Neutral Citation Number: [2021] EWHC 2808 (Comm)

Case No: CL-2019-000823

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2021

Before :

SIR NIGEL TEARE
sitting as a Judge of the High Court

- -

Between :

M/V PACIFIC PEARL CO. LIMITED	**Claimant**
- and -	
OSIOS DAVID SHIPPING INC.	**Defendant**

- -
- -

Robert Thomas QC (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
James M. Turner QC (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 11 and 12 October 2021

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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.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 October 2021 at 10:00 am."

Sir Nigel Teare :

Introduction

1. An arrest of a ship in English law (and in the law of many other maritime nations, though the details may differ) is a means not only of establishing jurisdiction but also of obtaining security for a maritime claim. Where ships collide causing damage the owners of each ship will be concerned to recover that damage from the other ship. Of immediate concern will be the decision as to where to arrest in order to commence proceedings and to obtain security for the claim. However, an arrest may not be the ideal way of founding jurisdiction or of obtaining security. The ship to be arrested may be in a jurisdiction which, for one reason or another, is not regarded as suitable for determining the merits of the claim. The arrest will only provide adequate security if the market value of the ship, when sold, is sufficient to cover not only the claim for collision damage but also the claims of others such as a mortgagee whose claims may have priority to that of the damage claimant. Furthermore, an arrest is costly, not only for the arresting party but also for the owner of the arrested ship.

2. For these reasons the owners of ships involved in a collision will often agree upon a jurisdiction where the claims of each owner against the other will be heard and will also agree to an exchange of letters of undertaking from each owner's P&I Club (or Hull Underwriters) securing the claim of each owner against the other. A letter of undertaking ("LOU") from an owner's P&I Club is preferable to an arrest. It avoids the costs and uncertainty of an arrest and provides a reliable and trustworthy form of security. A LOU is therefore often provided before an arrest takes place; see *The Alkyon* [2018] EWHC 2033 (Admlty) at paragraph 15.

3. Solicitors practising admiralty law in England, the Admiralty Solicitors Group (the "ASG"), have devised two concise forms of agreement to assist the owners of ships involved in a collision when dealing with the choice of jurisdiction and the provision of LOUs. The first, known as ASG 1, is a draft form of LOU. The second, known as ASG 2, is a draft Collision Jurisdiction Agreement, in which the parties agree to litigate or arbitrate their claims in England. Clause C of ASG 2 provides that "Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other."

4. The advantage of these standard forms of agreement is their simplicity which enables parties to agree them without delay so that the costs and delays caused by an arrest can be avoided. The published notes to ASG 1 state that ASG 1 will generally be given by the P&I Club or hull underwriters of the vessels concerned and that ASG 1 has been designed to be used in conjunction with ASG 2. ASG 2 is stated to be a flexible document capable of easy adaptation whereas ASG 1 should not need adaptation.

5. Governments sometimes conduct foreign policy by the use of sanctions. The operation of such sanctions can render the performance of the obligations of P&I Clubs under LOUs unlawful. As the evidence in this case has made plain, even where performance is not unlawful the existence of sanctions can create difficulties in the performance of those obligations.

6. In consequence P&I Clubs have sought to introduce clauses into their LOUs, the aim of which is to make provision for the operation of sanctions.

7. The present case concerns collisions in the Suez Canal in July 2018 between three vessels, PANAMAX ALEXANDER, SAKIZAYA KALON and OSIOS DAVID. All three owners agreed to liability for the collisions being determined by the English Admiralty Court pursuant to Collision Jurisdiction Agreements in the form of ASG 2. The Admiralty Court decided in October 2020 that PANAMAX ALEXANDER was solely responsible for the collisions; see *The Panamax Alexander* [2020] EWHC 2604 (Admlty).

8. At the time of the collisions President Trump had announced the re-introduction of sanctions against Iran; see *Mamancochet Mining Limited v Aegis Managing Agency and others* [2018] EWHC 2643 (Comm) at paragraphs 10-29 for a summary of the relevant sanctions history.

9. In September 2018 the Owners of PANAMAX ALEXANDER and their P&I Club, the Britannia, offered to the Owners of OSIOS DAVID an LOU which contained a sanctions clause. That LOU was not accepted by the Owners of OSIOS DAVID who had arrested a vessel in South Africa, PANAMAX CHRISTINA, and obtained an LOU for their claim from The UK P&I Club which did not contain a sanctions clause. In consequence the Owners of PANAMAX CHRISTINA have incurred expense in South Africa in "fronting" the provision of security and the Owners of PANAMAX ALEXANDER have indemnified the Owners of PANAMAX CHRISTINA in respect of that expense. That expense is sought to be recovered by the Owners of PANAMAX ALEXANDER from the Owners of OSIOS DAVID in this action on the grounds that the expense was incurred as a result of a breach of clause C of the Collision Jurisdiction Agreement (the "CJA") agreed between those Owners, namely, the refusal to accept the LOU offered by the Britannia.

10. In the context of litigation in this court the amount claimed is very modest but it has been said that the arguments being advanced on behalf of the Owners of OSIOS DAVID have "profound implications …for P&I Clubs and major insurers." The claim raises at least two matters of principle. The first is whether the LOU offered by the Owners of PANAMAX ALEXANDER was "in a form reasonably satisfactory" to the Owners of OSIOS DAVID notwithstanding that it contained a sanctions clause. The second is whether, if the LOU was in a reasonably satisfactory form to the Owners of OSIOS DAVID, the Owners of OSIOS DAVID were contractually obliged by the CJA to accept it. These two issues of principle are reflected in the declaratory relief sought by the Owners of PANAMAX ALEXANDER in addition to their damages claim; see the prayer of the Particulars of Claim.

A summary of the facts

11. There was no dispute as to the facts of the case but it is necessary, in the light of the arguments advanced by counsel, to summarise them.

12. The collisions occurred in the Suez Canal on 15 July 2018. At the time of the collisions OSIOS DAVID and SAKIZAYA KALON were at anchor.

13. Very shortly afterwards the Standard Club, OSIOS DAVID's P&I Club, was in contact with the Britannia Club, PANAMAX ALEXANDER's P&I Club, seeking security and an agreement to English law and jurisdiction. ASG 1 and ASG 2 were suggested.

14. On 18 July 2018 the Swedish Club, SAKIZAYA KALON's P&I Club, confirmed that its member agreed to English law and jurisdiction and an exchange of securities. There was discussion about a tripartite Collision Jurisdiction Agreement.

15. On 25 July 2018 the Britannia advised that it would recommend an exchange of securities between all three ships but that its member was not yet in a position to agree English law and jurisdiction.

16. On 26 July 2018 the Swedish Club suggested that the issue of liability which it had been seeking be "be parked for now".

17. On 2 August 2018 the Standard said it was willing to forgo a waiver of liability in order to reach agreement on law and jurisdiction.

