General Average.

(4) Only Rules A, C and F address the circumstances in which a sacrifice or expenditure gives rise to an allowance in General Average.

15. The York-Antwerp Rules 1994 added a Rule Paramount after the Rule of Interpretation and before the lettered Rules. It provides that:

> "In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred."

The Adjustment

16. In the first instance average adjusters applying the Rules will determine whether losses and expenditure arose in circumstances and are of a kind that requires a General Average contribution and the extent of that contribution from each of the interests. In this case there was an adjustment made by Mr Robin Aggersbury of Messrs Stichling Hahn Hilbrich ("SHH") dated 31 August 2011 ("the Adjustment").

17. The negotiation period expenses concern the following costs incurred during the negotiation period:

(1) US$75,724.80 for crew wages paid to the crew.

(2) US$70,058.70 for 'high risk area bonus' paid to the crew by reason of the fact that the vessel was detained within the Gulf of Aden. These are additional wages which the crew were entitled to under their contract of employment whilst at sea within a "high risk area".

(3) US$3,315 for crew maintenance (i.e. food and supplies).

(4) US$11,115.45 for bunkers consumed.

(5) US$20,639.30 for professional media response services.

18. The Adjustment found that these costs were recoverable in General Average under Rule F. The Adjuster's reasoning was as follows:

> "Vessel's Owners and Managers together with the appointed Consultant negotiated successfully the initial demand of ransom in an amount of USD6.000.000,00 down to an amount of finally USD1.850.000,00 during a negotiation period of about 51 days, so that an amount of USD4.150.000,00 was saved in the common interest of all property owners concerned, which would have been otherwise recoverable in General Average as per Rule A of the York-Antwerp Rules 1974. We are of the considered opinion that the expenses, which were incurred during the period of negotiation over the ransom amount, can be allowed in General Average as substituted expense as per Rule F of the York Antwerp Rules 1974, but only up to the amount of General Average expense which has been avoided".

19. The cargo interests brought proceedings seeking repayment of their contribution towards the negotiation period expenses on the grounds that they are not allowable in General Average. The Judge held that items (i) to (iv) were allowable under Rule F and that item (v) was allowable under Rule A. That decision is challenged on various grounds as set out in amended grounds of appeal. Permission to amend and to appeal is needed for one of the amended grounds and is opposed by the Respondents.

The outline facts

20. At the trial there were various documents before the Judge, including documents contained in the Adjustment, and two Reports of the Advisory Committee of the Average Adjusters' Association. There were witness statements from Mr Chruscz, the Director of Finance of the vessel's Managers, Mr Riepen of the Manager's Operating and Chartering Department, and Mr Poetzsch of SHH. None of the witnesses gave oral evidence. Their evidence, which was not seriously challenged, is summarised at paragraphs 45 to 47 of the judgment.

21. The facts are set out by the Judge at paragraphs 27 to 40 of the judgment and are not in dispute.

22. In outline, the vessel was hijacked by heavily armed pirates in the Gulf of Aden on 29 January 2009 at about 06.40 hours whilst en route to Go Dau, Vietnam. There was a brief fire-fight between the pirates and a warship of the Indian navy and one crew member was injured. Thereafter, the pirates forced all of the crew to assemble in the wheel house of the bridge deck and subsequently commanded the Master to alter the course of towards the bay of Eyl, Somalia. The Master followed the command and proceeded to the Eyl area, dropping anchor on 31 January 2009.

23. The vessel's owners and managers, having established through a telephone call with the Master that the vessel had been hijacked and the crew kidnapped, formed a crisis management team. Consultants from a specialist security firm were appointed. The crisis management team set a target settlement figure of US$1.5 million.

24. A ransom demand of US$6 million was made by the pirates' negotiator on 30 January 2009. On 2 February 2009, an initial offer of US$373,000 was put to the pirates.

25. General Average was declared on 3 February 2009. It was stated that it was being declared: "In view of the considerable amounts to be advanced to achieve the release of the vessel, her cargo, her bunker and the crew from the pirates".

26. Negotiations on the ransom price continued until a ransom was agreed in the sum of US$1.85 million at about 08.25 hours on 22 March 2009. The ransom was delivered on 27 March 2009 by way of chartered aircraft, from which the ransom package was dropped at sea. The vessel was released on 28 March 2009 and proceeded towards Galle, Sri Lanka, where, among other things, the crew were replaced.

27. Included in the Adjustment is a Case Summary Report which sets out the course of the ransom negotiations and describes the developing situation. In that summary "CD" is Case Day with 29 January being Case Day 1; "TC" is Telephone Call; "NYA" is NYA International, a consultant company; "WS" is Wilf Stanley of NYA; "CMT" is Crisis Management Team. All other abbreviations used are explained in the following passages from the Report:

> "**Introduction**
>
> The captain called the operating company, Bernhard Schulte Shipmanagement Co. (BSS), at the time of the hijacking. BSS appointed Capt. Ulrich Ganz (UG), chief Security Officer/Designated Person Ashore, as the point of contact with the pirates and vessel.
>
> …
>
> On CD2 (30 Jan), Alan Carney of Beazley (underwriters) assigned NYA to act as advisors to the owners/ship management company and NYA consultant Juan Valadez (JV) departed the US for Germany.
>
> **Initial Communications & Pirate Negotiator**
>
> In the first TC with UG (CD 2), the pirate communicator, Yusuf, demanded $6 million. UG spoke with the captain who reported that all crew members were all well, with the exception of the one who had been slightly wounded in the arm during the fire fight with the Indian naval vessel. The captain reported that the cargo, vinyl chloride, was stable but noted that the inhibitor would expire in 30 days. On CD 3 (31 Jan), Yusuf presented a new pirate negotiator, Looyan.
>
> **Initial Negotiations**
>
> UG said the pirates' demand was too high, and he would not be able to present an offer until he met with the owners. Both Yusuf and Looyan assured UG that the pirates wanted to settle as soon as possible….
>
> On CD 4 (1 Feb), JV and UG discussed negotiating strategy and tactics. UG stated that BSS would not tolerate protracted negotiations and wanted to end this affair as quickly as possible, UG also made it clear he would follow his own instincts in advancing the negotiations, and not be guided strictly by JV's recommendations. JV and UG tentatively agreed on a target settlement figure (TSF) of $1.5 million, with an initial offer (IO) of $373,000….
>
> **Crisis Management Team & Negotiation**
>
> The full CMT held its first meeting on CD 5 (2 Feb.). The CMT approved the TSF and the financial strategy outlined by JV, with nine offers to reach the TSF.

