Neutral Citation Number: [2018] EWCA Civ 2173

Case No: A3/2017/1699

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT
The Hon. Mr Justice Teare
[2017] EWHC 453 (ADMLTY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE LEWISON
and
LORD JUSTICE LEGGATT

- -

Between :

EVERGREEN MARINE (UK) LIMITED	**Appellant**
- and -	
NAUTICAL CHALLENGE LTD	**Respondent**

- -
- -

Nigel Jacobs QC and **James Turner QC** (instructed by **Ince & Co LLP**) for the **Appellant**
Vasanti Selvaratnam QC and **James Shirley** (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: 4th and 5th July 2018

- -

Approved Judgment

LORD JUSTICE GROSS:

INTRODUCTION

1. The present appeal, as will appear, highlights the continuing international reach of the Admiralty Court. Intriguingly, we were told that this is the first appeal on liability heard by this Court in a collision case since the *Bow Spring v Manzanillo II* [2004] EWCA Civ 1007; [2005] 1 WLR 144, in 2004, though there have of course been a number of contested collision actions since then.

2. This is an appeal from the judgment of Teare J, dated 13th March, 2017 ("the judgment"). Both vessels carried Voyage Data Recorders (devices which record navigational data of use in accident investigations), with the upshot that the tracks of each vessel have been agreed. In the result, as recorded by Teare J, at [2] of the judgment, there was little factual dispute at trial as to the navigation of either vessel. On appeal there is effectively no challenge to the Judge's primary findings of fact. The principal issue goes to the applicability of the "crossing rules", i.e., rules 15-17 of the *International Regulations for Preventing Collisions at Sea, 1972*, as amended ("the Collision Regulations").

3. The navigation of both vessels was helpfully illustrated by the parties and a copy of the agreed track was annexed to the judgment, as indicated by Teare J at [5]. A copy of the same document is annexed to this judgment, as *Annexe A*.

4. The collision took place on the 11th February, 2015 between a laden VLCC, *Alexandra I* ("ALEXANDRA 1"), owned by Nautical Challenge Ltd., a company registered in the Marshall Islands and a laden container vessel, *Ever Smart* ("EVER SMART"), owned by Evergreen Marine (UK) Limited, a company registered in the UK. As summarised by the Judge (at [1]), the collision "…between these two large vessels occurred just outside the dredged channel by which vessels enter and exit the port of Jebel Ali…" in the UAE. ALEXANDRA 1 was inbound; EVER SMART was outward bound. The collision took place at night but there were clear skies and good visibility. The damage was considerable; that suffered by ALEXANDRA 1 (in way of her bows) is said to amount to over US$32 million and that suffered by EVER SMART (to her port bow) is said to amount to almost US$4 million.

5. In the broadest outline, Teare J held that the crossing rules did not apply, so that when ALEXANDRA 1 approached the dredged channel ("the narrow channel"), she was not under a duty to keep out of the way of EVER SMART. Instead, the navigation of the two vessels was governed by the narrow channel rule, rule 9 of the Collision Regulations, in the case of EVER SMART and rule 2 of the Collision Regulations, the ordinary practice of seamen (i.e., the requirement of good seamanship), in the case of ALEXANDRA 1. Furthermore, the crossing rule was inapplicable because ALEXANDRA 1 was not on a sufficiently constant direction or heading to be on a course; she was waiting to embark a pilot rather than herself being on a course at the relevant time.

6. Teare J went on to hold that EVER SMART was at fault in respect of: (1) breaching the narrow channel rule by not keeping to the starboard side of the narrow channel; (2) keeping a defective radar and visual lookout and making assumptions on the basis of scanty information; (3) proceeding at an excessive speed, a direct consequence of her

failure to keep a good lookout. In turn, ALEXANDRA 1 had been at fault by failing to keep a good aural lookout, with the result that, following a misheard or misunderstood VHF conversation, she did not turn to starboard towards the channel and instead headed so as to cross the approaches to the channel.

7. Turning to the apportionment of liability, Teare J had regard to the relative culpability and causative potency of each vessel's faults. Those of EVER SMART were very serious in terms of culpability. ALEXANDRA 1's fault was culpable to a substantial degree. In terms of relative culpability, the faults of EVER SMART were much more culpable than those of ALEXANDRA 1.

8. As to causative potency, Teare J did not consider that there was a marked difference in quality between the contribution which each vessel made to the fact that the collision occurred. However, having regard to the unsafe speed of EVER SMART, she contributed far more to the damage resulting from the collision than the very much lower (and safe) speed of ALEXANDRA 1. It followed that the causative potency of EVER SMART's fault was greater than that of ALEXANDRA 1.

9. In the light of these conclusions, Teare J held that EVER SMART should bear 80% of the liability for the collision and ALEXANDRA 1, 20%.

10. Permission to appeal ("PTA") was granted by Longmore LJ in respect of the following grounds of appeal advanced on behalf of EVER SMART:

> " The Judge's decision was wrong in that:
>
> 1. He erred in law in failing to apply the crossing rules (Rules 15 and 16) and holding instead that crossing rules did not and/or could not apply where one vessel (EVER SMART) was in a narrow channel and the other vessel (ALEXANDRA 1) was navigating towards that narrow channel with a view to entering it.
>
> 2. He erred in his application of the law in failing to find that, on the facts, the crossing and the narrow channel rules could (and did) apply safely and without conflict to the respective vessel and to any other collision regulations.
>
> 3. On his alternative approach (in paragraph 70):
>
> (1) He erred in law, in wrongly imposing a requirement that the give way vessel be on a '*sufficiently constant'* course for the crossing rules to apply. He should have held that:
>
> (a) The vessels were crossing; and
>
> (b) Since (as he found at paragraph 66) the compass bearing of ALEXANDRA 1 did not appreciably change, there was a risk of collision under Rule 7(d)(i) and, therefore, Rules 15 and 16 were engaged irrespective of the course or heading of ALEXANDRA 1.

> (2) Further or alternatively, he erred in his application of the law and/or in failing to find as a fact that ALEXANDRA 1 was on a '*sufficiently constant*' east-south-easterly course to engage Rules 15 and 16.
>
> 4. He erred in law or misdirected himself by taking into account the extent of the *damage* alleged to have been caused by the respective vessels in determining the causative potency of their faults."

Longmore LJ refused PTA on a further ground going to the Judge's apportionment of liability.

11. As it seems to me, the principal issues in the appeal can conveniently be dealt with under the following headings:

    i) Issue I: the applicability of the crossing rules;

    ii) Issue II: the Respondent's Notice;

    iii) Issue III: causative potency.

    With reference to EVER SMART's grounds of appeal, Issue I is intended to cover grounds 1 – 3 and Issue III ground 4. Issue II picks up the various arguments advanced under ALEXANDRA 1's Respondent's Notice.

12. Each Issue will be taken in turn but, before doing so, it is necessary to add a little as to the facts, adopted gratefully from the Judge's comprehensive and clear outline (at [6] and following).

THE FACTS

13. ALEXANDRA 1 is a VLCC built in 1997, of 79,779 grt and 48,796 nrt, some 269 m in length and 46 m in beam. She was equipped with a full range of modern navigational aids. At the time of collision, she was laden with 113,915 mt of condensate and was inbound to Jebel Ali. On the bridge at the time of the collision were her Russian master, Russian third officer as officer of the watch and her Georgian helmsman. The second officer, also Russian, joined them on the bridge shortly before the collision.

14. EVER SMART is a container ship built in 2005 of 75,246 grt and 39,564 nrt, some 299 m in length and 42 m in beam. She too was equipped with a full range of modern navigational aids. At the time of collision, she was laden with 48,564 mt of containerised general cargo and was outbound from Jebel Ali. On the bridge at the time of the collision were her Taiwanese master, her Filipino third officer, as officer of the watch and the helmsman.

15. As set out by the Judge:

> "10. The dredged channel leading out from Jebel Ali lies on an axis of 315/135 degrees (true) and is about 8.5 nautical miles in length and slightly less than 2 cables in width. It is marked by lateral buoys, from buoys no. 1 at the seaward end to buoys no.

> 12 at the outer breakwater, and is dredged to 17 meters. At the seaward end is the designated pilot boarding area, a circular area with a 1 nautical mile radius. The limit of the circular area as shown on the chart is about 3 cables beyond buoys no. 1."

There was and is no dispute that the dredged channel was a "narrow channel" for the purposes of the Collision Regulations.

16. There were clear night skies and good visibility of 10-12 miles. The wind was force 3, said to be Easterly or East North Easterly, though nothing turned on its precise direction. There was a South Westerly setting current of about 1 knot, taken into account on the agreed track.

17. Teare J's statement of the time and place of collision was fully accepted before us:

> "13, The collision occurred at 23.42:22 on 11 February 2015 about 5 cables west north west of the no. 1 buoys and so outside the dredged channel but within the pilot boarding area. EVER SMART had disembarked her pilot during the course of her passage along the dredged channel and ALEXANDRA 1 was waiting to embark that same pilot. The port bow of EVER SMART struck the starboard bow of ALEXANDRA 1 at an angle of about 40 degrees…..leading aft on EVER SMART. At collision the speed of EVER SMART was 12.4 knots over the ground and the speed of ALEXANDRA 1 was 2.4 knots over the ground. "

18. At the time of collision, ALEXANDRA 1's course made good was 104 degrees and her heading was 101 degrees, while EVER SMART's course was 316 degrees: judgment, at [23] and [34].

19. A detailed account of the navigation of both vessels is contained in the judgment (at [14] – [36]) and need not be repeated here. Some brief mention is, however, convenient for an understanding of the incident.