18. On 3 August 2018 the Owners of SAKIZAYA KALON and OSIOS DAVID signed a bipartite CJA on the terms of ASG 2.

19. On 8 August 2018 the Owners of PANAMAX ALEXANDER and OSIOS DAVID agreed in principle to a bipartite CJA on the terms of ASG 2. Such a CJA was signed on 16 August 2018. Clause A provided that each party's claim will be determined exclusively by the English Courts in accordance with English law and practice. Clause B provided that each party's solicitors (Ince and Co for the PANAMAX ALEXANDER and Reed Smith for OSIOS DAVID) will accept service of the other party's proceedings on behalf of their respective clients.[1] Clause C provided:

> "Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other."

20. Clauses D and E contained warranties by each party as to ownership and the absence of a demise charter. Clause F provided that the CJA was to be governed by English law and any dispute was to be subject to the exclusive jurisdiction of the English courts.

21. It is to be noted that the pro-forma ASG 2 contained a further sentence in clause C which read as follows:

> "Each party agrees to waive its rights to apply to arrest or re-arrest to obtain further security under the Civil Procedure Rules 1998 Part 61.6.".

22. It appears from the CJA agreed by the parties that that second sentence was struck out.

23. The Standard was concerned that PANAMAX ALEXANDER might be declared a constructive total loss which would mean that its P&I Club would not be obliged to provide an LOU. The Standard therefore looked into other ways of obtaining security, including the arrest of a ship in "associated ownership" in South Africa. They learned that PANAMAX CHRISTINA was scheduled to call in South Africa in early September.

[1] At a later stage Ince and Co. became Ince Gordon Dadds LLP. I have referred to the firm throughout as Ince and Co.

24. On 21 August 2018 Reed Smith advised Ince that the Owners of OSIOS DAVID required security in the sum of US$2.3 million and that an LOU from the Britannia on the ASG1 form would be accepted. In the following days both Reed Smith and the Standard pressed for a response.

25. On 28 August 2018 Ince and Co requested security in the form of a P&I Club LOU in respect of the claim of PANAMAX ALEXANDER in the sum of US$13.7 million. On 29 August 2018 Reed Smith offered a P&I Club LOU in the sum of US$1.5 million. In a separate email Reed Smith threatened to take steps to obtain security absent security by noon on 30 August 2018. On 4 September 2018 Ince and Co. reduced their demand to US$12,499,200 and said that any attempt to arrest a vessel alleged to be "associated" would be wrongful. In response Reed Smith offered security in the sum of US$5 million on condition that the Owners of PANAMAX ALEXANDER provide security that day and said that the Owners of OSIOS DAVID would be justified in taking steps to obtain security without further warning.

26. On 5 September 2018 PANAMAX CHRISTINA was arrested in South Africa. (These proceedings are continuing because the lawfulness of the arrest is being challenged. There is presently an appeal pending before the Full Bench of the KwaZulu Natal Local Division due to be heard in June 2022.)

27. After the arrest, and still on 5 September 2018, Reed Smith suggested that in order to avoid delays and further costs the Britannia should now provide an LOU in the sum of US$2.3 million in the form of ASG1. On the same date the Britannia, which had been preparing a draft LOU since 3 September 2018, provided a draft LOU to the Standard. The Britannia expressed surprise at the developments in South Africa and said that they were prepared to provide security on the basis of an exchange of securities. With regard to the disputed sum of security demanded by Ince and Co. it was suggested that the court hearing the merits of the claims could determine that dispute. The form of LOU offered included a clause to that effect (but with regard to the sum of security demanded by the owners of OSIOS DAVID). The Britannia also advised as follows:

> "As you are aware, the voyage destination of our Member's vessel is BIK in Iran and accordingly our LOU will also need to contain the Club's sanctions clause, and the security sum is stated in Euros."

28. In the absence of an agreement to an exchange of securities the Britannia said that its member intended to arrest OSIOS DAVID.

29. Since the form of sanctions clause provided on 5 September 2018 was later amended no submissions were made about it and so there is no purpose in setting it out in full.

30. On 6 September 2018 the Standard replied at length saying that there were many difficulties with the Britannia's proposal. It was said that this was the first time the Standard had learnt that the vessel's destination was Iran and of the potential sanctions issue. Details of the cargo, the charterers, the shippers and the receivers were sought. Complaint was made of the width of the sanctions clause which may "effectively render the LOU useless". Confirmation that the Owners of PANAMAX ALEXANDER was not in breach of any sanctions was sought and subject to that the Standard was prepared to include in its LOU a provision to the effect that any payment would not breach any

sanctions. It was said that any uncertainty as to sanctions should not harm the ability of the Owners of OSIOS DAVID to obtain recovery for its losses. The form of LOU offered was said not to be "in a form reasonably satisfactory" to the Owners of OSIOS DAVID. The Standard was prepared to agree to an exchange of securities even though there was said to be no obligation to do so. Finally, it was pointed out that in view of the "Iranian nexus" and the amount of security demanded by the owners of PANAMAX ALEXANDER it was necessary to consult with the International Group of P&I Clubs ("the IG") before issuing security at the level demanded. (This was necessary because of an agreement reached by the sanctions committee of the IG in May 2018 that all members of the IG should consult with the IG before issuing security with an "Iranian nexus" above US$10 million. The IG is a group of the 13 largest P&I Clubs which cover more than 90% of the world's ocean-going fleet and share between them claims above US$10 million through a pooling arrangement.)

31. On 7 September 2018 the Britannia replied. The information which had been requested was provided. With regard to the form of LOU which it was willing to provide a revised wording was provided which sought to "achieve a balance between the wording we put forward and your wording". It was intended that the wording be "reciprocal". However, the demand for an exchange of securities was not pursued. It was suggested that if the wording was now accepted the IG would then be consulted.

32. The sanctions clause now put forward was in the following form:

> "We shall not be obliged to make payment under, nor be deemed to be in default of, this Letter of Undertaking if (i) doing so would be unlawful, prohibited or sanctionable under the United Nations resolution or the sanctions, laws, or regulations of the European Union, United Kingdom, United States of America or [the place of incorporation or domicile of your member] or the ship's flag state ("the Sanctions"), or (ii) if any bank in the payment chain is unable or unwilling to make, receive or process any payment for any reason whatsoever connected with the Sanctions (including but not limited to a bank's internal policies). If any such circumstance arises as described in (i) or (ii) herein, then we shall use reasonable endeavours to obtain whatever Governmental or other regulatory permissions, licences or permits as are reasonably available in order to enable the payment to be made."

33. On 8 September 2018 the Standard agreed to provide security for the claim of the Owners of PANAMAX ALEXANDER in the sum of Euros 10,760,000 in a form which included the sanctions clause drafted by the Britannia. Anna Doumeni of the Standard has said in her witness statement that the Standard agreed to provide security because Britannia was threatening to arrest OSIOS DAVID.