JV commented Somali piracy cases were taking more time and costing more money to settle than just a few months ago….

In subsequent TC's the same day, UG presented the IO to Looyan and asked the pirates to cooperate with him by reducing their demand, so that "we need to meet somewhere in between" their respective positions. Looyan said the pirates' demand remained at $6 million but he would try to convince them to reduce it. Looyan also told UG not to talk further with Yusuf.

….

On CD 10 (7 Feb), the pirates reduced their demand to $4 million….

On CD 12, JV and UG agreed on a new offer of $505,000, which was communicated to the pirates via e-mail. In a TC on CD 13 (10 Feb.), Looyan said the pirates were not happy with UG's initial offer, would not reduce their demand, and might begin taking the crew off the ship.

On CD 14 (11 Feb), Looyan told UG the pirates were willing to reduce their demand to $3million, but not lower.

….

On CD 19 (16 Feb), Looyan said that the pirates' demand was still $3million, but said the pirates would consider another reduction if UG increased his offer to $1.5million.

….

On CD 24, WS and UG agreed to increase the offer to $555,000 in an attempt to gauge the pirates' willingness to continued negotiation or resistance. No immediate response was received. On CD 25 (22 Feb), the pirates allowed the crewmen to call their families, primarily to encourage the families to pressure the owner. In TC's on CD 27 (24 Feb), the pirates made new threats. The captain also complained to UG about deteriorating conditions on board.

….

On CD 30 (27 Feb), UG considered a new increase in the offer to $750,000 with no further increases until the pirates come down to at least $2.5 million. On CD 31 (28 Feb), UG presented the new offer to Looyan as $755,000.

On CD 33 (2 Mar), Looyan said the pirates would reduce their demand to $2.5 million if the company increased its offer to $1.5 million, possibly signalling to UG the pirates' TSF of $2 million. On CD 34 (3 Mar), UG and the police discussed increasing the offer to $855,000. WS disagreed, saying this would reward the pirates for holding their ground and signal a weakening in the CMT's position. WS counter proposed that UG tell the pirates he would increase his offer to $1 million if the pirates reduced their demand to $2.2 million, signalling a willingness to settle around $1.6 million. UG accepted this and sent it to the pirates via e-mail.

….

On CD 47 (16 Mar), Looyan suggested what would eventually become the basis for the final settlement, observing that the mid-point in the pirates' proposal was $2 million and the mid-point in UG's latest proposal was $1.6 million. UG concluded that Looyan was hinting that both sides may now be able to reach settlement at the new mid-point; that is, $1.8 million.

….

Settlement

On CD 50 (19 Mar) reminded Looyan of his words that the two sides might find common ground between $1.6-2.0 million.

On CD 52 (21 Mar), Looyan said the pirates agreed in principle to settle between $1.6 and 2.0 million. UG consulted the CMT and received its approval to go as high as $1.85 million. UG then offered $1.825 million. Looyan countered with a new demand of $1.9 million, and UG replied saying the most he could offer was $1.85 million. On CD 53 (22 Mar), the pirates accepted UG's final offer. March 27 was set as the ransom delivery date.

….

Observations/conclusions

….

The pirates had in Looyan a calm, rational communicator who never resorted to nasty threats, obscenities, or other coercive tactics."

The Advisory Reports of the Association of Average Adjusters

28. The Association of Average Adjusters can be asked to provide advice in relation to adjustment issues and will form an Advisory Committee of Fellows of the Association for that purpose, all of whom will be experienced adjusters. In mid-2010, an Advisory Committee, consisting of five Fellows of the Association, was requested to provide an opinion in relation to a different adjustment arising out of a different act of Somali piracy as to whether or not expenses for crew and bunkers during the detention of the vessel are allowable in General Average. Their unanimous opinion was that they were not. Their conclusion was as follows:

"1. It is not considered that wages and maintenance of crew and bunkers consumed during the period of seizure by pirates can be allowed in general average since (a) a location to which the pirates take a vessel and her cargo is not deemed to represent a port or place of refuge so as to give rise to an allowance under Rule 11 of the York-Antwerp Rules and (b) the resort to such location was not intentionally incurred within the terms of Rule A and relevant costs would represent a loss by delay excluded by the second paragraph of Rule C.

2. It is not thought that any claim can be allowed in general average for the loss of navigational equipment or food and stores which evidently amounts simply to theft by the pirates and not a GA act for the common safety of ship and cargo."

29. In 2012 a submission was made to the Advisory Committee of the Association in relation specifically to the Adjustment concerning the hijacking of the vessel. The Report of the Advisory Committee, dated 21 June 2012, included the following:

"The following submission has been made to the Association:

….

We have a number of issues on the adjustment received however the purpose of this approach is concerning expenses claimed under Rule F.

….

Our rebuttal is that the negotiation period is common in all piracy cases, and the expenses were not extraordinary in nature and the expenses claimed could not be in any way be (sic) classed as substituted expenses for costs normally and reasonably allowed in GA. In the thirteenth edition of Lowndes & Rudolph, the alternative course of action which would give rise to expenses allowable as general average is dealt with particularly at F29-31. In F31 it states "*it should be a natural and logical alternative and not a matter of artificial invention*."

In our experience there is always a period of negotiation before a vessel is released and it is the normal means of dealing with such situations and this case is just such an example. There was no alternative course of action taken, the case followed the unfortunate but normal course of events. We are of the view that the "*saving*" of $4,150,000 is in fact an erroneously manufactured "*catch all*" and certainly not within the meaning or spirit of Rule F.

Despite what we consider to be reasoned arguments, the adjusters remain entrenched in their views and we would appreciate receiving the guidance of the panel. This is an important issue and if the panel needs any more information we can supply the details with which to approach the adjusters.