20. *ALEXANDRA 1:* ALEXANDRA 1's focus was on embarking a pilot, prior to entering the narrow channel. Information as to the timing of the pilot's availability from Port Control was not altogether consistent, leading, as appears from the audio record, to some frustration on her bridge. At all events, at 22.54, Port Control informed ALEXANDRA 1 that the pilot was on EVER SMART, passing buoy no.12 and that EVER SMART would continue up to buoy no.1; once EVER SMART was clear, ALEXANDRA 1 could enter the narrow channel. At all material times thereafter, ALEXANDRA 1 was in the pilot boarding area and at 23.15 she was about 1.4 miles to the WNW of buoys no.1. At 23.27 (C-15) the engines of ALEXANDRA 1 were put to dead slow ahead, having been stopped and her speed began to increase. She was now about 1 mile WNW of buoys no. 1.

21. At 23.28 (C-14), the master overheard a conversation ("the VHF conversation") between Port Control and the tugboat ZAKHEER BRAVO. The tug was towing a barge and requested permission to pass the pilot station from West to East *en route* to Jumeirah. She was asked if she could see a waiting tanker and replied that it was on her

starboard bow. Port Control advised her to proceed at least one mile astern of the tanker. As Teare J recorded (at [17]):

> " ….The master of ALEXANDRA 1 mistakenly thought that Port Control was speaking to EVER SMART. This caused him concern because he did not understand how EVER SMART could pass one mile astern of ALEXANDRA 1. He feared that if ALEXANDRA 1 went around buoy no.1 there would be a 'fucking crunch' at the entrance to the channel….."

22. At 23.35 (C-7), the master of ALEXANDRA 1 was still frustrated by the delay in embarking the pilot. On the audio record, he appeared to compare the two vessels in terms of speed and manoeuvrability. EVER SMART was a "Mercedes", whereas ALEXANDRA 1 was a "hog on ice, with no skates".

23. By 23.37 (C-5), ALEXANDRA 1 was, as the Judge observed (at [19]), approaching the point "…at which one would expect her to turn to starboard so as to line up on the starboard side of the approaches to the channel". However, the course made good and heading changes between C-5 and C-4 did not suggest any starboard helm action. Instead, she continued heading so as to cross the approaches to the channel.

24. At about 23.40 (C-2), the master of ALEXANDRA 1 observed that EVER SMART was abeam of buoys no.1. He was concerned (as expressed graphically) that EVER SMART was not turning to port as he expected her to do, in light of his mistaken understanding of the VHF conversation. The engines of ALEXANDRA 1 were put full astern but the engine order had little effect on her speed, at the time some 2.3 knots over the ground. At 23.41 (C-1), ALEXANDRA 1's speed was 2.5 knots. At this time, the master advised Port Control that EVER SMART was not changing course and there would be a collision.

25. At 23.41:52 (C-30 seconds), the engines of ALEXANDRA 1 were put to dead slow astern; very shortly afterwards, the master told EVER SMART by VHF to go hard to starboard and switched on the deck lights of ALEXANDRA 1.

26. Less than a minute after the collision, the master said to Port Control, "he's not following your rules…you told him to go to my stern".

27. *EVER SMART:* At 22.30, EVER SMART left the Container Terminal with a pilot on board. Proceeding down the channel, her engines were at full ahead (manoeuvring) and her speed over the ground was 12.9 knots. Her course made good was 313 or 314 degrees. At about 23.31 (C-11) her engines were reduced to half ahead and at 23.32 (C-10) her engines were further reduced to slow ahead. At this time, she was passing buoys no.3 and was slightly to port of mid-channel. Teare J surmised (at [26]) that the effect of the Easterly wind on the high sided container vessel may have caused her to be set to port.

28. At about 23.33 (C-9), the pilot, before disembarking, advised the master to proceed at 10 knots and to keep a course of 314 over the ground. He further advised that there was a vessel to port and that the master should take care. At this time, EVER SMART's speed was 12.2 knots over the ground (11.1 knots through the water) and her course made good was 312 degrees.

29. At about 23.34 (C-8), the master ordered a course of 319 degrees be steered, possibly to bring the vessel back to the starboard side of the channel though this does not appear to have been achieved. The radar, which had been on relative motion, was switched to North up. The engines were reduced to dead slow ahead, probably to enable the pilot to disembark.

30. It does not appear that the radar echo of ALEXANDRA 1 was particularly observed. There was a dispute before Teare J as to whether the master had seen ALEXANDRA 1 visually. By 23.36 (C-6), the pilot had disembarked and the pilot vessel proceeded ahead of EVER SMART to meet ALEXANDRA 1.

31. Thereafter, EVER SMART increased her speed, set out by Teare J as follows (at [31]):

> " At 23.37 or C-5 (when the course made good was 314 degrees and the speed over the ground was 9.5 knots or 8.3 knots through the water) the engines of EVER SMART were put to half ahead and at 23.38 or C-4 her engines were put to full ahead (manoeuvring). 30 seconds later, at C-3 ½ her engines were put to full sea speed…… Thus the vessel's speed over the ground and through the water increased. By 23.41 or C-1 the speed of EVER SMART was 11.8 knots over the ground or 9.8 knots through the water."

32. At about C-½ Port Control contacted EVER SMART and asked whether she was clearing to starboard. At about the same time, the pilot on the pilot boat now on the starboard quarter of ALEXANDRA 1, Port Control and ALEXANDRA 1 advised EVER SMART by VHF to go hard to starboard. The master of EVER SMART gave the order "hard to starboard".

33. About 3 seconds before the collision, the audio record shows that the master of EVER SMART said "what's that?" In Teare J's view, he said this having seen the deck lights of ALEXANDRA 1 switched on.

34. Teare J records the following, shortly after the collision:

> "35. Less than 2 minutes after the collision the master said (apparently to the officer of the watch and helmsman) 'both of you…have you seen it or not?' He then said (it is suggested to himself) 'how come you didn't see it?'
>
> 36. At about 23.48 or C+6 the master reported the collision to his owners saying 'We hit her….because she stopped outside waiting, we were leaving the port, we did not see that….I saw the light, but didn't know she was transverse, so we knock against her bow."

ISSUE I: THE APPLICABILITY OF THE CROSSING RULES

35. *(1) The Collision Regulations:* Rules 2, 9 and 15-17 are of primary relevance to the resolution of this Issue.

36. Rule 2, headed "Responsibility", underpins the requirement of good seamanship and is in these terms:

> "(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
>
> (b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, ….which may make a departure from these Rules necessary to avoid immediate danger."

37. Rule 9, the "narrow channel" rule, provides as follows (so far as relevant):

> "(a) A vessel proceeding along the course of a narrow channel…shall keep as near to the outer limit of the channel…which lies on her starboard side as is safe and practicable."

38. Rules 15 – 17 contain the crossing rules:

> " Rule 15
>
> Crossing situation
>
> When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.
>
> Rule 16
>
> Action by give-way vessel
>
> Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.
>
> Rule 17
>
> Action by stand-on vessel
>
> (a) (i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.
>
> ……."

39. It is further convenient at this stage, to make reference to rules 5, 6 and 7.

40. Rule 5 deals with look-out:

> " Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision."

41. Rule 6 covers safe speed:

> " Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.
>
> ……"

"Traffic density" is included, at (a)(ii), amongst the factors to be taken into account in determining a safe speed.

42. Rule 7 addresses risk of collision:

> "(a) Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.
>
> (b) Proper use shall be made of radar equipment…..
>
> (c) Assumptions shall not be made on the basis of scanty information, especially scanty radar information.
>
> (d) In determining if risk of collision exists the following considerations shall be among those taken into account:
>
> (i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change;
>
> …."

43. *(2) The Judgment:* At [37] and following, Teare J addressed the principal dispute, namely, whether the crossing rules applied.

44. Many authorities were cited to Teare J. From those cited, he regarded the statements of principle in *The Canberra Star* [1962] 1 Lloyd's Rep 24 (Hewson J) and *Kulemesin v HKSAR* [2013] 16 HKCFA 195 (a decision of the Final Court of Appeal in Hong Kong, with the judgment delivered by Lord Clarke of Stone cum Ebony), as supporting the case of ALEXANDRA 1 that the crossing rules did not apply in this case. Neither decision was binding: *The Canberra Star* was a first instance decision; *Kulemesin* was a decision of a foreign court. However (at [50]):

> " …both decisions are of considerable persuasive authority bearing in mind the experience and knowledge of collision

> actions possessed both by Hewson J (a naval officer, an Admiralty specialist, author of a treatise upon navigation and Admiralty Judge from 1958 until 1966) and by Lord Clarke (whose expertise in this field is too well-known to require explanation). I consider that I ought to follow their statements of principle unless I consider that they are wrong."

45. Understandably, the Judge asked himself why the clear terms of rule 15 should not apply to two vessels crossing so as to involve risk of collision. The answer (at [52]) was this:

> "….To have two sets of rules with different requirements applying at the same time is of course unsafe and cannot have been intended by those who drafted the Collision Regulations…..where one vessel is within a narrow channel and has a vessel on her port bow on a crossing course outside the channel but proceeding towards it in preparation for entering it, the vessel in the narrow channel cannot be under a duty (pursuant to the crossing rules) to maintain her course and speed and at the same time under a duty (pursuant to the narrow channel rule) to keep to the starboard side of the channel since the two duties may, depending on the circumstances, require different action. As Lord Clarke said there would be considerable scope for confusion."

46. Accordingly, Teare J went on to say (at [53]):

> " These considerations strongly suggest that in the interests of safety, which of course is the foundation of the Collision Regulations, the crossing rules cannot have been intended to apply where one vessel is navigating along a narrow channel and another vessel is navigating towards that channel with a view to entering it. In construing the Collision Regulations 'regard shall be had to all dangers of navigation and collision'; see rule 2. One such danger is the risk of collision created by two rules potentially requiring different action applying at the same time. The approach of Lord Clarke as expressed in paragraph 225 of his judgment in *Kulemesin v HKSAR* …..is therefore consistent with the principles underlying the Collision Regulations and permitted by them."