34. Also on 8 September 2018 the Standard replied to the Britannia's revised form of LOU which it had offered to provide to the Owners of OSIOS DAVID. The first point made was that "considering the trade of your member's vessel there is a significant risk that our member's claim will remain unsecured". There were three "significant factors to take into account". They were expressed as follows:

> "1. Our member's trade is not in any way related to any sanctioned entities;
>
> 2. The Bill of Lading is negotiable and made out "to order", therefore it cannot be made certain that this voyage will not ultimately become a sanctions problem; and
>
> 3. In all likelihood our member will be the money receiving party. Therefore, any sanctions related risk of non-payment would be run only by our member. In reality, therefore, your reciprocity is an empty letter.
>
> In the above circumstances, your proposed wording effectively seeks to transfer the risks of all the "bad deeds" of our member onto the shoulders of our member and this is not acceptable.
>
> ……..
>
> Therefore, in view of the latest information about the sanctions, our member insists on the standard LOU wording without any sanctions clause, which shall not exceed the sum of Euros 1,980,000 ……..or the equivalent in Euros of the amount of US$2,300,000……..at the exchange rate applicable on the date of such agreement or judgment whichever is the higher, inclusive of interest and costs. ……"

35. It is clear that this was a rejection of the form of LOU offered by the Britannia.

36. On 10 September 2018 the Standard asked the Sanctions Committee of the IG whether it had any objection to the form of sanctions clause it proposed to include in its LOU to the owners of PANAMAX ALEXANDER. Mr. Salthouse (of the North of England P&I Club) replied on behalf of the committee saying that the clause was a "sensible approach to this issue" and that he would have no objection. No objections were received from any other member of the committee.

37. Also on 10 September 2018 the UK P&I Club provided an LOU to the Owners of PANAMAX CHRISTINA to enable that vessel to be released from arrest in South Africa. That LOU did not contain a sanctions clause. The LOU also provided for South African law and jurisdiction to govern the LOU.

38. This development led to a revision by the Standard of the LOU which it was willing to provide to the Owners of PANAMAX ALEXANDER. The Standard required that its LOU also contained a submission to South African law and jurisdiction. It also included the Sanctions clause proposed by the Britannia and approved by the International Group.

39. On 12 September 2018 the Britannia replied to the effect that the Standard had already agreed to provide an LOU on the terms stated on 8 September 2018 and so the revised wording was rejected. That dispute continued and was not, I think, resolved.

40. On 25 September 2018 the Britannia provided counter-security to the UK P&I Club by way of an LOU which included the sanctions clause.

41. On 2 October 2018 there was a discussion between Nicholas Roberson of the Britannia and Anna Doumeni of the Standard. It is recorded in an email sent that very day from Mr. Roberson to the managers of PANAMAX ALEXANDER. The call was described as courteous and constructive. Mr. Roberson enquired whether the Owners of OSIOS DAVID would be willing to replace the UK LOU (without a sanctions clause) with a Britannian LOU (with a sanctions clause). Anna Doumeni said that that would cause a "huge problem" for her members. There then followed a discussion about the arguments set out by the Standard on 8 September. Mr. Roberson questioned whether having the sanctions clause made any difference "in that if the Club cannot pay, we cannot pay, and emphasising that if a payment were due, it would be in the Club's interest to try and make the payment, and it would not be in our interest to hide behind sanction to try and evade any payment". Anna Doumeni said that one of the "previous sticking points" had been the meaning of "reasonable endeavours". She said that her members thought there was room in those words for Britannia to try and avoid payment. Mr. Roberson replied that "as P&I Club and part of the IG founded on mutuality etc, that if our members were obliged to pay, we would want to since the Club would suffer reputational damage ……." Anna Doumeni asked whether "reasonable endeavours" could be replaced with "best endeavours". Mr. Roberson said that he would check internally and Anna Doumeni said she would check with her members "whether they would be prepared to agree a revised wording on that basis." Mr. Roberson appears to have checked internally that day and been informed that the wording could be changed to best endeavours.

42. On 4 October 2018 Anna Doumeni referred to the telephone call and advised Mr. Roberson by email that her members did not agree to replace the UK LOU with a Britannian LOU on the terms offered by the Britannia on 7 September 2018. She explained that her member was "not obliged to accept security which may or may not be effective".

43. On 12 October 2018 the Britannia repeated its offer to replace the UK Club LOU with a Britannian LOU on the same terms as had been offered on 7 September 2018.

44. On 14 December 2018 the Britannia withdrew its offer to replace the UK Club LOU with a Britannian LOU on the terms offered on 7 September 2018.

45. There matters effectively rested until 29 April 2019 when Ince and Co. advised Reed Smith that the Owners of OSIOS DAVID were in breach of the CJA for not accepting the security offered on 7 September 2018. They further advised that if the Britannian LOU were accepted in place of the UK LOU the claim for damages would be waived.

46. On 6 May 2019, in order to mitigate their member's claim for damages, Britannia offered an LOU in the same terms as before but this time backed by a guarantee from HSBC. The terms of the guarantee were that HSBC were irrevocably and unconditionally to guarantee payment of any liability of the Owners of PANAMAX ALEXANDER to the Owners of OSIOS DAVID. This offer was open for 7 days.

47. The Standard sought legal advice which was not obtained until 9 May 2019. It was then necessary to take instructions from the owners of OSIOS DAVID who were based

in the US and their own local lawyers had to consider the position. By 10 May the Owners of OSIOS DAVID remained very concerned that a bank would not pay out if the Britannia refused to pay out.

48. It was the evidence of Anna Doumeni that it was impossible to respond within the short time allowed.

49. On 14 May 2019 the Standard referred to the Iranian nexus and asked whether the Britannia had any concerns as to its potential inability to satisfy the claim of the Owners of OSIOS DAVID. On 16 May 2019 the Britannia replied that it did not see the relevance of the question and that the Standard should form its own view on the question raised.

50. On 17 May 2019 Reed Smith denied the alleged breach of the CJA and said that the security offered was not satisfactory because it was "caveated by what is, effectively, a promise not to pay". Reed Smith was, however, willing to consider the HSBC offer and provided an amended form of guarantee which would be "acceptable".

51. The question of security continued to be debated by Ince and Co. and Reed Smith but no agreement was reached. Thus on 15 July 2019 the Owners of PANAMAX ALEXANDER commenced proceedings in this court seeking damages and declaratory relief.

The LOU offered on 7 October 2018; was it in a form reasonably satisfactory to the Owners of OSIOS DAVID ?

52. This factual issue raises a point of principle because the refusal to accept the LOU on 8 September 2018, repeated on 4 October 2018, was in essence based upon the fact that the sanctions clause excused the Britannia from liability in the circumstances stated in the clause. As was made clear by the Standard on 8 September 2018 the Owners of OSIOS DAVID insisted upon receiving an LOU without any sanctions clause. It is, I apprehend, important for P&I Clubs to know whether an LOU with a sanctions clause can be a "form reasonably satisfactory" to the proposed recipient. In this case that requires consideration of whether the reasons put forward on 8 September 2018 justify the conclusion that the form of LOU on offer was not reasonably satisfactory to the Owners of OSIOS DAVID. Of course, every case must turn on its own facts and so there is an inherent limit to the value of the decision in this case as a precedent but I nevertheless understand why this case has been regarded as raising an issue of principle.

53. Subsequent to 8 September 2018, and right up until the hearing of this matter in October 2021, additional objections were taken to the LOU offered on 7 September 2018. These further objections do not raise the same issue of principle.