The Association convened a panel to consider the matter, consisting of the following Fellows: ...[Five Fellows were listed one of whom, Mr Madge, declared an interest in the matter as the Adjustment had been signed by a colleague in his London office and he gave a dissenting paper]

….

2. Allowance of wages and maintenance, fuel and other expenses under Rule F in substitution for the reduction in the ransom demand arising out of the process of protracted negotiation.

With the exception of Mr. Madge, the members of the Panel considered that there was no justification for an allowance on this basis.

The flaw in the argument put forward is that, before a substituted expense can be allowed in General Average, the hypothetical alternative scenario must involve greater costs which would have been allowable as GA. The hypothetical alternative in this case is that the matter might have been settled earlier for the higher amount of ransom demanded, before negotiation reduced it to the amount actually paid.

The original rationale was that the detention costs during the period of negotiation leading to the actual settlement should be treated as having been substituted for the reduction in the ransom demand achieved by the period of negotiation. The difficulty with this suggested reasoning is that, if the ransom ultimately agreed and paid is treated as the reasonable amount to have paid, then by definition any greater amount, even if settled earlier, must be regarded as unreasonable to the extent that it exceeds the amount actually settled. Thus there can be no excess which can constitute savings against which the putative substituted expenses can be allowed in General Average.

It is noted that Mr. Madge subsequently (see para. 16 in the Appendix) advised that he was in agreement "in principle with David Clancey's premise that only when the negotiations reach a point where the requested ransom would be considered "reasonable" could any argument for a substituted expense start". This would appear to be a concession that the original adjustment was incorrect in taking the first ransom demand as the starting point for the substituted expense argument.

He then goes on to identify the difficulty of deciding at what point in the negotiation a "reasonable" amount would have been reached. The Panel did not find this to be a difficulty at all. That point is reached when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept; it is, in short, the amount for which the ransom was actually settled.

In the circumstances there can be no savings against which any detention or other costs during the negotiation can be allowed as substituted expenses.

….

[Mr Madge's paper, as set out in the Appendix, incorporated the comments of the rest of the Committee in italics on a paragraph by paragraph basis, and included the following at paragraph 16:]

16) Clearly, the ransom amount initially demanded cannot automatically be allowed in GA. One has to go through a reasonable period of customary negotiation to reduce the ransom. The question then arises, how long is it reasonable to argue and negotiate and at what point is a reduced ransom considered reasonable? If the initial ransom is not considered reasonable then, in order to make allowance under Rule F, the question as to what level of ransom is reasonable has to be answered. I concur in principle with David Clancey's premise that only when the negotiations reach a point where the requested ransom would be considered "reasonable" could any argument for a substituted expense start. However, it still begs the question who is to decide whether US$ 4,000,000,

US$ 3,000,000 or US$ 2,000,000 is reasonable and should negotiations be required to take at least 30 days or 40 days or 90 days, bearing in mind the longer negotiations take to reach a "reasonable" level, the heavier the mental stress placed on the crew and higher the costs that are incurred by owners and time charterers, let alone depreciation in the condition and value of ship and/ or cargo, weather conditions, remaining bunker quantities, etc., all of which are material factors? Would it have been reasonable to spend more time and money trying to reduce the ransom payment even below US$ 1,850,000?

In the adjustment under review, it would appear from the adjuster's note quoted in the submission to the Panel that the comparison was made between the initial ransom demand of US$6 million and the eventual settlement of US$1,850,000. In early correspondence between members of the Panel, it was pointed out that payment of the first ransom demand would clearly have been unreasonable and would therefore not satisfy the terms of Rule A or the Rule Paramount. The Panel members could not recall any instance of a ship owner paying the first figure demanded by pirates and considered that any such early accession would simply be met by a demand from the pirates for a still higher figure.

In the above paragraph, Mr Madge appears to have conceded this point and agrees that only when a reasonable figure has been reached can any argument for substituted expenses start.

He then goes on to identify a difficulty in deciding at what point in the negotiation a "reasonable" amount would have been reached. With, respect, the Panel does not think this is a difficulty at all. It is surely when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepares to accept; it is, in short, the amount for which the ransom was actually settled.

Even if the other criteria for an allowance under Rule F had been met, there is no saving in General Average against which any substituted expenses can be offset".

30. As stated by the Judge, the opinions of the Advisory Committee are not in any way binding on the Court. The Report does, however, contain statements of the Advisory Committee's experience in Somali piracy cases. The collective experience of the majority was that there was always a period of negotiation before a vessel is released and that they knew of no instance of a shipowner paying the first figure demanded by the pirates. The minority member, Mr Madge, agreed that "one has to go through a reasonable period of customary negotiation to reduce the ransom".

31. That collective experience is borne out by the case of *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm); [2010] 1 Lloyd's Rep 509 which, in the context of two hijackings in August 2008, sets out a description of the modus operandi of Somali pirates and details of the extent of piracy cases as at the end of 2009. The evidence and findings in that case included the following:

(1) In the 12 month period to November 2008, some 30 vessels were seized and then released on payment of ransoms in excess of US$60 million – at [14].

(2) The pirates take vessels in order to ransom them and invariably negotiate with the shipowner or other interested party for the release of the vessel, cargo and crew, in exchange for a payment which represents an economic proportion of the value of the property at stake – at [19].

(3) As at 8 October 2009, there was yet to be a case in 2007 – 2009 where a merchant ship hijacked by Somali pirates had not subsequently been released – at [25(i)].

(4) As at 8 October 2009, there was a "typical profile" for a Somali pirate case and that the safest, most timely and effective means to secure the release of a ship's crew in such circumstances had proven to be, in case after case, to negotiate and subsequently pay a ransom – at [25(iii)].

(5) The pirates would not be interested in keeping the cargo and there was no risk of the cargo being discharged – at [25(v)].

(6) The then average period of detention was 37 days and the known range was 21 to 68 days – at [25 (vii)].

32. Whilst the detail of the evidence given in that case would not be known to owners or their crisis management team in January to March 2009, it does provide support for fact that at that time, as reflected in the stated experience of the Advisory Committee, seizure of a vessel by Somali pirates was invariably followed by a period of negotiation leading to release of the vessel for a ransom sum lower than that originally demanded.