47. Teare J decided (at [54]) that he would follow the statements of principle by Hewson J and Lord Clarke and stated that he agreed with them. He went on to reject the arguments advanced on behalf of EVER SMART as to distinguishing *Kulemesin* and himself distinguished the present case from the decision in *The Albano* [1907] AC 139. Teare J's conclusion (at [64]) was as follows:

> "I have therefore concluded that rule 15 of the Collision Regulations, the crossing rule did not bind ALEXANDRA 1 when she approached the dredged channel leading to Jebel Ali and so she was not under a duty to keep out of the way of EVER

> SMART. Her duty, as a matter of good seamanship, and as formulated by Lord Clarke, was to navigate in such a manner that, when she reached the channel, she would be on the starboard side of the channel in accordance with rule 9. She required to embark a pilot but that circumstance did not…absolve her from that duty."

48. It may additionally be noted that Teare J (at [93]) asked a question of the Elder Brethren as to whether good seamanship required ALEXANDRA 1 to keep a certain minimum distance from buoys no. 1, so long as EVER SMART was still in the dredged channel. The Elder Brethren answered the question as follows (at [94]):

> " Subject to a good aural and visual lookout, it would be reasonable and good seamanship for the Master of ALEXANDRA 1 to have approached the first pair of buoys keeping close to her own side of the entrance channel."

49. Teare J (at [95]) accepted that advice, which was consistent with the judgment of Lord Clarke in *Kulemesin* as to how a vessel should approach a narrow channel. The vessels could have been expected to pass port to port. For this purpose, the approaching vessel should keep to the starboard side of the approaches so that on entering the channel she is on the starboard side of it. Keeping a certain distance from the channel whilst another vessel was in the channel was not required to achieve a safe port to port passing.

50. Furthermore, Teare J held (at [70]) that the crossing rules did not apply for a separate reason. He was "very doubtful that ALEXANDRA 1 was on a sufficiently constant heading to be on a course", over the period C-26 to C-3. As the Judge put it, the variation of course made good and heading was "no doubt caused by the circumstance that ALEXANDRA 1 was proceeding very slowly (about 1-2 knots over the ground)". Nevertheless, she had made progress in a broadly ESE direction towards the entrance of the channel as she waited to embark the pilot. The Judge's conclusion was as follows:

> " Was she on a sufficiently constant direction or heading to be on a course? I do not consider that she was. Her 'course made good' varied between 81 and 127 degrees (and her heading varied between 84 and 112 degrees). It is difficult to describe that as a 'a course' (though her preliminary act describes her as being on an east south easterly course)…… I would describe ALEXANDRA 1 as waiting for the pilot vessel to arrive rather than being on a course. Had a good lookout been kept on board EVER SMART from C-21 until collision it would have been apparent that ALEXANDRA 1 had moved less than a mile. It would or ought to have been obvious that she was awaiting to embark a pilot."

51. In summary, Teare J (at [71]) held that the crossing rules did not apply for the reasons given by Lord Clarke in *Kulemesin* and "in any event ALEXANDRA 1 was not on a sufficiently defined course for the crossing rules to apply".

52. *(3) The rival cases:* Mr Jacobs QC (supported by Mr Turner QC) for EVER SMART mounted a sustained attack on the judgment. Both reasons given by Teare J for the inapplicability of the crossing rules were erroneous.

53. The crossing rules were triggered from, latest, C-23, when the vessels were less than 6 miles apart and in sight of each other; thereafter the vessels were on converging courses, so giving rise to a risk of collision. Once the crossing rules were engaged, they remained engaged throughout as the vessels never concluded the crossing phase. With the crossing rules thus engaged, there was no scope for the application of rule 2. There was no rule of law that the crossing rules would not apply where a vessel was emerging from a narrow channel and another vessel was crossing so as to enter it. The crossing rules were to be applied whenever reasonably possible and were only to be disapplied as a last resort and where there was a particular reason for doing so. There was no such reason here; both rules 15 and 9(a) could and should have been applied. The "centrepiece" of Mr Jacobs' submissions was that there was no inconsistency between the manoeuvres required from EVER SMART under the crossing rules and under the narrow channel rule — there was no inconsistency between EVER SMART seeking to regain the starboard side of the channel under rule 9 and keeping her course and speed as the stand-on vessel under rule 17. Maintaining "course and speed" under the Collision Regulations was not (necessarily) the same as continuing in the same direction at the same speed. As to authority, *Kulemesin* was dealing with a different issue and was distinguishable. *Kulemesin* apart, the crossing rules had only been disapplied by reason of local rules or conditions; a local by-law was key to the decision in *Canberra Star*. Finally, the Judge's conclusion had not been "stress-tested". If it was correct in respect of ALEXANDRA 1 crossing from West to East, then it must be applicable had ALEXANDRA 1 been crossing from East to West with a view to entering the narrow channel on the starboard side; however, in that East to West example, absent the application of the crossing rules there would be no clarity as to priority, putting safety at risk.

54. So far as concerned the Judge's separate reason for declining to apply the crossing rules, the application of the rules did not depend on the putative give-way vessel being on a steady course and heading. The key instead lay in the vessels converging. In any event, ALEXANDRA 1 had been on a sufficiently defined ESE course (as pleaded in ALEXANDRA 1's own Collision Statement of Case). While Mr Jacobs did not seek to challenge the fact finding that ALEXANDRA 1 was intending to pick up a pilot in the pilot boarding area and that "at some stage" she was intending to enter the channel, it was irrelevant and did not override the Collision Regulations. In any event, assumptions could not safely be made as to ALEXANDRA 1's navigation.

55. Ms Selvaratnam QC's submission for ALEXANDRA 1 was essentially that the Judge was right for the reasons he gave. The interests of safety provided the foundation of the Collision Regulations. Such considerations told against the applicability of the crossing rules in the situation under consideration here:

> "To have two sets of rules with different requirements applying at the same time is of course unsafe and cannot have been intended by those who drafted the Collision Regulations. "

The "situation" here related to the situation as a whole; not the precise, individual manoeuvres undertaken. Teare J's conclusion reflected the advice of the Elder Brethren,

as to good seamanship requiring ALEXANDRA 1 to approach buoys no.1 keeping to the starboard side of the narrow channel: see, the judgment at [93] – [95], set out above. Moreover, the pilot boarding area itself created the potential for difficulty if the crossing rules applied; was the stand-on vessel obligated to maintain course and speed as she passed through that area? The Judge's approach was consistent with authority, principle and safety and was to be upheld.

56. As to the Judge's separate ground, if open to EVER SMART interests to mount their challenge in the light of a concession at trial, then it was at the least implicit that both vessels must be on a course for the crossing rules to apply; it took two to cross. There was in any event no basis for interfering with the (specialist) Judge's finding of fact that ALEXANDRA 1 was not on a sufficiently defined course to attract the operation of the crossing rules, even if otherwise applicable.

57. *(4) Discussion and conclusions: (A) Overview:* The Collision Regulations are practical rules, having, as their primary object, the prevention of collisions at sea (*Marsden and Gault on Collisions at Sea*, 14th ed., at para. 5-065). With these considerations and especially safety of navigation in mind, I approach the question of the applicability of the crossing rules in the present appeal.

58. The very experienced Admiralty Judge held that they did not apply. Moreover, the advice of the Elder Brethren as to how ALEXANDRA 1 should approach the narrow channel in accordance with the requirements of good seamanship (judgment, at [93] – [95], set out above), supported his view. The navigation of EVER SMART in the narrow channel was governed by the narrow channel rule; the approach of ALEXANDRA 1 to the channel was governed by good seamanship, having regard to the requirements of the narrow channel rule as and when she entered the channel (which, of course, she never reached). There was neither need nor room for the application of the crossing rules.

59. In my judgment, the reality of the situation here, viewed as a whole, serves to explain the advice of the Elder Brethren and supports the view taken by the Judge. This case centrally concerns a narrow channel with its entrance and exit in the pilot boarding area of the port (not the open sea).

60. At all material times ALEXANDRA 1 was already in the pilot boarding area. She was there, to state the obvious, with a view to embarking a pilot and entering the narrow channel. That was and was the only "reasonable inference" (*The Pekin* [1897] AC 532, at p.537) to be drawn by EVER SMART as to ALEXANDRA 1's future course. As the Judge found (at [70]), it "would or ought to have been obvious" that ALEXANDRA 1 was waiting for a pilot. Matters do not end there. EVER SMART's skeleton argument at trial (sensibly) reflected this feature by acknowledging that "ES knew that A1 was waiting to enter the channel". Additionally and as appears from the audio record, the pilot (at C-11) drew the attention of the master of EVER SMART to the ALEXANDRA 1, to which he was going, and which would then (once he had embarked and other traffic was clear) enter the channel.

61. That the entrance and exit from the narrow channel were in the pilot boarding area was also relevant to a consideration of the navigation and speed of EVER SMART (see, for instance, *Marsden and Gault*, at para. 4-036).

62. Keeping in mind the object and terms of the Collision Regulations, an obvious concern would be, as the Judge expressed it (at [53]) "two rules potentially requiring different actions applying at the same time". The crossing rules require the stand-on vessel to keep her course and speed. The narrow channel rule requires a vessel proceeding in the channel to keep to its starboard side, so far as is safe and practicable. The potential for conflicting requirements is apparent.