The meaning of "reasonably satisfactory"

54. It was submitted by counsel on behalf of the Owners of PANAMAX ALEXANDER that clause C of the CJA, which required each party to provide security "in a form reasonably satisfactory to the other", gives rise to an objective test of reasonableness. The reference to "the other" was said to be a reference to a person in the position of "the other", that is, an owner who has agreed to the terms of the CJA when liability is in issue.

55. It was submitted by counsel on behalf of the Owners of OSIOS DAVID that "only the perspective of the party-to-be-secured, or more precisely of a reasonable person in its position, is relevant". There was therefore some common ground as to how to view "the other", the party to be secured. However, counsel submitted that "there is thus no requirement per se to consider the perspective of the securing party". This was not common ground. For counsel for the Owners of PANAMAX ALEXANDER submitted that the position of the Club offering the LOU was relevant, as were the legal and practical difficulties facing the Club in the context of sanctions.

56. In my judgment clause C imports an objective test. That is implicit in the words "reasonably satisfactory"; see *Lewison The Interpretation of Contracts* at paragraph 16.49 where the New Zealand Court of Appeal in *Mana v Fleming* is quoted as saying that "reasonably" (in a contract which obliged a purchaser of land "to do all things reasonably necessary" to enable a condition to be fulfilled) imports an objective standard. However, that objective test must be assessed by reference to the position of the proposed recipient of the LOU (or a reasonable person in his position); that is what the clause states and the security is being offered to him. The same focus on one party also featured in the case of *Mana v Fleming* where the Court of Appeal, in the passage to which I have already referred, said: "Adoption of an objective standard is consistent with principle. The Court is the arbiter of what is reasonably necessary in any case, viewed from the purchaser's perspective. Anything less than an objective standard would allow a subjective assessment according to the values of the party whose conduct is in issue."

57. However, in assessing that objective test by reference to the position of the proposed recipient the matters which have caused the Club to propose a sanctions clause must also, I think, be relevant. That is because it would be unrealistic to assess whether a sanctions clause was reasonably satisfactory to the proposed recipient without taking account of the legal and practical difficulties which have given rise to the need for the sanctions clause. The assessment cannot take place in a vacuum. As I shall explain, those same difficulties are relevant to the proposed recipient because if, instead of accepting the LOU, he sought security by way of an arrest he would face the same difficulties.

<u>The effect of sanctions</u>

58. No attempt has been made in the present case to suggest, let alone establish, that a payment by a P&I Club to discharge a liability in damages of the Owners of PANAMAX ALEXANDER to the Owners of OSIOS DAVID, or the involvement of a bank in effecting that payment, would be in breach of the US sanctions on Iran merely because the cargo of barley on board the vessel was destined for an Iranian port or because the consignee was on the "sanctions list". (The consignee was named as "to the order of Bank Keshavarzi, Vanak branch" which bank, I was told, was on the sanctions list.) Rather, this is a case where it was considered that, because there was an "Iranian nexus", there might be difficulty in making the required payment.

59. These difficulties were described by Mr. Anders Leissner, the expert witness called on behalf of the Owners of PANAMAX ALEXANDER. He is well qualified to speak about such matters having been the Legal Director of the Swedish Club and having had experience dealing with sanctions issues. He was a member of the Sanctions Committee

of the IG from its inception in 2011 until 2019. Thus he was on the committee when the Standard P&I Club sought its approval for the use of the sanctions clause in this very case. As a member of the committee he had experience in discussing and deciding policy issues concerning sanctions and P&I Clubs. He gave evidence that sanctions have added significant complexity to insurance cover and have created an uncertainty for the Clubs' members as to whether at the end of the day the Clubs will be able to pay a claim. He described the weakest link in the claims handling chain as the banks who may stop or delay payment without there being any formal prohibition against the transaction. He said that payments having an Iranian nexus were an illustrative example. "The extremely low risk tolerance level amongst banks has resulted in banks applying restrictions which go beyond the actual prohibition." He described the largest sanctions risk as being the risk that a legitimate transaction will fall foul of additional compliance requirements imposed by a bank. He noted that the sanctions guide issued by the North of England P&I Club emphasised that the practical ability to make a payment is a relevant factor for the club to consider when contemplating posting security for a claim.

60. Anders Leissner was of the opinion that in a case with an Iranian nexus LOUs issued by a P&I Club would typically include a sanctions clause. He considered it fair to say that any club providing security in relation to a claim with an Iranian nexus should seek to protect itself with a clause containing the same or similar language to the sanctions clause in this case.

61. The expert called by the Owners of OSIOS DAVID was Mr. Alistair Johnston, a well-known shipping solicitor. He has had much experience of seeing LOUs issued by Clubs but, as he himself fairly accepted, he did not have the "internal" Club experience of Mr. Leissner. He did not think it axiomatic that an LOU issued in a case with an Iranian nexus would contain a sanctions clause. He thought it was "fairly rare" for such clauses to be included. He based his views on the 20-30 collision cases seen by his firm each year. He said that on only one occasion was there a sanctions clause. However, as he said in cross-examination, of those 20-30 cases only about 4 had an Iranian nexus.

62. It was suggested to Mr. Johnston that he was not acting as an impartial expert witness, which allegation he denied. The allegation was not pursued in counsel's closing submissions. In fairness to Mr. Johnston I should say that I am satisfied that in giving his expert evidence he was not seeking to act impartially. Mr. Johnston knows full well the duties of an expert witness because he will have instructed many. It is most improbable that Mr. Johnston was doing anything other than giving his own honest view, based on his own experience. In cross-examination he was taken to a passage in his evidence where, in the context of the question whether sanctions clauses were typical in cases where there was an Iranian nexus, he dealt with examples of such clauses being accepted by other owners and suggested why they might have been accepted. This was said to be illegitimate speculation. His answer was that he thought he was dealing with relevant matters and trying to assist the court. I consider that that was his view and that he was not seeking simply to promote the case of the party instructing him. In the same section of his report he commented on the meaning of certain sanctions clauses including the one in this case. He was not taken specifically to these comments in cross-examination but counsel did make the general comment that Mr. Johnston gave his opinion on such matters when he had not been asked to. Mr. Johnston replied that it was difficult to give a view on the matters put to him without

looking at the clause itself. Again, it does not appear to me that these passages show that Mr. Johnston was simply acting as an advocate, which was the allegation put to him. It may be that he was unwise to consider the meaning of the sanctions clause as freely as he did in both his main report and in his supplementary report, given that he was not called as an expert on construction. It may also be that he allowed himself to stray into the area of what clauses he would accept and what clauses he would not accept notwithstanding that none of the questions put to him raised that matter directly. But the suggestion that he sought to blacken the name of the Britannia in support of the case of those instructing him seems, to me, deeply improbable. As Mr. Johnston said in response to that allegation the Britannia is a client of his.

63. I have, however, to decide which expert witness to prefer. It seems to me that Mr. Leissner's experience of what P&I Clubs do is much wider and deeper than that of Mr. Johnston and so I prefer Mr. Leissner's evidence that where there is an Iranian nexus a Club LOU will typically include a sanctions clause. That evidence is entirely consistent with Mr. Leissner's unchallenged evidence as to the practical difficulties for P&I Clubs caused by sanctions and , in particular, by the banks' attitudes when there is an Iranian nexus.