The Issues

33. By the end of the appeal hearing there remained only four grounds of appeal in issue, namely:

<u>Issue 1</u>

Whether the Judge ought not to have concluded that the expenses were incurred in adopting a course of action undertaken as an alternative to – or in substitution for – one where the expense would have been allowable as General Average. The Appellants contend that in fact there was only one course open after the hijacking of the vessel (negotiation with the pirates to seek to achieve a release of the vessel and cargo) and the substituted expenses were incurred taking that course.

<u>Issue 2</u>

Whether the Judge erred in concluding that payment by the Respondents of the initial ransom demand without attempting to negotiate would have meant that the hypothetical ransom payment of US$6 million would have been "reasonably incurred" within the meaning of Rule A in the Rules and whether he ought to have concluded that the payment of the originally demanded sum was not a course a reasonable shipowner would have taken and therefore was not reasonably incurred. This issue involves consideration of further matters raised by way of Respondents' Notice.

Issue 3

Whether the Judge erred in law in concluding that the consumption of bunkers was an "expense" for the purposes of Rule F.

Issue 4

Whether the Judge was wrong to conclude that the media response costs were recoverable under Rule A since, as there were a number of purposes for which those costs had been incurred, the Respondents had not proved that all of the costs had been incurred for the "common safety". If the Judge was wrong, the Respondents contend the expenses are nevertheless recoverable under Rule F.

Issue 1

Whether the Judge ought not to have concluded that the expenses were incurred in adopting a course of action undertaken as an alternative to one where the expense would have been allowable as General Average.

34. The Respondents object to this issue being raised on the grounds that it was not an issue at trial and was not in the original grounds of appeal. Having been taken in detail through the skeleton arguments at trial I am satisfied that it was an issue raised at trial and one to which no objection was taken at that time. The argument centres on what is meant by the requirement in Rule F that the substituted expenses be "in place of" another expense. This argument was raised in the skeleton argument for trial, was addressed at trial and was dealt with in the judgment at [94]. It is right to observe that the argument before this court develops that point more than at trial, but it is not a new point.

35. Even if was a new point, I am not satisfied that allowing it to be raised causes any prejudice to the Respondents. Given the relatively small sums at stake this is a case which was rightly approached economically, with a trial on documents and written witness statements, with junior counsel instructed on both sides. Had the fuller argument now put forward been advanced at trial I have little doubt that the trial would have taken the same course. There would have been no further evidence adduced or witnesses called.

36. I am accordingly satisfied that permission should be given to amend the grounds of appeal and also that it is appropriate to grant permission to appeal.

37. The Judge summarised the requirements of Rule F at [69] in terms which were not questioned by either side and which I am content to adopt:

(1) "First, the Rule is concerned only with "expenses";

(2) Second, it is only those expenses which can be described as "extra" which qualify;

(3) Third, there must have been an alternative course of action which, if it had been adopted, would have involved expenditure which could properly be charged to general average; and

(4) Fourth, the extra expenses must have been incurred in place of the alternative course of action."

38. The reference to an alternative course of action reflects the fact that substituted expenses have to be "in place of" another expense. That implies a choice being taken between two (or more) alternative courses of action.

39. This is borne out by the leading textbooks. The authors of *Lowndes* state:

"As the name implies, substituted expenses are the expenses incurred in respect of a course of action undertaken as an alternative to – or in substitution for – the expense that would be allowable as general average" (at F.01).

"For this rule to have any application there must have been an alternative course which, if adopted, would have involved expenditure which could properly be charged to general average" (at F.29).

40. Similarly, in *Hudson & Harvey*, *The York Antwerp Rules*, 3rd Edition, 2010 ("*Hudson*"), it is stated that:

"To fall within the terms of the Rules, there must be another course of action available to the shipowner which if followed would give rise to a general average expense" (at 11.28)

"Although Rule F is phrased in terms which refer to the incurring of expense, its application in practice presupposes a choice between two (and sometimes more) different courses of action" (at 11.33)

41. The Appellants contend that in this case there was no available course of action alternative to that in fact pursued by the owners. In reality there are only two available options when faced with a hijacking of vessel and cargo by Somali pirates, namely to abandon the vessel and cargo or to engage with the pirates, negotiate and agree a ransom and pay it to effect release of ship, crew and cargo. The moment that the Somali pirates took control over the vessel, and even prior to a ransom demand being made, the owners were involved in a negotiation for the release of their vessel.

42. The Appellants further contend that, as was common ground, abandonment was not a real choice at all and was dismissed as such by the Judge at [105]. Negotiation is a course which might lead to a short period of detention or a more protracted one depending upon the length of any negotiations, the period before a first demand is made, the response to any demand and the behaviour of the pirates. The owners, and the others involved in the negotiations, have no control over the process. The decision whether or not to release the vessel and upon what terms lies exclusively with the pirates themselves. However, whether the negotiation is short or long, the owners will in both situations incur crewing expenses and the vessel will consume bunkers by reason of the hijacking and will ultimately upon conclusion of the negotiations pay a ransom.

43. Some support for the Appellants' approach is to be found in the evidence. Thus, it does not appear that the owners ever considered that they faced a choice. The owners'

crisis management and negotiation team were set up before any ransom demand had been made. From the outset the goal was to negotiate to obtain release of the vessel upon payment of a ransom, but in a reduced amount. There is no evidence to suggest that they ever considered choosing between paying the ransom on demand and paying a lesser sum following negotiation.

44. This is also borne out by the Advisory Committee's stated experience, which is that in all Somali piracy cases the same course of action is taken, namely to negotiate and pay a reduced ransom leading to release of the vessel. Again it does not appear that there is considered to be a choice of payment on demand.

45. In my judgment this failure to recognise that there is a choice reflects the reality, which is that payment on demand is simply a different way of going about the same course of action and not a true alternative course of action. Whether or not the ransom is paid on demand there will still be a negotiation, there will still be delay, there will still be the incurring of vessel and crew running costs during the period of delay. In either case the same expenses will be incurred; the difference is only in their extent.