63. In this regard:

i) It is to be acknowledged, as Mr Jacobs contended, that keeping "course and speed" within rule 17 is not to be interpreted literally (and, it might be said, unthinkingly). Thus, as explained by Lord Alverstone CJ in *The Roanoke* [1908] P 231, at p. 239:

> "… 'course and speed' ….mean course and speed in following the nautical manoeuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. …….The 'course' certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted….A vessel bound to keep her course and speed may be obliged to reduce her speed to avoid some danger of navigation, and the question must be in each case, 'Is the manoeuvre in which the vessel is engaged an ordinary and proper manoeuvre in the course of navigation which will require an alteration of course and speed; ought the other vessel to be aware of the manoeuvre which is being attempted to be carried out?"

See too, *The Taunton* (1928) 31 Ll. L. Rep. 119, at p.120 (Scrutton LJ) and Lord Wright's observations in *The Alcoa Rambler* [1949] AC 236, at pp. 243 and 250 — a case on facts far removed from the present – where he urged that the crossing rules "ought to be applied and strictly enforced because they tend to secure safe navigation" even "in cases where in a strict sense there is deviation from the ship's course", though such applications required attributing "to the give-way ship actual or imputed knowledge of the situation".

ii) However, even allowing for the impact of these authorities on the interpretation of the crossing rules, I am wholly unable to accept Mr Jacobs' submission that there was no risk of any such inconsistency here, by reason of the precise manoeuvres undertaken by EVER SMART as she proceeded along the channel. It is the situation as a whole that falls to be considered and it is, to my mind, unrealistic to suggest that there was no risk of the narrow channel rule and the crossing rules potentially requiring different actions at the same time. It must be unlikely that a proper application of the Collision Regulations would place a seaman in an invidious position of this nature. That a particular course correction (for example, a one-off, obvious and decisive manoeuvre to regain the starboard side of the channel) might not be inconsistent with both rules, seems to me to be neither here nor there. In any event, were both rules to be applicable, the scope for confusion for the putative give-way vessel faced with a putative stand-on vessel lingering to port of mid-channel is considerable.

iii) For my part, I would not regard this as a situation when the crossing rule ought to be applied (in the words of Lord Wright in *Alcoa Rambler*) as tending to secure safe navigation.

64. Accordingly, an overview of the situation as a whole suggests that the Judge was right and that the crossing rules are inapplicable. I turn to consider authority, without finding it necessary to retrace the entirety of the very careful survey conducted by the Judge (at [40] and following).

65. *(B) Authority:* Unsurprisingly, the authorities reflect the very wide range of circumstances encountered. Thus:

i) In the "ordinary" case of two vessels approaching each other in a narrow channel, navigating respectively up and down the channel, the crossing rules will not apply; there is no room for them to do so and the requirements of the crossing rules and the applicable narrow channel rule are different: Willmer J (as he then was), in *The Empire Brent* (1948) 81 Ll. L. Rep. 306, at p.312; Brandon J (as he then was) in *The Glenfalloch* [1979] 1 Lloyd's Rep. 247, at p. 255.

ii) However, the mere fact that a narrow channel or narrow channels are involved does not of itself mean that the crossing rules will be inapplicable. Thus, by way of example, the crossing rules may be applicable with regard to the navigation of vessels approaching the junction between two narrow channels: see, *The Leverington* (1886) 11 PD 117. So too, the crossing rules may apply in a situation where a vessel is crossing a narrow channel and another vessel is navigating up or down the channel: *The Empire Brent (ibid)*; *The Glenfalloch (ibid).*

66. The present case did not involve a vessel crossing a channel or vessels navigating respectively up and down a narrow channel. What of the situation where one vessel is approaching a narrow channel intending to enter it and the other vessel is navigating in the narrow channel intending to exit it?

67. *The Canberra Star (supra)* was such a case. Hewson J, speaking with the experience described by Teare J (at [50]), held that the crossing rules did not apply. At p. 28, Hewson J observed that he was far from saying that the crossing rules never applied in the area of the River Thames covered by the Port of London River By-laws:

> " It is fruitless to attempt to envisage all the possible combinations of circumstances in this or any other river and I am not going to attempt it."

There were various River By-laws but, other than a By-Law (Rule 38) which was in materially the same terms as the narrow channel rule, these were not applicable – albeit Hewson J did remark that the principle of By-Law (Rule 40) covering a vessel entering the main channel from a tributary or creek was one of good seamanship and that principle applied in full force. Insofar as Mr Jacobs sought to distinguish the *Canberra Star* on the basis that the decision owed all or much to a local by-law, I cannot agree.

68. For present purposes, the key passage in Hewson J's judgment is the following (*ibid)*:

> " In the circumstances of this case, where vessel *A*, proceeding down river outside the channel, intending to enter it, sees an upcoming vessel *B* approaching in the next reach, bearing on her starboard side, on a main-channel course which, if followed into the reach in which *A* is navigating, will or should enable the two vessels to pass safely port to port by reason of the fact that *B* should keep to her own starboard side of the channel and *A* will navigate into and keep to her own starboard side, the crossing rule does not, in my view, apply. The actions of vessel *B* should be governed by Rule 38 [equivalent to the narrow channel rule], and *A* by the rule of good seamanship….. The rule of good seamanship for a vessel entering a main channel is that she should do so with caution and not hamper traffic already navigating in it. Vessels already in it, as well as those about to enter it, should behave reasonably. It does not appear to me that the vessel already in the channel has a complete right of way, and she must not hog the river regardless of the reasonable aspirations of other vessels."

69. I come next to *Kulemesin* and the judgment of Lord Clarke. Teare J (at [48]) provided a succinct summary of *Kulemesin:*

> " This was an appeal in a criminal case arising out of a serious collision off Hong Kong as a result of which there was much loss of life. The masters of both vessels had been convicted of a criminal offence and each appealed. One of the questions certified for hearing on the appeal was whether the crossing rules apply when a vessel is approaching a channel on a crossing course involving risk of collision with another vessel navigating in the channel; see paragraph 142. There was however another question, which Lord Clarke described as 'the most important issue' in the case namely, whether the buoyed channel was a narrow channel within rule 9 of the Collision Regulations; see paragraph 150. It was held that it was; see paragraph 198. Lord Clarke further held that the vessel (N67) which was navigating in the narrow channel was bound by the narrow channel rule and not by the crossing rule. He said the observations of Willmer J in *The Empire Brent* were 'plainly correct'; see paragraph 201. He also said that the observations of Hewson J in *The Canberra Star* seemed 'good sense'; see paragraphs 217-8. When dealing with the navigation of the other vessel (YH) which was approaching the entrance of the narrow channel he said this, at paragraph 225:
>
> '….vessels approaching a narrow channel and intending to proceed along it are not bound by the crossing rule but must enter the channel and, as they do so, keep as near to the starboard side as is safe and practicable in accordance with r.9. It seems to me to follow that a vessel shaping to enter the channel should, as a matter of good seamanship, navigate in such a manner that, when

> she reaches the channel, she is on the starboard side of the channel in accordance with r.9.' "

70. Teare J added (at [49]) that the circumstances of *Kulemesin* were similar, though not identical, to the circumstances of the present case. The two vessels were crossing so as to involve risk of collision. The difference between that case and this was that YH was not planning to embark a pilot before entering the channel (unlike ALEXANDRA 1 here).

71. The reason the crossing rules did not apply to two vessels (*prima facie*) crossing in this situation was that given by Lord Clarke, in *Kulemesin*, at [167]:

> " Safety requires a vessel approaching the channel so as to proceed along it to navigate so that if the vessels pass in the channel they will pass port to port. This will be achieved if the narrow channel rule applies. If it does not, there is considerable scope for confusion. "

As is clear from Lord Clarke's approval of the conclusions of the Judge at first instance (at [217]), underlying that approach and the "good sense" of Hewson J's views in *The Canberra Star* was that:

> "….vessels approaching the channel and vessels within it must acknowledge that there must be some continuity so that r.9 applied at the entrance to the channel in order to avoid chaos and ambiguity…. "

72. Mr Jacobs made strenuous efforts to distinguish *Kulemesin.* It was a criminal case. Lord Clarke (at [225]) was only dealing with the navigation of inbound vessels at the entrance to the channel; that passage did not assist on the applicable rules prior to alignment or when not aligning at all. Nothing said in *Kulemesin* was inconsistent with the application of the crossing rules at an earlier stage – and once they applied, they continued to do so until the crossing phase was over, with the consequence that there was no room for the application of rule 2. In any event, Lord Clarke's judgment had not dealt with the interrelationship between the crossing rules and the narrow channel rule, and it had given no consideration to priority. There were experts but no assessors.

73. I cannot agree. It is correct but irrelevant that *Kulemesin* was a criminal case and that there were experts not assessors. Fairly read, the judgment not only dealt with the entrance to the channel but also with the prior navigation of the approaching vessel to ensure continuity. Again, fairly read, the judgment did deal with the interrelationship between the crossing rules and the narrow channel rule. Even if and to the extent that any of Lord Clarke's observations were strictly *obiter*, they were, with respect, carefully considered observations and their persuasive force stands undiminished.

74. Pulling the threads together on authority in the situation where one vessel is approaching a narrow channel intending to enter it and the other vessel is navigating in the narrow channel intending to exit it:

i) First, in agreement with Teare J, I regard the observations of both Hewson J and Lord Clarke as powerfully persuasive, supporting the inapplicability of the

crossing rules in the present situation. I do not think that either *The Canberra Star* or *Kulemesin* is meaningfully distinguishable.

ii) Secondly, I respectfully agree with the reasons given by Teare J, Hewson J and Lord Clarke. As already discussed, the risk of potentially different actions being required at the same time is thereby avoided; this is not a situation where it is necessary to apply the crossing rules to secure safe navigation – and if it is not necessary to apply the crossing rules it can fairly be said that it is necessary *not* to apply them, so as to avoid adding a layer of confusion.

iii) Thirdly, the view upheld in *The Canberra Star, Kulemesin* and by the Judge, ensures continuity and a seamless entry into the channel, as explained in *Kulemesin.* It is to be underlined that in the present case the entrance to and exit from the narrow channel were in the pilot boarding area and that at all material times ALEXANDRA I was manoeuvring in that area.

iv) Fourthly, with respect, like Hewson J, I am wary of over-generalising. On the facts here, I am persuaded that the crossing rules did not apply. Any rule of law in this regard must be limited to factually indistinguishable or materially similar situations. Beyond that, I would not go and, reading the judgment as a whole, I do not think the Judge went either.