64. There was therefore in the present case, where there was an Iranian nexus, good reason for the Britannia to include the sanctions clause in the LOU it was willing to provide. The fact that the clause provided that the Britannia was not obliged to pay not only when to do so would be unlawful but also when a bank was unwilling to make payment for whatever reason connected with the Sanctions was the subject of comment by counsel for the Owners of OSIOS DAVID. Reference was made to the inclusion of "banking sensitivities" as being "particularly striking". But the inclusion is entirely consistent with, and justified by, the practical difficulties fully explained by Mr. Leissner's evidence.

The objections raised

65. I have quoted earlier in this judgment the Standard's email of 8 September 2018. The sanctions clause was said to be unsatisfactory because it transferred the risks generated by the fact that PANAMAX ALEXANDER had an Iranian nexus (namely, that the cargo was destined for Iran) from the Owners of PANAMAX ALEXANDER to the Owners of OSIOS DAVID. The latter could not accept the sanctions clause because their own trade was not related to any sanctioned entities. Moreover, because the Owners of OSIOS DAVID were to be the "money receiving party" (because OSIOS DAVID had been at anchor) this "sanctions related risk of non-payment" was to be run only by the Owners of OSIOS DAVID and not, reciprocally, by the Owners of PANAMAX ALEXANDER.

66. The question is whether the sanctions clause was "reasonably satisfactory" to the recipient of the LOU. Counsel for OSIOS DAVID submitted that the suggestion that it was reasonably satisfactory makes the error of considering the matter from the point of view of the Club issuing the security rather than from the point of view of the recipient. I do not think there is any such error. The reality is that because of the low risk tolerance of banks where there is an Iranian nexus payments may not be made. This is a fact of commercial life which affects a shipowner who is seeking compensation for loss caused by a collision with a ship with an Iranian nexus. As Mr. Leissner explained in his

evidence, if the shipowner had arrested the wrongdoing ship and then sought a payment into court as the price for the release of the vessel from arrest the bank asked to make the payment might well raise the sanctions issue and not made the payment. Similarly, as it appears to me, if the shipowner obtained judgment on his claim and sought to execute the judgment by having the vessel under arrest sold, the shipowner would be exposed to the same risk. The bank asked to pay the proceeds of sale into court might well raise the sanctions issue and not make the payment. Thus the sanctions clause does not reflect a problem faced just by the Club. It reflects the reality of practical problems facing anyone who seeks to make or receive a payment where there is an Iranian nexus. Sanctions issues affect the proposed recipient of an LOU just as much as they affect the Club offering the LOU. During the course of Mr. Leissner's cross-examination it was clear that this was his view.

67. I now turn to the reasons given by the Standard in its email dated 8 September 2018 for saying that the LOU with the sanctions clause was not acceptable. Three significant factors were mentioned. First, it was said that its member was not in any way related to a sanctioned entity. That is true but the Iranian nexus arises from the fact that a payment under the LOU would discharge the liability of a shipowner who did have an Iranian nexus. This, as already explained, is a problem for both the payor and the payee. It is a fact of commercial life in an era when sanctions are used by governments as an instrument of foreign policy. Second, it is said that the bill of lading was negotiable and made out to order and so it could not be made certain that the voyage would not ultimately become a sanction problem. That is also true. In fact the "order" party or consignee was a sanctioned Iranian entity. So the Iranian nexus was clear. Third, it was said that the Standard's member would be, in all likelihood, the "money receiving party". This proved to be true but at the time liability was disputed and continued to be disputed to the end of the trial in July 2020, notwithstanding that at the time of the collision OSIOS DAVID was at anchor; see paragraphs 3 and 234-269 of the judgment on liability at [2020] EWHC 2604 (Admlty). Even if it could be said that it was very likely that OSIOS DAVID would be the receiving party it would not be objectively reasonable to take that into account at the very early stage of agreeing the terms of the security because to do so, where there was a dispute as to liability, would only lead to delay in agreeing the terms of the LOU. Such delay increases the likelihood of an arrest and its attendant expense. It would appear that the Swedish Club and the Standard itself had these very concerns in mind on 26 July 2018 and 2 August 2018 when seeking to agree a CJA.

68. The conclusion reached by the Standard on 8 September 2018 was that the sanctions clause transferred the risk of "bad deeds" of PANAMAX ALEXANDER to OSIOS DAVID which was "not acceptable". The unfortunate phrase "bad deeds" was intended to refer to the fact the cargo of barley on PANAMAX ALEXANDER was being taken to Iran and so there was an Iranian nexus. But the risk that a bank might refuse on that account to make a payment so as to discharge a liability of PANAMAX ALEXANDER was one which faced OSIOS DAVID whenever and however it sought payment as compensation for the losses it had suffered. That risk was not being transferred to OSIOS DAVID. Once an Iranian nexus was apparent the risk of non-payment arose and would be run by OSIOS DAVID even if it sought to secure its claim by an arrest. (For reasons which have not been explored in evidence the UK Club's LOU in South Africa did not contain a sanctions clause. But if payment were sought pursuant to that LOU the risk of non-payment on account of the Iranian nexus would remain.)

69. Counsel for OSIOS DAVID submitted that "the consideration for not arresting the vessel remains the security provided in lieu of arrest. The security must therefore secure. Security which is or appears liable to evaporate is – to put it at its lowest – less likely to be reasonably satisfactory than security which does not." However, the security provided by an arrest is liable to "evaporate" for the same reason. Where there is an Iranian nexus banks may be reluctant to handle the proceeds of sale of the vessel. The collision damage claimant cannot expect the P&I Club who provides an LOU in lieu of an arrest to be able to avoid the effect of sanctions when there is an Iranian nexus. Such an expectation would be unrealistic and unreasonable. Thus an LOU which contains a sanctions clause recognises an inevitable commercial reality and is not unreasonable for doing so.

70. The point about the risk being transferred was put in another way during the hearing and developed by counsel in his written closing submissions. It was said that the effect of the clause was to end the liability of the Britannia to pay if either of the stated events occurred. Its liability to pay was not merely suspended. Mr. Leissner fairly accepted that a sanctions clause which permanently ended the Club's liability would not be reasonably satisfactory. But in my judgment the effect of the sanctions clause was clearly suspensory. The clause contained an obligation by the Britannia, in the event that payment would be unlawful or in the event that a bank was unwilling to pay, to use reasonable endeavours to obtain whatever permits were reasonably available in order "to enable the payment to be made". If such endeavours were successful would the Britannia be still liable to pay? Plainly it would be. The successful exercise of reasonable endeavours would be of no value if the club's liability to pay had been permanently ended. Counsel's only answer to this was to suggest that a new obligation to pay arose once the reasonable endeavours of the Club had been successful. But this only goes to show the force of the argument that the Club's liability to pay had been suspended. There is only one "payment to be made", not two, and that payment is the one that the Club was required to make under the LOU. In my judgment the original liability would, in the events contemplated, have been suspended and would be reactivated when the reasonable endeavours had been successful.