46. In this case, for example, there was a period of delay between the hijacking and the first ransom demand. Even if that first demand had been accepted, it does not follow that it would have been agreed. As the majority of the Advisory Committee state, the unprecedented acceptance of the ransom on demand may well have been "met by a demand from the pirates for a still higher figure". Even if that was not the case, it would still have been necessary to negotiate and agree matters relating to place and method of payment and to the release of vessel and crew. Thus in this case it is to be noted that there was a period of six days between the agreement of the ransom and the release of the vessel.

47. As the Appellants point out, if payment on demand is regarded as an alternative course of action then a number of anomalies arise. For example:

(1) How do owners show that if they had agreed to pay on demand that that would have led to the vessel's release? It may well, as the majority of the Advisory Committee state, simply lead to further ransom demands and negotiation.

(2) It places undue emphasis on when the first demand is made. It may not be made, for example, for two weeks, during which time there could on no view be any entitlement to claim vessel operating costs as Rule F expenses.

(3) What happens if there is no formal demand for a specific sum but simply a negotiation? Presumably the Rule F claim could not be made in such circumstances but why should the precise nature of negotiations make a difference to the outcome?

(4) Given that in all cases there will be a negotiation at what stage does that negotiation become a different course of action?

(5) What is the position if a ransom demand is made which is so excessive that on any view it would not be reasonable to agree to pay it? Presumably there could be no Rule F claim until it had been negotiated down to what might be

considered to be a reasonable figure. But that gives rise to all the difficulties in determining what, if anything, is to be regarded as a reasonable ransom sum, as highlighted by the Judge at [97]-[98], difficulties which the Respondents themselves submit should be avoided.

48. The Respondents submit that there cannot be any real doubt that the owners had the option of paying a ransom in the amount of the first demand, as borne out by the fact that the Judge found that that would have been a reasonable course. They submit that it is to be inferred that if a price is demanded for release of the vessel, and the price is agreed and paid, the vessel will be released. The option was there in this case, because it was the initial option presented by the pirates, and once it is accepted that this option existed, there is no further difficulty.

49. Although nobody appears to have considered it to be an option at the time, it is correct that the owners could have agreed to pay the initial ransom demand and, if the pirates had agreed to that, release of the vessel would have followed in due course, and that this could be regarded as an option that was available to owners. That does not, however, address the issue of whether it is an option to take a course of action which is a true alternative to that actually taken. Is a short negotiation with pirates for payment of ransom leading to the release of the vessel a different course of action to a long negotiation with pirates to the same ends? In my judgment it is not; both fundamentally involve doing the same thing. This is to be contrasted, for example, to a clear alternative to obtaining release of the vessel by agreeing and paying a ransom, such as by an operation to regain control of the vessel by use of force.

50. The Judge did not really address these issues. This was probably because the argument before him was developed in less detail. The point was made to him that these were not substituted expenses because both the actual and the hypothetical course of action involved payment of a ransom. He dismissed this argument at [94] on the grounds that it was sufficient that the expenditure was incurred in substitution for the saving in ransom. He did not, however, address the argument at paragraph 54 of the cargo interests' skeleton argument that none of the textbook examples of substituted expenses "are comparable to the instant case in that they represent truly alternative courses of action by which expenditure different in kind is incurred". No doubt this was because the main focus of the arguments before him was on other matters.

51. The Judge did support the overall conclusion he reached on the grounds that it accorded with equity and natural justice. The Respondents support this, stressing that all those interested benefited from the saving in ransom achieved and that it is fair that the cost of a general benefit should be generally shared. However, whether or not General Average is recoverable depends on the proper interpretation and application of the Rules. They reflect what is recognised as representing a fair apportionment of benefit and costs. Further, the expenses claimed are ordinary operating costs incurred by reason of delay. Generally there is no recovery in General Average for ordinary expenditure (Rule A) or for loss or damage sustained through delay (Rule C). Delay will often cause loss to both ship and cargo but generally that loss lies where it falls. Whilst such owners' expenses may on occasion be recoverable under Rule F, that Rule presupposes some real choice being made, which it was not. Further, the majority of the Advisory Committee saw no unfairness in the conclusion that the expenses are irrecoverable, and that represents a respected professional view.

52. Although the express reasoning of the majority of the Advisory Committee in reaching their conclusion is different, the underlying point being made is similar. The majority are making the point that there is only one road open to owners, namely negotiation, and that road leads to wherever the negotiation ends. It is a single track road with no forks in the road and it ends in the eventual ransom payment agreement.

53. That there are no forks in the road is significant. Just as acceptance of the initial ransom demand is not a true alternative; nor is acceptance of any other ransom sum less than that initially demanded but greater than that eventually agreed. That means that the difficulty which troubled the Judge (and Mr Madge) about determining hypothetically what might be a reasonable ransom does not arise.

54. It follows that I agree both with the conclusion and the underlying reasoning of the majority of the Advisory Committee

55. For all these reasons, I would allow the appeal on Issue 1.

Issue 2

> *Whether the Judge erred in concluding that payment by the Respondents of the initial ransom demand without attempting to negotiate would have meant that the hypothetical ransom payment of US$6 million would have been "reasonably incurred".*

56. This issue falls to be considered on the basis that payment of the initial ransom demand is to be regarded as an alternative course of action.

57. Under Rule F it must be shown that if the alternative course of action had been adopted if would have involved expenditure which would "have been allowable as general average". To be so allowable under Rule A it would need to be shown, among other things, that it was "reasonably made or incurred".

58. As explained by the Judge, there has been considerable debate as to the reasonableness requirement applicable to the hypothetical course of action.

59. It is generally recognised that it must be a realistic and practical alternative and not one which is contrived or artificial. As stated in *Lowndes* at F.31:

> "It should be a natural and logical alternative, and not one of artificial intervention".

60. In the 12th edition of *Lowndes* (which had different editors) it was said at F.28 that it must be a course of action which "to which a reasonable shipowner" would normally give serious thought and be likely to adopt in practice".

61. An example of artificial invention given in *Lowndes* is of a claim for container hire at a port of refuge as substituted expenses for the cost of unstuffing the containers and storing the contents in a warehouse, a course of action which would never be taken in practice.

62. It was argued by the Respondents before the Judge and before this Court by Respondents' Notice that it should be held that there is in effect no reasonableness requirement under Rule F because of the so called Hudson conundrum.