75. For completeness, I have not lost sight of the decision of the Privy Council in *The Albano* [1907] AC 139. The short answer, however, is that *The Albano* is plainly distinguishable, for the reasons given by the Judge at [57] – [63], notably that the case was not concerned with a narrow channel at all.

76. *(C) "Stress-testing" the provisional conclusion:* As already foreshadowed, in support of his criticism of the Judge's conclusion that the crossing rules were inapplicable in the *actual* West-East situation, Mr Jacobs submitted that the Judge's solution should be "stress-tested" with regard to a *hypothetical* East-West situation – i.e., the incoming vessel approaching the channel from the East. On that hypothesis, the incoming vessel had to get over to the starboard side of the channel and, absent the application of the crossing rules, there would be no rule of priority.

77. *West-East:* By way almost of recap, in the actual West-East factual situation, the inapplicability of the crossing rules gives rise to no real difficulty. ALEXANDRA 1, with options as to navigation in the pilot boarding area was duty bound to enter the narrow channel on the starboard side so as to continue as far to its starboard side as safe and practicable once within it. Her navigation was governed by rule 2, thereafter by rule 9 (once within the channel). EVER SMART was duty bound to keep as far to the starboard side of the narrow channel as safe and practicable, so as to exit safely. Her navigation in the channel was governed by rule 9. For that matter, had the crossing rules been applicable, there might well have been concern at the prospect of EVER SMART maintaining course and speed as it exited the narrow channel through the pilot boarding area.

78. *East-West:* Having regard to the emphasis placed by Mr Jacobs on the hypothetical East-West factual situation, we formed the view that the matter (though hypothetical) raised a question of seamanship and would benefit from the advice of the Elder Brethren. In doing so, it should be underlined that the question posed to the Elder

Brethren covered wholly different ground from the questions put to the Elder Brethren below by the Judge — thus avoiding the complication and embarrassment of asking the same questions to different nautical assessors: see, *The Savina* [1976] 2 Lloyd's Rep. 123, esp., at p.131. Furthermore, given that the answer of the Elder Brethren constitutes expert evidence, we followed the now accepted (ECHR compliant) procedure of inviting submissions from counsel on the proposed question to the Elder Brethren and, subsequently, on the answer given by the Elder Brethren: *The Bow Spring and The Manzanillo II* [2004] EWCA Civ 1007; [2005] 1 Lloyd's Rep. 1, esp. at [57] and following; *The Global Mariner and The Atlantic Crusader* [2005] EWHC 380; [2005] 1 Lloyd's Rep 699, at [14] – [15].

79. In the event, the question posed to the Elder Brethren ("the Question") was in these terms:

> " In circumstances where:
>
> 1. A vessel is proceeding outbound in the Jebel Ali dredged channel ('the narrow channel');
>
> 2. A vessel ('the incoming vessel') is approaching the mouth of the narrow channel from the East on a broadly Westerly heading;
>
> 3. A risk of collision between the two vessels exists in the vicinity of the entrance to the narrow channel;
>
> what actions would you expect from a prudent mariner in accordance with the ordinary practice of seamen on (a) the outbound vessel; (b) the incoming vessel?"

80. The answer given by the Elder Brethren ("the Answer") was as follows:

> "The prudent mariner in the outbound vessel in such circumstances would:
>
> - keep a sharp lookout
>
> - ensure compliance with Rule 9 by staying on the starboard side of the channel and proceed at a safe speed
>
> - acquire the vessel coming from the east as an ARPA target at an early stage and watch its bearing to determine the risk of collision
>
> - consult the onboard pilot and Jebel Ali VTS/port control re the subject vessel's identity and intentions
>
> - make contact with the other vessel on VHF at an early stage to advise own ship's constraints in a narrow channel and his intentions when dropping his pilot

> - be prepared to adjust own ship's speed to resolve close quarter/collision risk if necessary within the constraints of remaining in the channel and on the starboard side
>
> He would then proceed at a safe speed to the vicinity of the Fairway Buoy before increasing to full sea speed.
>
> The prudent mariner in an incoming vessel approaching from the east would:
>
> - keep a sharp lookout
> - consider approaching via the fairway buoy to avoid a close quarter or collision risk in the vicinity of the channel, particularly if not immediately entering the channel
> - acquire information from Jebel Ali VTS/port control regarding own pilot boarding time and position, ensuring that when manoeuvring to pick up his pilot he stays clear of the channel mouth and lines up to enter on his starboard side of the channel
> - acquire the outbound vessel as an ARPA target at an early stage and keep a close watch on the vessel's bearing to determine the risk of collision
> - identify and make early contact with the outbound vessel on VHF (identify via AIS or Jebel Ali port) in order to ensure that collision risk is avoided and agree to keep clear of the vessel navigating under Pilotage in a narrow channel.
>
> This accords with the ordinary practice of seamen having regard to the particular circumstances of the case."

81. Mr Jacobs launched a vigorous critique of the Answer. It was unclear whether the Elder Brethren considered that the hypothetical encounter was governed by the crossing rules. Unless the crossing rules applied, the Answer (in the hypothetical East-West situation) lacked clarity and certainty as did the judgment (in relation to the actual West-East situation). There was no rule of priority; it was more a "work-around" than a solution. It relied on a VHF solution, which was fraught with potential difficulty and had been criticised by Courts in the past. Further, the reasoning of the Elder Brethren had completely undermined the Judge's approach to the faults of ALEXANDRA 1 so requiring the Judge's apportionment to be revisited.

82. Ms Selvaratnam's response was that the Answer was entirely consistent with the advice given by the Elder Brethren below to Teare J, "…as both sets of Answers show that the crossing rule has no role to play in the approaches to a narrow channel". The suggestion that EVER SMART interests should be given permission to appeal on the question of apportionment in the light of the Answer was "extraordinary and deeply flawed".

83. To begin with, I cannot help deprecating the attempt on behalf of EVER SMART to re-open apportionment; with great respect, it is wholly misconceived. Nothing whatever in the Answer calls into question the Judge's approach to apportionment – let alone opens the door to allegations of fault against ALEXANDRA 1 hitherto un-pleaded.

84. Turning to the substance of the Answer, I accept the advice of the Elder Brethren and am unable to accept the criticisms advanced by Mr Jacobs. The Elder Brethren were, of course, concerned with seamanship not matters of law. But it is plain from the Answer that the Elder Brethren did not consider the crossing rules to have any role to play in the hypothetical East-West situation. To my mind, the Answer provides a comprehensive, realistic guide to safe navigation for both vessels, according to the requirements of good seamanship, and governed by rules 2 and 9. The attraction of the rule of priority under the crossing rules is understandable but less than compelling in the situation with which we are concerned. In my judgment, the Answer reflects the practical reality of good seamanship, within this port area. I would not, certainly in any pejorative sense, describe it as a "work-around". Nor do I read the Answer as placing any inappropriate reliance on VHF communications; to the contrary, the Answer rightly includes VHF communications (of the nature described) as amongst the means the prudent mariner would employ to assess and reduce the risk of collision. In any event, the application of the crossing rules would itself not be free from difficulty in the hypothetical East-West situation. Thus, the putative give-way vessel would be navigating in the narrow channel and constrained by it. So too, the putative stand-on vessel would be required to keep her course and speed as she manoeuvred through the pilot boarding area. In short, the attractions of the crossing rules in this situation may be more forensic than nautical.

85. For all these reasons, I am amply satisfied that a consideration of the hypothetical East-West situation does not at all undermine the Judge's solution to the actual West-East encounter. To the contrary, the advice of the Elder Brethren to us is entirely consistent with the approach adopted by the Judge.

86. *(D) The Judge's separate reason for treating the crossing rule as inapplicable:* It will be recollected that the Judge (at [70] – [71]) gave as a separate reason for the inapplicability of the crossing rules, the fact that ALEXANDRA 1 was not on a sufficiently defined course. In the light of Mr Jacobs' challenge to this conclusion, two questions arise: (1) First, is there a requirement in law that the putative *give-way* vessel should be on a course, for the crossing rules to apply? (2) Secondly, if the answer to question (1) is yes, did the Judge err as a matter of fact in holding that ALEXANDRA 1 was not on a course? In one sense the matter is academic, given the conclusion to which I have already come but I propose, nonetheless, to deal with it.

87. Before turning to those questions, I must deal with the preliminary point raised by Ms Selvaratnam, namely that it was not open to EVER SMART to challenge the Judge's conclusion on question (1), in the light of a concession made at trial. For my part, though the language of EVER SMART's skeleton argument at trial suggests the assumption that ALEXANDRA 1 needed to be on a sufficiently defined course for the crossing rules to apply, I am disinclined to hold EVER SMART to that "concession", if concession it was. Quite simply, matters have moved on since the skeleton argument at trial, so that the point should be addressed on its merits. Equally and for similar reasons, I am not attracted to shutting out ALEXANDRA 1 from seeking to uphold the Judge's conclusion on question (2) by reason of the admission of fact in its Collision

Statement of Case that ALEXANDRA 1 was on an East-South-Easterly course – or treating that 'pleading' as undermining the stance it now adopts.