71. It was then said that even if that is the correct construction of the sanctions clause it was reasonable for the owners of OSIOS DAVID to think that the effect of the clause was to end the club's obligation to pay and so the form of the LOU was not reasonably satisfactory to the owners. I must disagree. The meaning which the clause would bear to the reasonable man in the position of Owners of OSIOS DAVID would be that the obligation to pay was suspended, not terminated, and was liable to be reactivated if the Club's endeavours were successful.

72. At the hearing the concern expressed by Anna Doumeni to Nicholas Roberson on 2 October 2018 was pursued. It was said that the obligation to use reasonable endeavours was inadequate and that the obligation ought to have been to use best endeavours. A further point was taken that the ambit of the obligation was limited to using reasonable endeavours to (in summary) *obtaining Government or other regulatory permits to enable the payment to be made* and ought to have been expressed more widely in terms such as an obligation to use reasonable endeavours *to enable the payment to be made*. There was therefore, it was said, no obligation to persuade an unwilling bank to make payment.

73. With regard to the first point, best endeavours as opposed to reasonable endeavours, there is substantial support for the argument that an obligation to use reasonable endeavours is a less rigorous obligation than an obligation to use best endeavours or all reasonable endeavours (which are effectively the same); see the analysis of the authorities by the Singapore Court of Appeal in *KS Energy Services Ltd. V BR Energy (M) Sdn Bhd* [2014] SGCA 16 at, in particular, paragraphs 54-63 and *Lewison The Interpretation of Contracts* at Section 7, paragraphs 16.47 and 16.50 (though cf paragraph 16.48). However, as was pointed out in *KS Energy Services* at paragraph 44 the task in each case is one of construction to ascertain the meaning which the expression used in the contract in question would convey to the reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract. Thus context is important.

74. In the case of an LOU issued by a Club, as Mr. Roberson said to Ms. Doumeni on 2 October 2018, it would be in the Club's interest to try and make the payment and it would not be in the Club's interest to hide behind a sanction and try to avoid payment. There would be reputational damage if it did so. This was not in dispute. Mr. Johnston also said that he would not expect a Club to try to avoid lability or payment. "Their worldwide reputation is built on honouring such undertakings." Thus it is arguable, as it seems to me, that the obligation in the LOU offered by the Britannia "to use reasonable endeavours to obtain whatever Governmental or other regulatory permissions, licenses or permits as are reasonably available in order to enable the payment to be made" would be regarded in its context as an obligation to use all reasonable endeavours (which is effectively the same as best endeavours). In the context of a Club LOU the reasonable person with knowledge of the importance to the Club of honouring its obligation to pay might very well regard the obligation to use reasonable endeavour as an obligation to use all reasonable endeavours.

75. It is unnecessary to decide this question of construction. If one assumes that the obligation does not extend to all reasonable endeavours or to best endeavours I do not consider that the LOU offered by the Britannia was not reasonably satisfactory to the offeree for that reason. The point was not taken on 8 September 2018 when Ms. Doumeni set out her objections and it was not taken on 4 October 2018 when the point had actually been canvassed on 2 October 2018. The failure to take the point on both occasions is cogent evidence that the inclusion of a mere reasonable endeavours obligation did not cause the LOU to lack the quality of being reasonably satisfactory.

76. With regard to the second point, that the obligation was too narrow and did not encompass an obligation to seek to persuade an unwilling bank to pay, I consider that counsel for PANAMAX ALEXANDER was correct to say that where a bank was unwilling to pay the obtaining of a Government or other regulatory permission for a payment would be the first step in persuading the bank to pay. The permission would be obtained in order to persuade the bank to pay. The distinction sought to be drawn therefore lacked reality. But even if this is wrong I am not persuaded that the absence of an obligation to persuade the banks to pay caused the LOU offered by the Britannia to be unsatisfactory. If it did so then one would have expected Ms. Doumeni to have taken the point on 8 September 2018 or 4 October 2018 and she did not.

77. Having considered the objections raised by the Owners of OSIOS DAVID both in 2018 when the LOU was tendered by the Britannia and at the hearing I do not consider that

any of them when considered individually or collectively enable the Owners of OSIOS DAVID to say that the LOU was not reasonably satisfactory to them. It is apparent from the Standard's email of 6 September 2018 that it was thought that the sanctions clause initially proffered might render the LOU "useless". The same thought features in Reed Smith's email of 17 May 2019 when the LOU was described as being caveated by a "promise not to pay". But, however the Owners of OSIOS DAVID were to receive payment for their losses, whether by means of an LOU or by the sale of a vessel under arrest, the risk of non-payment as a result of the Iranian nexus was present. The sanctions clause recognised that reality. It was, I consider, unreasonable for the Owners of OSIOS DAVID to expect the Britannia to be able in some way to avoid that risk. As Mr. Roberson told Ms. Doumeni on 2 October 2018, if the Club were unable to pay because of the Iranian nexus that would be so whether or not the sanctions clause was included in the LOU. The sanctions clause recognised that risk and stated what all would expect, namely, that the Club would nevertheless endeavour to ensure that payment was made. I have therefore concluded that, given the Iranian nexus, the LOU with the sanctions clause was, considered objectively, reasonably satisfactory to the Owners of OSIOS DAVID.

78. Both Mr. Leissner and Mr. Johnston agreed that the IG Sanctions Committee, when asked for its approval of a sanctions clause, was concerned to ensure both that the P&I Club and its members did not breach the sanctions and that parties in receipt of LOUs from P&I Clubs were properly secured. This is what one would expect given that P&I Clubs are mutual associations of shipowners. The shipowner members and hence the Clubs are interested both in ensuring that sanctions are not breached and that the security offered by the Clubs to shipowners is proper or adequate. Thus the fact that the Committee had no objection to the sanctions clause in the LOU tendered by the Standard to the Britannia in respect of the claim of the Owners of PANAMAX ALEXANDER supports the conclusion which I have reached. It was pointed out that Mr. Salthouse took just 15 minutes to respond and it was suggested that the absence of a response from anyone else on the Committee indicated that none engaged with the question. The fact is that the sanctions clause did not strike the Committee as something to which objection could be taken. It was also suggested by counsel for the Owners of OSIOS DAVID that the lack of an objection to the clause in that LOU did not support the conclusion I have reached because the Sanctions Committee was not asked to approve the clause in the LOU tendered by the Britannia to the Standard in respect of the claim of the Owners of OSIOS DAVID. However, it was the very same clause and the Committee must have considered that the Owners of PANAMAX ALEXANDER were properly secured by it. It was said that those Owners were unlikely to be the receiving party and so there was little need for proper security. But the email from the Standard to the Committee said nothing about who was likely to be the receiving party. That matter cannot therefore have featured in the Committee's consideration of the adequacy of the security.