63. This conundrum was explained in the first edition of *Hudson* at p47 as follows:

> "To fall within the terms of the Rule, there must be another course of action available to the ship-owner which if followed would give rise to a general average expense. This may be an expense admissible in general average under the terms of the numbered Rules or of Rule A. If the alternative course of action would be allowed under Rule A or when it comprises wages and maintenance of crew incurred during the prolongation of a voyage or a period of detention allowable under Rule XI, the expense must be reasonable in order to qualify in general average.
>
> For this reason it is sometimes argued that there must be some point at which the "other" expense becomes unreasonable, and hence it should not rank in full in justification of the substituted expense. It is submitted that this argument is circular and self-defeating. Consider the cost of repatriating from the port of refuge a substantial number of vessel's crew in order to avoid the expense of paying their wages and maintenance over an extended period. If, for such extended period, it would be considered unreasonable to incur the cost of wages and maintenance of a full crew, then clearly it becomes reasonable to repatriate so many of them as are not required to ship and assist in the repairs. ... ."

64. The essential point is that the actual course of action will have been undertaken in preference to the hypothetical alternative, almost invariably on the basis that it appeared to be the more economical and reasonable one. Indeed, the more uneconomical the hypothetical alternative should appear, the more appropriate it will have been to undertake the actual course of action followed. Given that the actual course of action will almost invariably appear the more reasonable and economical one, and sometimes emphatically so, in what sense must the hypothetical alternative avoided have been a "reasonable" one in order to fulfil the requirements of Rule A?

65. The Respondents submit that the answer to this conundrum is to adopt the approach taken in *The Bijela* [1992] 1 Lloyd's Rep. 636 (Hobhouse J); [1993] 1 Lloyd's Rep 411 (CA); and [1994] 1 WLR 615 (HL) to a similar issue which arose in relation to the allowance of substituted expenditure under two of the numbered rules, Rule XIV ("Temporary Repairs") and Rule X ("Expenses at Port of Refuge etc."). Rule XIV provides:

> "Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.
>
> "When temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there."

66. In *The Bijela* case the vessel went aground in Rhode Island Sound and it was decided to carry out temporary repairs at Jamestown rather than permanent repairs in drydock in New York at a cost of US$282,606. This sum was claimed in General Average on the basis that if temporary repairs had not been effected in Jamestown, expenses "would have been incurred and allowed in general average" within the meaning of the second paragraph of Rule XIV. The expenses which it was said would have been incurred included the cost of discharging, storing and reloading cargo so as to facilitate the carrying out of permanent repairs. It was said that those costs would have been allowable under under Rules X(b) and X(c), but under those Rules costs are only allowable "if the repairs were necessary for the safe prosecution of the voyage".

67. At first instance, Hobhouse J accepted that the temporary repairs were effected in order to enable the adventure to be completed and that, if they had not been carried out, permanent repairs would have had to be carried out elsewhere at greater expense. Nevertheless, the costs were not allowable under Articles X(b) and X(c) because (at page 644):

> "... they cannot show that repairs in drydock in New York "were necessary for the safe prosecution of the voyage". All that was necessary for this purpose were the temporary repairs which could be carried out afloat and were in fact carried out at Jamestown."

This was so, notwithstanding that, as the Judge recognised, it was difficult to see upon this reasoning in what circumstances the second paragraph of Rule XIV might ever apply.

68. Hobhouse J's decision was upheld by a majority in the Court of Appeal (Neill and Mann LJJ). Hoffmann LJ dissented, pointing out that the very fact that temporary repairs had been effected in order to enable the adventure to be completed, as Rule XIV requires, in itself necessarily entailed that permanent repairs could not have been necessary for that purpose, within the meaning of Rule X(b) (see p. 422 rhc). Yet Rule XIV required the assumption to be made that temporary repairs had not been carried out. In order to give Rule XIV some practical effect, he said :

> "I think that a fair reading of the rule clearly requires one to assume that (1) the temporary repairs actually done had not been done and (2) the ship nevertheless completed the voyage. I do not see how these two assumptions can stand together except upon the further assumption that permanent repairs had been done instead. However, in order to avoid a conclusion that the rule requires one to assume that the owner was acting uncommercially or even in breach of duty, I think it must be assumed that temporary repairs was not an available option. This is the obvious and I think the only way to give business efficacy to the rules."

69. The House of Lords allowed the shipowners' appeal. There was a single speech by Lord Lloyd who acknowledged the need to make assumptions in order to give the rule business efficacy, but he differed with Hoffmann LJ on what assumptions should be made. His conclusion was as follows:

> "The second paragraph of r. XIV obliges us to suppose that the temporary repairs had not been effected at Jamestown. What then would have happened? The answer is simple. She would have gone into drydock in New York. Was the discharge of cargo necessary to enable the damage to the ship to be repaired in drydock? The answer is clearly yes. Were those repairs necessary to enable the vessel to proceed safely from New York to India, always assuming that she had not already been repaired in Jamestown? The answer, again, is clearly yes. The assumption required by r. XIV must be carried through when applying r. X. It is not necessary to assume that the vessel could not have been repaired in Jamestown in order to give effect to the two rules. It is necessary only to assume that she was not so repaired, as r. XIV requires. In this way effect can be given to the clear intention of the opening words of the second paragraph of r. XIV, that the cost of temporary repairs of accidental damage are admissible in general average, subject only to the limit imposed by the second half of the paragraph."

70. The Respondents contend that this reasoning should be read across to Rule F in order to avoid the Hudson conundrum and that it should be held that when assessing the reasonableness of the hypothetical alternative course of action, it should be assumed that the actual course followed had not been taken (as per the House of Lords decision) or that the actual course was not an available option (as per Hoffmann LJ).

71. I agree with the Judge that there is no justification for so doing. In particular:

    (1) Rule A requires proof that the expense of the hypothetical alternative course of action would have been "reasonably" incurred. That wording cannot be ignored.

    (2) The requirement of reasonableness under Rule A imports more flexibility than the test of necessity under Rule X(b). Often there may be more than one reasonable course of action available.