88. Question (2) can be taken almost summarily. Notwithstanding Mr Jacobs' submissions (summarised earlier), there is no or no sufficient basis for departing from the Judge's conclusion of *fact* that ALEXANDRA 1 was not on a sufficiently defined course for the crossing rules to apply. I am content to agree and adopt the Judge's succinct description, namely, "…ALEXANDRA 1 …[was]…waiting for the pilot vessel to arrive rather than being on a course".

89. I turn to Question (1): is there a requirement that the putative *give-way* vessel must be on a sufficiently defined course for the crossing rules to apply? There is no doubt that, as a matter of authority and common sense, the *stand-on* vessel must be on a sufficiently defined course for the crossing rules to apply; as Lord Wright put it, in *The Alcoa Rambler (supra),* at p.249:

> " As the purpose of arts. 19 and 21 [the then crossing rules] is to impose a duty on the give-way ship to keep clear, that ship must be in a position to appreciate what the situation is and to know what the other ship is doing, and whether it is on a course at all or, if so, on what course."

But what of the give-way vessel?

90. The tenor of the observations in the authorities suggest that the same applies to the give-way vessel. In *SS Orduna v Shipping Controller* [1921] 1 AC 250, at p.255, Viscount Finlay spoke of the crossing rules beginning to apply "as soon as the two ships are approaching one another on courses which, if continued, may cause a collision." So too, in *The Savina (supra),* at p.132, Lord Simon of Glaisdale, albeit focusing primarily on the stand-on vessel, said that for the duties under the crossing rules to apply "…so as to impose on a vessel the duty to give way, both vessels must be keeping a steady course involving risk of collision and the 'give-way' vessel should be able to ascertain that the other vessel is on such a course." Before that moment, Lord Simon continued, each vessel owed the other "a general duty of careful navigation, with good look-out, on a basis of mutuality".

91. In *The Broomfield* (1906) 10 Asp MLC 194, the key question was whether the putative give-way vessel was more or less stationary; it was held that she was not, so that, on the facts, the vessels were "slightly crossing" and the crossing rules applied. A different conclusion was reached by Brandon J (as he then was) on the facts in *The Avance* [1979] 1 Lloyd's Rep. 143, at p.151, where he held that the crossing rules did not apply because the putative give-way vessel had been waiting off the harbour entrance and "…was not on any settled course at the time, nor was it possible for those on board the *Avance* [the putative stand-on vessel] to appreciate that she was…". The *Alcoa Rambler* was cited. The give-way vessel was nonetheless seriously at fault for a very late manoeuvre which resulted in her moving ahead of the *Avance* — but her liability was not based on the crossing rules.

92. It may well be that we are not strictly bound by the observations in any of these decisions, some being *obiter* and, in the case of *The Avance*, a decision at first instance (albeit a decision of Brandon J). However, I do regard the observations as persuasive

and respectfully agree with them. Though the position may not be as obvious as in the case of the stand-on vessel, I am nonetheless satisfied that both vessels, the give-way vessel included, must be on sufficiently defined courses for the crossing rules to apply. That is of the essence of the crossing rules. The need for an appreciation of the situation is not confined to the give-way vessel; the stand-on vessel must be in a position to appreciate her own status as such – and, additionally may be required to make a judgment call in the light of the action taken by the give-way vessel: rule 17 (a)(ii) and (3). The mere fact that there was a risk of collision through convergence, is not determinative of whether the crossing rules apply. Put colloquially (in Ms Selvaratnam's words), it takes two to cross.

93. It follows that for this separate reason too, I agree with Teare J's conclusion that the crossing rules were inapplicable. I would dismiss EVER SMART's appeal on Issue I.

ISSUE II: THE RESPONDENT'S NOTICE

94. I consider here the further arguments advanced by Ms Selvaratnam by way of the Respondent's Notice in support of the Judge's conclusion.

95. The first ground was that even if the crossing rules had otherwise been applicable, EVER SMART could not rely upon them because any putative crossing situation had only come about due to EVER SMART's own faulty navigation. This ground is hopeless, for the reasons given by the Judge, at [66].

96. The second ground was that there was no crossing situation because EVER SMART was herself not on a sufficiently defined course. This ground too is hopeless and fails for the reasons given by the Judge, at [67].

97. It is convenient to take as the next ground the submission that ALEXANDRA 1's failure to do what the crossing rules would otherwise have required was in any event justified as a matter of good seamanship under rule 2(a), not only for the reasons given by the Judge but also "because ALEXANDRA 1 was in a designated pilot boarding area waiting to pick up a pilot". That the narrow channel's entrance/ exit was in the pilot boarding area is, as already discussed, a feature of significance in this case – and was so treated by the Judge. But beyond that, there is nothing in this point.

98. The final ground – and the only ground on which it was necessary to trouble Mr Turner QC who dealt with this part of the Appeal for EVER SMART – was that if the crossing rules would otherwise have applied they were to be disapplied because ALEXANDRA 1 was "a vessel restricted in her ability to manoeuvre" within rule 18 (a)(ii) of the Collision Regulations. In particular, the submission focused on the definition contained in rule 3(g)(iii), which provides as follows:

> " The term 'vessel restricted in her ability to manoeuvre' means a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel. The term 'vessels restricted in their ability to manoeuvre' shall include but not be limited to:

> (iii) a vessel engaged in …..transferring persons…while underway;"

In Ms Selvaratnam's submission, ALEXANDRA 1 was waiting in the pilot boarding area for the pilot to board with minimum steerage way; she therefore came within the definition. If so, it was EVER SMART's obligation to keep out of the way of ALEXANDRA 1. In support of this submission, Ms Selvaratnam drew attention to the observation of ALEXANDRA 1's master, that she was a "hog on ice, with no skates". The observation, while certainly graphic, does not suffice to persuade me that ALEXANDRA 1 was a vessel restricted in her ability to manoeuvre within the meaning of rules 18 and 3(g)(iii). I agree with Mr Turner both that the facts of *Forest Pioneer* [2007] EWHC 84 are distinguishable and that ALEXANDRA 1 was not required to embark the pilot at the precise place chosen. I further entirely agree with the Judge's conclusion (at [69]):

> "….had the crossing rule applied and ALEXANDRA 1 been obliged to keep out of the way of EVER SMART she could have done so, for example at C-6, by putting her engines astern and so permitting EVER SMART to cross ahead in safety or by turning to starboard. She was not restricted in her ability to take such action by reason of embarking the pilot because that work had not commenced (and never did commence)…."

It follows that this ground too fails.

ISSUE III: CAUSATIVE POTENCY

99. *(1) The respective faults of each of the vessels:* Having resolved the principal Issue between the parties, Teare J turned to the respective faults of each vessel. Although not themselves giving rise to a ground of appeal, a brief reminder of this part of the judgment is helpful, by way of introduction to the Judge's approach to apportionment.

100. Dealing firstly with the alleged faults of EVER SMART, Teare J held (at [73] – [74]) that she was in breach of rule 9, in that from about C-10 she failed to navigate well to starboard of mid-channel. The breach created a risk that the vessels might not safely pass safely port to port and was thus a material cause of the collision.

101. Next, Teare J held (at [75] – [83]) that EVER SMART was in breach of rule 5, by reason of a defective radar and visual lookout and in breach of rule 7 in making assumptions on the basis of scanty information. With regard to the radar lookout, the Judge accepted the advice of the Elder Brethren and held that EVER SMART had been at fault in not acquiring ALEXANDRA 1 as an ARPA target, timeously or at all. As to visual lookout, the Judge's conclusion – unsurprisingly, I cannot help interposing, in light of the Master's own contemporaneous comments recorded above – was that it was seriously defective.

102. As to speed, the Judge said this (at [87]):

> " ….in circumstances where at C-4 ALEXANDRA 1 was heading so as to cross the approaches to the channel and was about a mile ahead of EVER SMART fine on her port bow and

> where that would have been apparent to EVER SMART had she been keeping a good lookout EVER SMART ought to have reduced her speed substantially. Instead, she increased her engines to full ahead manoeuvring at C-4 and then to full sea speed at C-3 ½ . Her unsafe speed was a direct consequence of her failure to keep a good lookout. "

The Judge added this (at [88]):

> "There can be no doubt that the causative potency of her excessive speed with regard to the damage which in fact occurred was substantial."

103. Next, Teare J held that ALEXANDRA 1 was at fault by failing to keep a good aural lookout, in breach of rule 5 of the Collision Regulations. As summarised by the Judge (at [99]):

> "….The master of ALEXANDRA 1 misheard or misunderstood the VHF conversation between Port Control and ZAKHEER BRAVO. He thought, mistakenly, that the conversation was between Port Control and EVER SMART and so concluded that EVER SMART was being instructed to pass astern of him at a distance of a mile. Since the name of ZAKHEER BRAVO was clearly stated on VHF, as was the fact that she was towing a barge from west to east, it is likely that the master was not listening carefully. "

In consequence (at [100]), the master of ALEXANDRA 1 did not turn to starboard towards the channel and instead headed so as to cross the approaches to the channel, in order to give room for EVER SMART to turn to port and for the vessels to cross starboard to starboard. This fault was causative of the collision.

104. *(2) Apportionment of liability:* Turning to apportionment of liability, Teare J observed (at [109]) that the "relative culpability and causative potency of each vessel's faults have to be assessed".

105. Teare J viewed EVER SMART's faults as "very serious" (at [111]), in terms of culpability. ALEXANDRA 1's fault was culpable to a substantial degree (at [112]). In terms of relative culpability (at [113]), "…the faults of EVER SMART were…..much more culpable than those of ALEXANDRA 1."

106. In terms of causative potency, Teare J did not (at [116]) consider that there was "a marked difference in quality between the contribution which each vessel made to the fact that the collision occurred". However (*ibid*), Teare J held the unsafe speed of EVER SMART "contributed far more to the damage resulting from the collision than the very much lower (and safe) speed of ALEXANDRA 1". That was apparent from looking at the damage done to the bows of ALEXANDRA 1 and the "much lesser damage" to the port bow of EVER SMART. Accordingly, it "must follow that the causative potency of EVER SMART's fault was greater than that of ALEXANDRA 1".