79. The evidence in this case also reveals that other Clubs or hull underwriters provided the Owners of PANAMAX ALEXANDER with LOUs which contained the same sanctions clause. On 16 July 2018, the day after the three collisions between PANAMAX ALEXANDER, SAKIZAYA KALON and OSIOS DAVID had occurred, further incidents took place in the Suez Canal involving PANAMAX ALEXANDER, NYK FALCON and NYK ORPHEUS. On 6 December 2018 and 9 January 2019 the Japan P&I Club and Tokio Marine Fire Insurance Co., a major Japanese insurance company,

provided LOUs to the Owners of PANAMAX ALEXANDER in respect of those incidents. Those LOUs contained the same sanctions clause which the Britannia had offered to the Owners of the PANAMAX ALEXANDER. As noted earlier in this judgment the Standard provided an LOU containing the sanctions clause to the Owners of PANAMAX ALEXANDER in relation to the collision between that vessel and OSIOS DAVID. The Owners of PANAMAX ALEXANDER acted consistently with their submissions in this case by accepting such LOUs. Attempts were made by counsel for OSIOS DAVID to distinguish the circumstances of the collisions on 15 and 16 July 2018 and by reference to who was and who was not expected to be the receiving party but I was not persuaded by those distinctions. The fact that other Clubs or hull underwriters offered and the Owners of PANAMAX ALEXANDER accepted LOUs with the same sanctions is at least consistent with the submission that such LOUs were reasonably satisfactory to the recipient. But of more significance is the fact that the Owners of NYK ORPHEUS accepted an LOU from Britannia which contained the sanctions clause. That acceptance also supports the conclusion which I have reached, notwithstanding that I was told by counsel for OSIOS DAVID that the outcome of the collision litigation between PANAMAX ALEXANDER and NYK ORPHEUS was less predictable than that between PANAMAX ALEXANDER and OSIOS DAVID. In my judgment such distinctions carry little, if any, weight. The time when security is offered is far too early to make any reliable assessment of the likely outcome of the collision litigation notwithstanding that the Standard sought to do that in its email of 8 September 2018.

Does the CJA, and in particular clause C, oblige the owner to accept an offer of an LOU which is in a form which is reasonably satisfactory to him ?

80. On the basis of my finding that the LOU tendered by the Britannia to the Owners of OSIOS DAVID was in a form reasonably satisfactory to the Owners of OSIOS DAVID the next important question is whether, on the true construction of the CJA, the Owners of OSIOS DAVID were obliged to accept it.

81. It is the case of the Owners of PANAMAX ALEXANDER (see paragraph 3 of the Particulars of Claim) that on the true construction of clause C of the CJA each party was required to accept security that was objectively reasonably satisfactory and/or each party would not act unreasonably by rejecting security that was objectively reasonable. In the course of his submissions by way of reply counsel said that his preference was for the first formulation with the words “as soon as reasonably practical” added.

82. Counsel for the Owners of PANAMAX ALEXANDER submitted on the true construction of the express terms of clause C each party was required to accept security that was objectively reasonably satisfactory as soon as reasonably practical. However, there are no words in clause C capable of bearing the suggested construction.

83. Counsel submitted in the alternative that there was a term to be implied in clause C to the effect that each party was required to accept security that was objectively reasonably satisfactory as soon as reasonably practical.

84. The basis of counsel’s submission, as stated in Counsel’s Opening Submissions, was that it was obvious that one party, A, could not refuse a form of security offered by the other party, B, and instead arrest the vessel or a sister-vessel simply because A

unreasonably rejected security that was objectively reasonable. Any other conclusion would significantly reduce the value of the promise in clause C.

85. The Owners of OSIOS DAVID denied that clause C was to be construed in that way but did not offer their own construction (see paragraphs 3 of the Amended Defence). In counsel's Opening Skeleton Argument the question whether clause C imposed an obligation on the party to be secured was raised, though perhaps (I hope it is not unfair to suggest) obliquely. In counsel's Closing Submission the question was clearly raised; see paragraphs 5-13. From those paragraphs it is clear that the case of the Owners of OSIOS DAVID is that clause C imposes neither of the suggested obligations upon the party to be secured.

86. Counsel for OSIOS DAVID emphasised "the commercial reality that a party-to-be-secured generally will accept security that is reasonably satisfactory to it" and submitted that "the CJA works perfectly well as an agreement without the implication of a term placing an obligation on the party-to-be-secured to accept security".

87. The test for implying terms into a contract has been explained in *Marks & Spencer plc v Paribas Securities Services Trust Co.* [2016] AC 742. Lord Neuberger set out previous statements of the law which he said represented a clear, consistent and principled approach to which he added a number of comments. Although it is a lengthy passage I think it is necessary to set it out in full.

> "18. In the Privy Council case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, [1977] UKPC 13, 26, Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that:
>
> > "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."
>
> 19. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Sir Thomas Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading". Sir Thomas then explained that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain ... eventuality" and "may well

choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur". Sir Thomas went on to say this at p 482:

> "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in *Reigate*, and continued] [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

20. Sir Thomas's approach in Philips was consistent with his reasoning, as Bingham LJ in the earlier case *The APJ Priti* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charter-party. His reasons for rejecting the implication were "because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter".

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in *BP Refinery* as extended by Sir Thomas Bingham in Philips and exemplified in *The APJ Priti*. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements,

> it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, *The Interpretation of Contracts 5th ed* (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

88. It is therefore necessary to consider whether the implied term suggested is necessary to give business efficacy to the CJA or, to use the modern formulation, whether without the suggested term the contract would lack commercial or practical coherence.

89. The argument in favour of the suggested term is as follows. The CJA enables the parties to agree that the English court has exclusive jurisdiction to hear their respective claims and to oblige them to offer to each other security, usually in the form of an LOU, so that the costs and uncertainties of arrest may be avoided. Without the suggested implied term the need to arrest may not be avoided and so the CJA would lack commercial or practical coherence. Counsel submitted that its purpose would be frustrated.

90. The argument against the implication of the suggested term is that the efficacy of clause C derives from the commercial reality that a party to be secured will generally accept security that is reasonably satisfactory and so there is no necessity to imply the suggested term. In support of that argument it was pointed out that the ASG which devised ASG 2 did not include words which imported an obligation on the party-to-be-secured to accept reasonably satisfactory security tendered to it.

91. The implication of the suggested obligation would ensure that the delay, uncertainty and cost of an arrest would be avoided and in that sense the implied term might well be said to be necessary. That is an attractive argument. However, I have noted the observation of Bingham MR in paragraph 19 of the above quotation from Lord Neuberger's judgment that "it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred ..."

92. I have been guided by that observation and have concluded that I am unable to say there is only one contractual solution. One solution is to imply the suggested term. The other solution is not to imply the suggested term but to rely on the commercial reality that a party will generally accept security that is reasonably satisfactory to it. I am also unable to say that without doubt the solution of implying the suggested term would have been preferred by the parties. In such circumstances to imply the suggested term would in reality amount to re-writing the parties' agreement. It may well be that the parties intended to leave the party with the choice of accepting the reasonably satisfactory security which was on offer or of arresting. In most cases it is to be expected that the security on offer would be accepted but there might be cases where a party considers that it can obtain "better" security by arresting. I have concluded that the CJA leaves the choice with him.