    (3) The wording of Rule XIV and Rule F is materially different. In particular, as the House of Lords held, the second paragraph of Rule XIV requires an assumption to be made.

    (4) The general context and applicability of Rule F is different to the specific context of Rule XIV.

    (5) There is no necessity to make assumptions in order to give Rule F business efficacy. The Rule is workable and in most cases works without difficulty.

72. Further, it is to be noted that Hoffmann LJ in *The Bijela* considered Rule F and stated (at p422) that:

> "It does not require one to suppose that the circumstances in which the owner made his choice were different from what they actually were".

73. I accordingly agree with the Judge on this issue. He expressed his conclusion as follows at [77]:

> "..despite the problems canvassed by the textbook writers, there is little room for doubting the proposition that, on the true construction of Rule F of the York-Antwerp Rules 1974, the hypothetical alternative course of action must meet the requirement that it was "*reasonably ... incurred*" if the substitute expense is to be allowed in general average. What the problems canvassed by the textbook writers show is that the requirement that the expense, if it had been incurred, would have been "*reasonably ... incurred*" must be interpreted and applied with a sufficient degree of latitude to give Rule F practical effect."

74. I agree with that conclusion.

75. Having regard to the need to interpret the reasonableness requirement with a degree of latitude, the issue which arises is whether, in all the circumstances as they would reasonably be perceived at the time, the Judge was wrong to conclude that payment by the Respondents of the initial ransom demand without attempting to negotiate would have been a reasonable course of action.

76. In so deciding the Judge emphasised the following matters in particular:

    (1) Save in exceptional circumstances (e.g. where the amount demanded clearly exceeds the value of the property involved in the maritime adventure), it would not be reasonable to say of a shipowner who is faced with a demand for a ransom made by pirates who have detained his ship and her crew and cargo that the payment of the ransom was not "reasonably … incurred".

    (2) Pirates are not rational people and there was always the potential for them to act in an unreasonable, irrational and illogical way.

    (3) There was no means of knowing or predicting with any degree of certainty how particular negotiations about the ransom amount would progress.

    (4) The amount of the demand was clearly less than the reasonably understood value of the property involved in the maritime adventure and a saving would be made if the amount of the demand was paid.

77. The Appellants contend that the Judge was wrong to conclude that payment on demand would have been reasonable and that account should have been taken (but was not) of the following matters:

    (1) The established modus operandi for Somali pirates as at the date of the hijacking, namely invariably to negotiate down the amount of the ransom demanded over a period of time with little or no risk to cargo or crew.

    (2) In the experience of the majority of the Advisory Committee, "the negotiation period is common in all piracy cases" and "there is always a period of negotiation before a vessel is released and it is the normal means of dealing with such situations".

    (3) The minority member accepted that there was a reasonable period of "customary" negotiation and that "clearly, the ransom amount initially demanded cannot automatically be allowed in GA".

(4) The position adopted by the owners in their Skeleton Argument at trial, "That is not to say that paying the first-demanded ransom is ever likely in fact to be a reasonable course of action. In reality, where there is the option of entering into negotiations with pirates, it will almost always be the right thing to do".

78. They submit that if proper regard is had to these matters it should be concluded that it would be unreasonable to pay the originally demanded ransom without even attempting to negotiate the amount of the ransom payment, contrary to the established practice, and that the Judge was wrong to conclude otherwise. They further submit that payment on demand would be an "artificial invention".

79. The Respondents do not accept that there is satisfactory evidence to establish the matters sought to be relied upon by the Appellants, but that in any event they do not render payment of the full ransom demand unreasonable.

80. The Respondents accept that the evidence at that time was that Somali pirates would release a vessel upon payment of a ransom. As they point out, that being so, the sooner the ransom was paid, the quicker the vessel would be released and the vessel, cargo and crew removed from danger.

81. In my judgment, if, as stated in the *Masefield* case, "the safest, most timely and effective means to secure the release" of a ship and crew was to pay a ransom, it follows that the most safe, timely and effective means of so doing is to pay as soon as possible. It may be that the general practice was to try to negotiate the ransom down, but that does not mean that it would be unreasonable to pay the ransom straight away so as to avert the very real danger to vessel, cargo and crew as quickly and effectively as possible. Nor can a course of action which procures such real and tangible benefits be regarded as an "artificial invention".

82. Further, in my judgment the reasons given by the Judge are all cogent and compelling reasons for concluding that payment of the initial ransom sum would have been reasonable.

83. Further reasons for supporting that conclusion include the following:

(1) The effect of the delay involved in seeking to negotiate a lower ransom is to keep the vessel, cargo and crew in peril, with all the risks of saying "no" to pirates, who are violent, armed criminals.

(2) The vessel and cargo were under the control of the pirates. As such, there were obvious dangers should there be a storm or other peril of the sea.

(3) The owners knew that there had been a firefight during the capture of the vessel and that a crew member had been wounded.

(4) Although, as matters turned out, the pirates' main negotiator was said to be a "calm, rational communicator" who never resorted to threats or other coercive tactics, the owners had no reason to assume that.

(5) This was just one of many "known unknowns" facing the owners.

84. For all these reasons I conclude that it cannot be shown that the Judge was wrong to find that payment of the initial ransom demand would have been reasonable. It follows that I would dismiss the appeal on this issue.

Issue 3

Whether the judge erred in law in concluding that the consumption of bunkers was an "expense" for the purposes of Rule F.

85. The Appellants contend that the consumption of bunkers is not an expense because it is generally treated as being a General Average sacrifice (as the bunkers are used up) rather than General Average expenditure. It is a loss rather than an expense and Rule F does not extend to losses.

86. As a matter of language there is no difficulty in treating the consumption of bunkers as an expense. The owners have incurred the expense of paying for the bunkers so consumed. Precisely when they incurred that expense does not alter the fact that their consumption involves expense. It would be remarkable if, for example, it was claimed that crew wages could not be recovered during a period of detention because they happened to have been paid in advance.

87. As to the Rules, whether or not expense includes bunkers consumed depends on the context. For example, Rule XI entitled 'Wages and Maintenance of Crew and other Expenses bearing up for and in a Port of Refuge, etc.' states in its first sub-paragraph that it covers 'Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage'. There, the title suggests that the fuel consumed are 'other Expenses'.