107. In the light of these conclusions, Teare J held (at [118]) that EVER SMART should bear 80% of the liability for the collision and ALEXANDRA 1, 20%.

108. *(3) The rival cases:* It is settled law that in assessing fault for the purpose of apportioning liability, both the relative culpability and the causative potency of each vessel's faults must be assessed (see, for instance, Lord Pearce in *The Miraflores and The Abadesa* [1967] AC 826, at p.845). Issue III gives rise to a single point of contention: in dealing with causative potency, did the Judge err in taking into account, at [116] and, hence, in his conclusion on apportionment, the extent of the damage sustained by ALEXANDRA 1?

109. Mr Jacobs submitted that the answer to this question was "yes". The Judge was wrong in principle in singling out and "double-counting" excessive speed in relation to causative potency – once in relation to the *fact* that the collision occurred and again with regard to the *damage* sustained. The Judge's approach was unsupported by authority, which did not suggest that the extent of the damage suffered was relevant to the prior question of fault. In any event, there was no necessary correlation between the extent of the physical damage sustained and a party's financial loss. Moreover, at this stage, the Judge's approach was questionable evidentially and was inconsistent with traditional Admiralty Court practice of addressing collision liability separately from and before the assessment of damage (a matter left to the Reference). Mr Jacobs accepted that the general propensity of a vessel proceeding at a greater speed to cause more damage could be taken into account by the Judge but here the Judge had gone too far.

110. Ms Selvaratnam invited an answer of "no" to the question posed. The Judge's approach was orthodox, correct and supported by a plethora of authority. The Judge was not precluded, when apportioning liability, from considering the relative impact of each vessel's faults on the severity of the collision. No double-counting had been involved. That there may be no obvious correlation between the physical damage and the extent of the loss was irrelevant; apportionment was not a science. The Judge had made a broad qualitative judgment, as he was fully entitled to do.

111. *(4) Statute and authority: The Merchant Shipping Act 1995* ("the 1995 Act"), a consolidating statute, consolidated amongst other enactments the *Maritime Conventions Act 1911* ("the 1911 Act"). It was the 1911 Act which, giving effect to the *International Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels signed at Brussels on September 23 1910* ("the Collision Convention"), introduced the rule of liability in proportion to fault in Admiralty cases, replacing the previous 50:50 division of loss rule: *Marsden and Gault*, at para. 16-018. The principles in Admiralty Law pursuant to the 1995 Act are the same as those applicable more generally under the *Law Reform (Contributory Negligence) Act 1945*.

112. S.187 of the 1995 Act contains the relevant provisions:

> " (1) Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault.

> (2) If, in any such case, having regard to all the circumstances, it is not possible to establish different degrees of fault, the liability shall be apportioned equally."

113. A brief note in *Civil Procedure*, Vol. 2 (2018) ("the White Book"), at 2D-230, summarises the matter this way:

> "It is now well established that in assessing degrees of fault and apportioning blame, regard must be had both to the blameworthiness or culpability of the conduct and also its causative potency as a factor contributing to the collision *and damage*….." (Italics added)

114. A considerable number of authorities were cited to us, beginning with *The Margaret* (1881) 6 PD 76. The case concerned a schooner moored to a buoy at the time of a collision with a dumb barge. As a result of the collision, the barge and her cargo sustained damage by reason of the schooner's anchor hanging improperly and in breach of the Thames by-laws. The collision was caused by the negligence of the barge – there would, however, have been no damage at all but for the anchor being improperly placed. Both the schooner and the barge were held to blame, so that (given the Admiralty rule at the time) the damage was equally divided between them. I am not persuaded by Ms Selvaratnam that this decision significantly advances the debate. While it illustrates that causative potency goes not simply to the fact of the collision but also to the fact that damage was sustained – necessary in any event for the existence of a cause of action (as observed by Brett LJ, at p.79) – I do not think that this decision assists with regard to taking account of the extent of the damage when considering apportionment. Plainly too, *The Margaret*, as a pre-1911 Act case, could not assist on any questions of apportionment as such.

115. In *The Peter Benoit* (1915) 13 Asp. MC 203, at p.208, Lord Sumner observed:

> "The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do… "

He went on to say (*ibid*) that "fault" under the 1911 Act "must be fault as regards the collision". In *The SS Haugland v The SS Karamea* [1922] AC 68, Viscount Finlay (at p.71) commented on this latter passage as meaning "…that only faults which contribute to the accident are to be taken into account…". Insofar as EVER SMART sought to rely on these observations, I am not persuaded that they assist her case. On a fair reading of Lord Sumner's speech, he was distinguishing *causative* from non-causative fault – rather than drawing any distinction between fault causing the collision and fault causing damage. This is clear too from Viscount Finlay's very next sentence in *SS Haugland* (at pp.71-2), where he said that the "existence of fault on the part of one of the ships is no reason for apportionment unless it in part caused the damage". Moreover, as to Lord Sumner's earlier observations in *The Peter Benoit* (set out above), they do no more than reinforce the general rule against speculation; they do not preclude a Judge from forming a view as to the propensity for greater speed to increase the damage caused – a matter which in any event Mr Jacobs (rightly) accepted in argument.

116. *The British Aviator* [1965] 1 Lloyd's Rep. 271 does contain observations which, in my judgment, lend support to the view taken by the Judge. Willmer LJ, having referred to the speech of Lord Sumner in *The Peter Benoit* and dealing with proviso (a) to s.1(1) of the 1911 Act (see now s.187(2) of the 1995 Act) said this (at p.277):

> "Later cases have thrown more light on the meaning of the proviso, and in particular….it is now accepted that in assessing degrees of fault regard must be had both to the blameworthiness of the conduct alleged and also to its causative potency as a factor contributing to the collision *and damage*." (Italics added)

So too, Sellers LJ expressed the matter as follows (at p.280):

> "Where negligence contributing to the collision is found or admitted….then the burden is on the one side or the other to justify a departure from a decision of both being equally to blame. There must be a preponderance of fault on the one side to disturb the balance. Only fault which affected the collision must be assessed, and fault must be measured by blameworthiness, causation *and by the damage caused by the negligent conduct*. The decision calls for an appreciation and a comparative assessment of those ingredients of the respective faults found against each party." (Italics added)

See further, *Marsden and Gault*, at para. 16-021.

117. I come next to the major contribution made by Sir Henry Brandon, writing extra-judicially on *Apportionment of Liability in British Courts under the Maritime Conventions Act of 1911* (1977) 51 Tulane Law Review 1025. At p.1029, Sir Henry cited *The Margaret (supra)* as an example of a case where the fault (the improperly positioned anchor) did not contribute to the collision occurring but did contribute to the damage or loss arising out of it. Under the 1911 Act, liability for that damage was therefore to be apportioned, according to the degree of fault of each vessel. Continuing, Sir Henry underlined (at p. 1031) that both culpability and causative potency of faults were relevant in apportioning liability under the 1911 Act. Liability was to be apportioned equally unless there was a clear preponderance of fault, judicially established one way or another (at pp. 1032 and following). Finally and of particular relevance for the present debate, Sir Henry Brandon spoke of "two aspects" of causative potency (at pp. 1038-1039):

> " The first aspect is the extent to which the fault concerned contributed to the fact that the collision or other casualty occurred at all. The second aspect is the extent to which the fault contributed to the damage or loss resulting from the collision or other casualty. Two examples of faults of this kind in collision cases may be given. The first is excessive speed, whether in fog or clear weather. The second is an improper alteration of course which increases the angle of blow or results in one ship being struck by another in an especially vulnerable area. Both these kinds of fault are likely to be causatively potent, not only with regard to causing the collision to occur at all, but also with regard

> to the extent and severity of the damage or loss resulting from it."

In the EVER SMART skeleton argument, an effort was made to suggest that Sir Henry Brandon was saying no more than that a vessel's speed or improper alteration of course might attract greater culpability. I cannot agree. Sir Henry wrote with the utmost clarity, distinguishing *culpability* and *causative potency* – and this final passage was squarely addressed to two aspects of causative potency. For my part, Sir Henry's contribution lends unequivocal support to the Judge's approach and carries very great weight indeed.

118. The impact of speed was addressed in *The Nordic Ferry* [1991] 2 Lloyd's Rep 591, at p.598, by Sheen J. Having treated the blameworthiness of the vessel in question as not of a high order, he held that its causative potency was of a high order "…because it was the great speed of this large ship *Nordic Ferry* which caused so much damage….". In much the same vein, in *The Sanwa* [1998] 1 Lloyd's Rep 283, at p.300, Clarke J (as he then was) said that speed "…is always an important fault because of its causative effect upon the damage in a collision and because it reduces the time that the other vessel has to take action."

119. In the course of his judgment in *The Nordlake* [2016] 2 All ER (Comm) 449, Teare J commented upon Sir Henry Brandon's article, as follows:

> "149. Sir Henry Brandon's extra-judicial exposition of the law and practice of apportionment of liability in his article in the Tulane Law Review should be better known than it is. It will assist all who have to consider such matters. His understanding and knowledge of how liability for damages in collision cases was in practice assessed was gained at a time when almost every week there was a collision action in the Admiralty Court, unlike the present time when, perhaps because voyage data recorders and other electronic devices have almost eliminated the need for a trial, there are few such trials. In his article Sir Henry Brandon described the proposition that both culpability and causative potency must be taken into account as 'the true principle of law applicable'….. Whilst there were no universal rules with regard to the assessment of culpability or causative potency he identified ('on the basis of practical experience in numerous cases over many years') certain broad lines of approach which can be used when apportioning liability (see 1037-1041). They may be summarised as follows:
>
> (i) The number of faults on one side or the other is not decisive. It is the nature and quality of a ship's faults, rather than their number, that matter.
>
> (ii) Breaches of the obligations imposed on ships in certain defined situations by the Collision Regulations will usually be regarded as seriously culpable. One such rule is the narrow channel rule.