93. To leave that choice with the party would give commercial or practical coherence to the CJA. The right to arrest is a right well known to English law and to the law of maritime nations. There is nothing in the CJA about that right, and certainly nothing about giving up that right. Yet, if the suggested term is implied into clause C of the CJA, the party to be secured will effectively lose his right to arrest once security has been tendered in a reasonably satisfactory form. Of course, once such security has been accepted its terms will almost certainly provide that the right to arrest will be lost, for the promise not to arrest will be the consideration for the provision of security; see the form of ASG 1 and indeed the form of the LOU offered by the Britannia. The suggested implied term therefore prompts the question whether the parties to the CJA intended that once security in a reasonably satisfactory form had been tendered the other party was obliged to accept it and so lose his right to arrest.

94. There is nothing in the CJA agreed by the parties about the right to arrest. There seems to me considerable force in the argument that if the parties had intended to impose an obligation upon an owner to accept security in a reasonably satisfactory form and so lose his right to arrest they would have said so. The scheme of the CJA no doubt envisages that the right to arrest will be lost when the security on offer is accepted because the promise not to arrest is the consideration for the offer of security. But there is nothing in the CJA to suggest that the right is lost at an earlier stage, namely, when security in a reasonably satisfactory form is offered. That indicates that the omission of an obligation to accept the security in a reasonably satisfactory form was deliberate. Moreover, the implication of the suggested term would be inconsistent with the scheme of the CJA which envisages the right to arrest being lost at a later stage when the LOU is accepted.

95. There is another matter not stated in the CJA, namely, whether any acceptance of security is to be mutual or reciprocal. That is another indication that the CJA left the recipient of the offer of security with the choice of accepting the offer or not.

96. For these reasons I conclude that the suggested term is not necessary for the business efficacy of the CJA or for the commercial or practical coherence of the CJA. For the same reasons Lord Simon's third requirement that the suggested implied term must be so obvious that it goes without saying cannot be satisfied.

97. Counsel for the Owners of PANAMAX ALEXANDER submitted that it was obvious that the parties cannot have intended that one them (A) could refuse a form of security

offered by the other (B) and instead arrest the vessel or a sister-vessel, potentially causing significant losses, simply because A unreasonably rejected security that was objectively reasonable judged against market practice at the time. I am not able to accept that submission for the reasons I have given.

98. For completeness I should mention that Clause C in the standard form of ASG 2 contains an additional sentence:

> "[Each party agrees to waive its right to arrest or re-arrest to obtain further security under the Civil Procedure Rules 1998 Part 61.6.]"

99. That additional sentence was not included in the CJA as agreed by the parties and so I have construed the CJA without reference to it. I should however mention it because it refers to a waiver of a right to arrest.

100. The published notes to ASG 2 provide as follows:

> "4. The second sentence of paragraph C is an addition to the original wording and should be carefully considered. See Note 5 to the Notes to ASG 1."

101. ASG 1 opens by saying:

> "In consideration of your releasing and/or refraining from arresting [or re-arresting at any time hereafter] ……."

102. The notes to ASG 1 provide as follows:

> "5. Attention is drawn to the fact that the stated consideration for the provision of security has been extended from that in the original wording. The beneficiary of the guarantee now agrees to refrain not only from arresting but also (if the words in square brackets at the beginning of the paragraph dealing with re-arrest are not deleted) from re-arresting. This change arises from the Civil Procedure Rules 1998 Part 61.6 which now makes provision for the court to order that the claimant may, subject to certain conditions, arrest or re-arrest the property to obtain further security."

103. ASG 1 has been designed to be used in conjunction with ASG 2. Although ASG 2 contains in the second sentence a reference to the waiver of a right to arrest that is a reference to the waiver which arises when an LOU is accepted in consideration of an agreement not to arrest. That is why note 4 to ASG 2 makes express reference to note 5 to ASG 1. Thus the second sentence of ASG 2 is not referring to a waiver of a right to arrest which arises once security in a reasonably satisfactory form has been tendered. In any event, as already noted, the second sentence of ASG 2 was not adopted by the parties their CJA.

104. For these reasons I have concluded that there is not to be implied in clause C of the CJA an obligation to accept security which has been tendered in a reasonably satisfactory

form. For the same reasons the alternative implied term (an obligation not unreasonably to reject such security) also cannot be implied. In my judgment the recipient of an offer of security in a reasonably satisfactory form retains the choice whether to accept it or to arrest. It follows that the claim of the Owners of PANAMAX ALEXANDER for damages must be dismissed.

The HSBC guarantee

105. In the event that it was held that the security tendered on 7 September 2018 was not in a reasonably satisfactory form because it contained the sanctions clause the Owners of PANAMAX ALEXANDER had an alternative case, namely, that the renewed offer of such security in May 2019 backed by an unconditional and irrevocable undertaking by HSBC to pay was security in a reasonably satisfactory form. However, since I have found that the security tendered on 7 September 2018 was in a reasonably satisfactory form and have also held that there is no obligation to accept security in a reasonably satisfactory form I need not lengthen this judgment by considering the arguments which were advanced with regard to the HSBC guarantee.

Damages

106. It is also unnecessary to determine the amount of damages which would have been recoverable had the claim of the Owners of PANAMAX ALEXANDER succeeded. I shall however determine the principal issues which were referred to in the parties' written submissions so that, if necessary, the quantum of damages can be agreed.

107. The first head of claim is a monthly sum paid to the Owners of PANAMAX CHRISTIANA of Euros 8,250 based on 5% per annum of the amount secured. This is challenged on a number of grounds. It is said to be absurdly high and unjustified in circumstances where the Britannia would inevitably counter-secure the UK P&I Club which it did. Further, on the basis of the findings of the South African courts, the PANAMAX ALEXANDER and the PANAMAX CHRISTINA are associated vessels and so the 5% fee should be disregarded.

108. However, none of these objections was pleaded. The allegation of loss was simply not admitted. As a result there is before the court no evidence responding to the detailed criticism of the 5% fee. On the pleadings the Owners of PANAMAX ALEXANDER were obliged to prove the liability and this they did by proving the agreement reached. It is now accepted that the liability to pay has been proved. I do not consider that the Owners of OSIOS DAVID can pursue their other detailed criticisms of the 5% fee because they were not pleaded and hence the court has no evidence on which to base any findings. I therefore consider the 5% loss proved.

109. The second head of claim is the legal fees payable in South Africa. The first invoice covers the period from 5 September to 17 October 2018. It is agreed that some deduction should be made because the relevant security was not tendered until 7 September 2018. There is a dispute as to when any breach in failing to accept occurred. Was it on 8 September 2018 as alleged by the Owners of PANAMAX ALEXANDER or was it on 4 October 2018 as alleged by the Owners of OSIOS DAVID ? I consider that if there was a breach it was on 8 September 2018. The Standard's email of that day was not a request for a discussion about the security offered but was a rejection of it.

Although further time could have been sought, further time was not sought. I therefore consider that the legal fees payable from 9 September 2018 are recoverable.

Conclusion

110. The Owners of PANAMAX ALEXANDER have established that the LOU tendered on 7 September 2018 was in a reasonably satisfactory form to the Owners of OSIOS DAVID. However, the Owners of OSIOS DAVID were not on the true construction of the CJA obliged to accept that security. The claim of the Owners of PANAMAX ALEXANDER must therefore be dismissed.