88. Further, it would appear that the general practice is to include bunker consumption as an expense. As stated in *Hudson* at 11.17 under the heading of substituted loss:

> 'Generally speaking, "expense" comprises those allowances which qualify as general average expenditure, but when calculating the expenses which have been or would have been incurred during the prolongation of a voyage or a period of detention in port, it is the practice to include the figures for the consumption of bunker fuel, even though for other purposes the consumption of bunkers (unless specially replaced during the voyage) is treated as a general average sacrifice.'

89. For all these reasons, and those given by the Judge, I consider that the Judge did not err in law and would dismiss the appeal on this issue.

Issue 4

Whether the Judge was wrong to conclude that the media response costs were recoverable under Rule A since, as there were a number of purposes for which those costs had been incurred, the Respondents had not proved that all of the costs had been incurred for the "common safety".

90. The Judge accepted Mr Riepen's evidence that the Respondents' purpose in incurring media response costs was to secure the release of the vessel and cargo as cheaply and efficiently as possible. He held that did not need to be the sole purpose of so doing in

order to be allowable under Rule A. On the assumption that the Appellants were right to contend that there were two other purposes, namely to protect the corporate image of the owners and to reduce the possibility of litigation by the crew or their families, he accordingly held that that would make no difference.

91. Under Rule A expenditure is recoverable if it is incurred "for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure". The Appellants submitted at trial that this means it must be incurred for that sole purpose. On appeal they submit that it must be for that predominant purpose.

92. As the Judge observed at [67], "so long as the act is done specifically for the purpose of preserving from peril the property involved in the common adventure, that purpose need not be the sole or exclusive purpose. There is nothing in the wording of Rule A or in the history of the development of the principle of general average which requires the application of the principle to be restricted in this way." The same applies to the Appellants' new argument of predominant purpose.

93. Further, the concept of predominant purpose imports undesirable and unnecessary complications. In situations where expenditure is incurred for more than one purpose it may often be difficult to identify a predominant purpose, and indeed there may not be one. The expenditure may be incurred for two (or more) equal purposes. Provided that preserving the property from peril was an effective cause of the incurring of the expenditure, that should suffice. There is no principled reason for requiring it to be either the sole or only effective purpose or cause or the predominant and most effective purpose or cause.

94. The Judge found that the owners had established that the purpose of preserving the property from peril was one of the reasons why it engaged the media response costs and that that suffices. I agree. I would add that in fact that was the only reason in evidence. The two other possible reasons put forward by the cargo interests were not supported by any evidence but were assumed by the Judge to be further reasons for the purpose of considering the argument.

95. For these reasons, and those given by the Judge, I would dismiss the appeal on this issue.

Conclusion

96. For the reasons outlined above I would allow the appeal on Issue 1, but dismiss the appeal on Issues 2, 3 and 4.

97. It follows that the appeal is allowed in respect of the items of expenditure set out at paragraph 17 (1) to (4) and dismissed in respect of the item set out at paragraph 17 (5).

Sir Timothy Lloyd:

98. I agree with Lord Justice Hamblen that, for the reasons set out in his judgment, permission to amend, and to appeal, should be given to the Appellants, to the extent that, in the end, it was sought, and that their appeal should be allowed as regards the

items of expenditure identified in sub-paragraphs (1) to (4) of paragraph 17 of his judgment, and dismissed as regards item (5) there specified.

99. As he explains, Rule F presents a logical dilemma, at least in certain factual situations, as identified by the so-called Hudson conundrum (see his paragraph 63). The reasoning adopted by Hoffmann LJ (dissenting) in *The Bijela* and then the rather different reasoning adopted by Lord Lloyd of Berwick on the further appeal in that case does not provide the answer to the dilemma in a pure Rule F case. Hoffmann LJ's approach (hypothesising that the alternative course not only was not, but could not have been, adopted) could not realistically be applied to facts such as the present, even if it were legally relevant. How could one at the same time suppose that the ship-owners could have accepted the pirates' first demand, in order to secure the release of the ship, its crew and cargo, while excluding the very possibility of their responding differently to that first demand by pursuing negotiations with a view to securing the release at lesser cost? That difficulty in itself seem to me to reinforce the conclusion that the answer to the question whether the running costs incurred during the period of negotiation are or are not to be allowed in general average is that they were not incurred "in place of" another expense. In truth, there was only one course of action open to the ship-owners in the present case, namely to treat with the pirates with a view to securing the release of the ship, crew and cargo on terms which satisfied their priorities as regards speed, safety and economy, however long that might take.

100. On that basis, it matters not whether it would have been reasonable to have paid the ransom as first demanded by the pirates, because Rule F is not engaged. However, like Hamblen LJ, I do not regard the Judge's approach to this question, and to the Hudson conundrum, as erroneous in law. If this analysis had been determinative, I would agree with the Judge that to pay the ransom as first demanded would not have been an unreasonable thing to have done.

101. As regards the media response services, which the Adjuster allowed under Rule F, but the judge under Rule A, we were told that the direct cost of negotiation and the cost of delivering the ransom had been allowed under Rule A, but Mr Kenny submitted that they really ought to have been allowed under Rule F. He argued in the alternative that the media response costs ought to have been allowed under Rule F, in order to support his argument under Rule F in respect of the running costs, and that there would be difficulties in fitting the incurring of these costs into Rule A, unless on the basis that they were treated as part and parcel with the payment of the ransom itself. I see no distinction in principle between direct costs of negotiation on the one hand and the media response services, on the other, accepting, for the reasons given by Hamblen LJ, that the latter were incurred for the common safety for the purpose of preserving from peril the property involved. I can see no good reason for drawing a distinction between the costs involved directly in the negotiation of the ransom, on the one hand, which must be allowable with the ransom under Rule A, and these media response costs on the other.

Lord Justice Kitchin:

102. I agree with the judgments of Lord Justice Hamblen and Sir Timothy Lloyd. I too would allow the appeal in respect of the items of expenditure set out at paragraph 17

(1) to (4) of the judgment of Lord Justice Hamblen and dismiss it in respect of the item set out at paragraph 17 (5).