> (iii) Causative potency has two aspects. The first is the extent to which the fault contributed to the fact that the collision occurred. The second is the extent to which the fault contributed to the damage resulting from the casualty.
>
> (iv) In most cases though not all it will be right to treat the fault of a ship that creates a situation of difficulty or danger as greater than that of the ship that fails to react properly to such situation after it has been created.
>
> (v) The fact that a fault consists of a deliberate act or omission may in certain circumstances justify the court in treating it as more culpable than a fault which consists of omission only.
>
> 150. The court deals with questions of apportionment in a fairly broad way….."

With respect, as with Sir Henry Brandon's article, Teare J's summary is of real value. Paragraph (iii) of that summary is of course directly relevant to the present Issue.

120. It may be noted that Teare J's approach in *The Nordlake*, drawing on Sir Henry Brandon's article has been applied in the Hong Kong High Court in *The MCC Jakarta* [2017] HKCFI 981, at [75]. So too, in the High Court of Singapore, where, in *The Dream Star* [2017] SGHC 220; [2017] 2 Lloyd's Rep 538, [127], Belinda Ang Saw Ean J remarked that "the apportionment of liability is a broad, commonsensical and qualitative assessment of the culpability and causative potency of both vessels".

121. Finally, we were referred to Meeson and Kimbell, *Admiralty Jurisdiction and Practice* (5th ed., 2017), at para. 7-113. Early in the relevant passage, the authors underline that when considering whether a particular fault has or has not contributed to the result, "it is not simply the contribution to the collision that is relevant, but the contribution to the damage"; the authors next turn to Sir Henry Brandon's "seminal article", already discussed. The final sentence of the paragraph in question reads as follows:

> "The degree of fault is judged objectively and cannot be increased or decreased by the actual amount of damage caused."

This sentence is not easy to reconcile with the earlier sentence, making reference to the contribution to the damage; it is also irreconcilable with the views of Sir Henry Brandon in the article in question. For my part, the sentence must either be read (1) as confined to culpability only; or (2) as meaning that it would be neither necessary nor appropriate to assess the degree of fault by reference to the precise calculation of damage, as established by the later Reference (which, would not be available at the time of the Collision Action). Alternatively, with respect, it must be disapproved.

122. *(5) Conclusions:* It may be noted that when refusing EVER SMART permission to appeal, the Judge observed that speed was a recognised and obvious contributor to the extent of damage in collision cases and, in his experience, had always (where relevant) been taken into account in the same manner as he had done in the judgment. Furthermore, "the explanation of Sir Henry Brandon as to the meaning of causative potency has been 'hornbook' law in Admiralty for many years….".

123. This review of authority, together with considerations of principle, lead me to agree with and follow the views of Sir Henry Brandon in his (aptly described) seminal article and those of Teare J in *The Nordlake.* Those views reflect and are consistent with the observations in *The British Aviator*, *The Nordic Ferry* and *The Sanwa*; conversely, they are not inconsistent with any of the authorities cited. For my part, nothing in s.187 of the 1995 Act or in authority requires causative potency to be arbitrarily restricted so as to exclude consideration of the damage or loss sustained in the collision; indeed, such an exclusion would seem to run contrary to practical common sense and the statutory language. But if there is no such exclusion, then causative potency extending to the extent and severity of the damage sustained can perfectly properly be taken into account in the apportionment of liability.

124. I would pull the threads together as follows:

i) Liability for damage in a collision case is to be apportioned under s.187 of the 1995 Act having regard to the degree of fault of each vessel.

ii) Both the culpability and the causative potency of the faults established are relevant to the apportionment of liability.

iii) Causative potency has two aspects; the first relates to the extent to which the fault contributed to the fact of the collision occurring; the second, to the extent to which the fault contributed to the damage or loss resulting from the collision.

iv) Excessive speed is a prime example of a fault likely to contribute to the extent and severity of the damage or loss suffered.

v) A Judge is amply entitled to take into account the propensity of excessive speed to increase the damage suffered when undertaking the exercise of apportionment – and thus to have regard in broad terms to the magnitude of the damage sustained. That the correlation between the extent of physical damage and ultimate financial loss may well be less than perfect, is neither here nor there. Two caveats apply: first, the Judge needs to keep in mind that a detailed assessment of the damage and loss must await the Reference; secondly, the Judge cannot engage in speculation – faults and their causative potency need to be proved.

vi) Approached in this manner, the apportionment of liability will constitute, in the words of the judgment in *The Dream Star*, "a broad, commonsensical and qualitative assessment of the culpability and causative potency of both vessels".

125. Against this background, I return to the judgment. To my mind, the Judge has not fallen into error in his approach to the causative potency of EVER SMART's excessive speed. I reject Mr Jacobs' submission of "double-counting"; the short answer is that having regard to this fault *both* in relation to the fact of the collision occurring and the severity of the collision, amounts to the separate counting of two different (and cumulative) aspects of the same fault. Nor do I think that the Judge either strayed into the proper territory of the Reference on the one hand or engaged in speculation on the other. The views he expressed at [116] – drawing no doubt on the figures set out at [1] and his earlier observation at [88] – reflect an unimpeachable broad qualitative assessment of the impact of excessive speed.

126. I would dismiss EVER SMART's appeal on Issue III. It follows that I would dismiss the appeal as a whole.

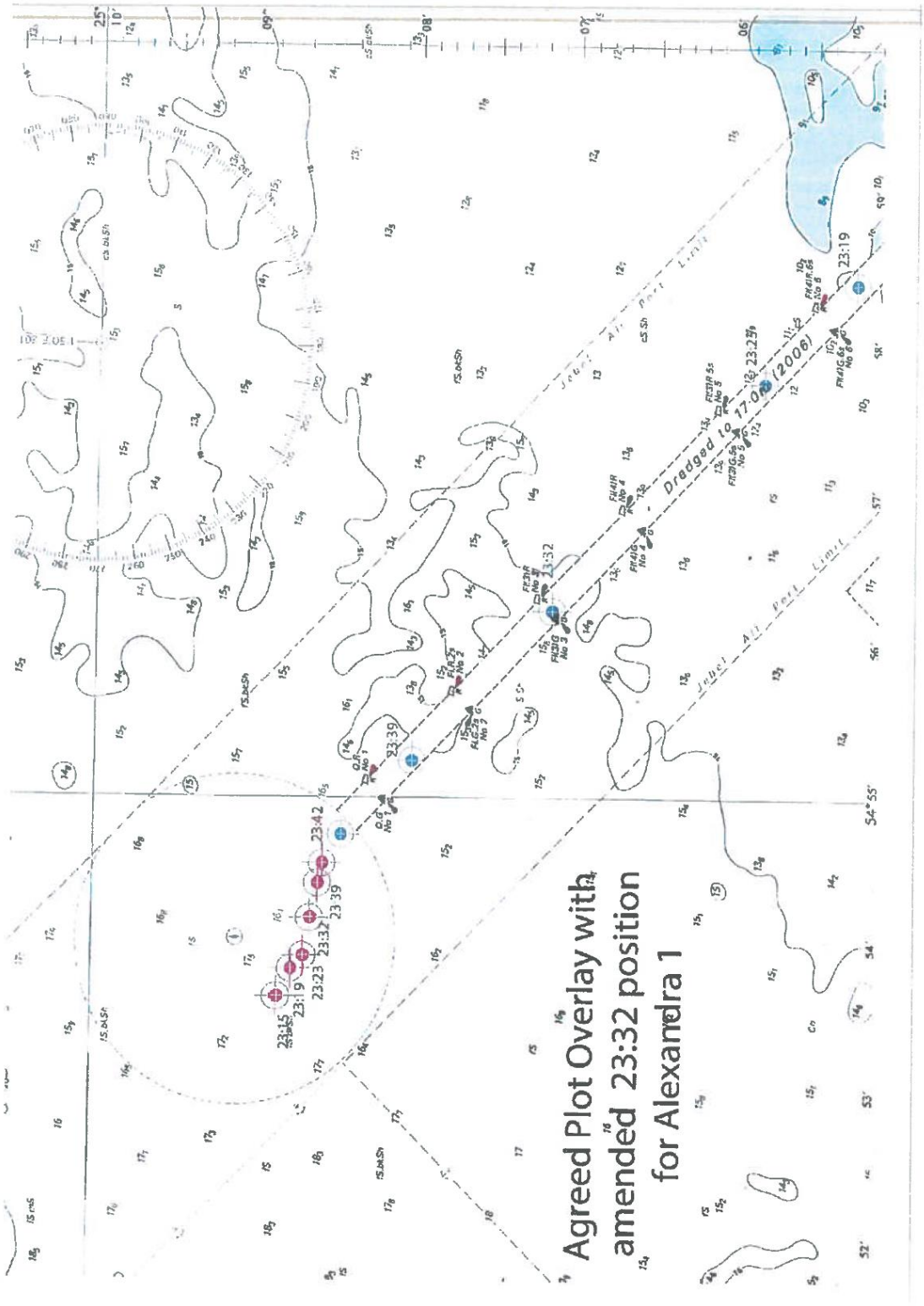
LORD JUSTICE LEWISON:

127. I agree.

LORD JUSTICE LEGGATT:

128. I also agree.

Annexe A


Agreed Plot Overlay with amended 23:32 position for Alexandra 1
Dredged to 17.0m (2006)
23:42
23:39
23:32
23:23
23:19
23:15
23:25
23:19
54° 55'