Neutral Citation Number: [2014] EWCA Civ 713

Case No: A3/2013/0477

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEENS BENCH DIVISION COMMERCIAL COURT
MR JUSTICE EDER
[2013] EWHC 3678 (COMM)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2014

Before :

LORD JUSTICE FLOYD
LORD JUSTICE CHRISTOPHER CLARKE
and
SIR STANLEY BURNTON

- -

Between :

FALKONERA SHIPPING COMPANY	**Appellant/ Claimant**
- and -	
ARCADIA ENERGY PTE LTD	**Respondent /Defendant**

m.t. "*Falkonera*" – c/p 18.11.10

- -
- -

Mr C Hancock QC and Miss S Tresman (instructed by **Ince & Co**) for the **Appellant**
Mr David Allen QC and Mr N G Casey (instructed by **Clyde & Co**) for the **Respondent**

Hearing dates : 27th & 28th January 2014

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Approved Judgment

LORD JUSTICE CHRISTOPHER CLARKE :

1. *Falkonera* Shipping Company ("Owners"), the appellants, are the owners of a Very Large Crude Carrier ("VLCC") – the *Falkonera*. On or about 18 November 2010 they chartered her to Arcadia Energy Pte Ltd ("Charterers") to carry crude oil from the Yemen to "*1-2 ports far east*". The charter was on BPVOY4 terms with amendments/additions.

2. Clause 8 of those terms provides:

> "*8.1 Charterers shall have the option of transferring the whole or part of the cargo…to or from any other vessel including, but not limited to, an ocean-going vessel, barge and/or lighter (the "Transfer Vessel")…*
>
> *All transfers of cargo to or from Transfer Vessels shall be carried out in accordance with the recommendations set out in the latest edition of the "ICS/OCIMF Ship to Ship Transfer Guide (Petroleum)".*
>
> *Owners undertake that the Vessel and her crew shall comply with such recommendations, and similarly Charterers undertake that the Transfer Vessel and her crew shall comply with such recommendations. Charterers shall provide and pay for all necessary equipment including suitable fenders and cargo hoses. Charterers shall have the right, at their expense, to appoint supervisory personnel to attend on board the Vessel, including a mooring master, to assist in such transfers of cargo.*"

3. There was a further clause ("the STS lightering clause") which provided (without the numbering which has been added for ease of reference) that:

> "*(i) if charterers require a ship-to-ship transfer operation or lightening by lightering barges to be performed then <u>all tankers</u> and/or lightering barges to be used in the transhipment/lightening shall be subject to prior approval of owners, which not to be unreasonably withheld, and all relevant certificates must be valid.*
>
> *(ii) all ship-to-ship transfer operations shall be conducted in accordance with the recommendations set out in the latest edition of the ics/ocimf ship-to-ship transfer guide (petroleum).*
>
> *(iii) all such lightering ships must have a fully working inert gas system (igs), unless the cargo flash point exceeds 60f and only with express approval of the owners/master.*"

4. The question in this appeal is whether the judge was right to hold that Owners had unreasonably withheld their approval of another VLCC for use in a ship-to-ship (STS) transfer of cargo.

The course of the voyage

5. On 24 November 2010 the Charterers gave orders for the vessel to load oil in the Yemen and to proceed to Singapore for orders. On 2 December loading was complete.

The vessel proceeded to Singapore for orders. On 5 December Charterers asked Owners to approve two vessels for an STS transfer – the *Thaioil 2* and the *Kythira*. Owners approved the latter but asked for further detail in respect of the former. Charterers then decided that they wished to discharge the *Falkonera* cargo into three vessels - the *Kythira*, the *Front Queen* and the *Front Ace*– that they had chartered for use as floating storage vessels. The *Thaioil 2* and the *Kythira* were both smaller than the *Falkonera*. The *Front Queen* was exactly the same length as the *Falkonera* – 330 metres.

6. STS transfers, like all marine operations, involve a degree of risk. The vessels may collide; oil may spill; property may be injured; people may be hurt. Claims may follow. An STS transfer from a VLCC to a smaller vessel is a very standard operation, habitually carried out. For such transfers the two vessels are usually secured by lines which include head lines and stern lines. As their names imply, a head line leads forward from the bow of the vessel; a stern line leads aft from the stern. If one vessel is smaller than the other there is room for the lines to go fore and aft from the smaller to the larger vessel at an angle which is less than 90 degrees and usually of about 45 degrees. These are designed to resist longitudinal and transverse forces, although primarily the former. There will also be spring lines (see below).

7. The transfer of oil from one VLCC to another is in a different category. VLCCs are usually of the same or very similar length. That means that there is no possibility of using head lines and stern lines in the same way. A line from the bow of one vessel to the bow of another will be at a right angle. The two vessels can however be secured to each other by:

    a) breast lines which go from side to side, perpendicular to the longitudinal axis of the two vessels and resist transverse forces;

    b) spring lines, which go in a broadly longitudinal direction between the two vessels and resist longitudinal forces; and

    c) what were described by Captain Battye as "effective" head and stern lines[1]. These are lines connecting the sterns and bows of the two vessels.

8. Captain Gilchrist was the founder of a company called SafeSTS Ltd ("SafeSTS"), a company specialising in assisting in the safe execution of STS transfers. He suggested a mooring arrangement for the *Falkonera* and the *Front Queen* (see [27] below) which is set out in the following diagram and uses breast lines (lines a and f); spring lines (lines d and e) and "*effective head and stern lines*" (lines b, c, h and g). The single lines on the diagram represent a set of 2 lines in each case (making 16 in all).

[1] The use of this expression makes some of the evidence confusing. Head lines and stern lines from a larger to a smaller vessel at an angle of about 45 degrees are distinguished from "*effective head lines and stern lines*" which go from one vessel to another of similar size but at a much smaller angle.

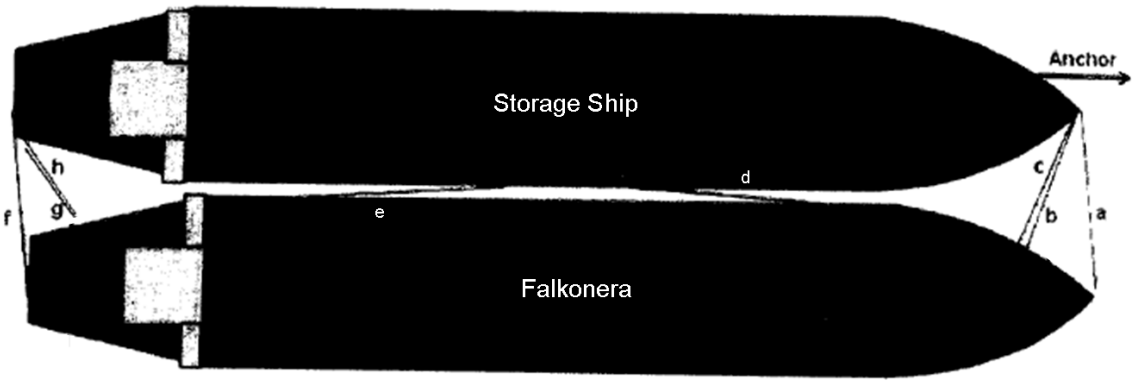

Figure 5 Proposed mooring arrangement FALKONERA/FRONT QUEEN

9. The ICS/OCIMF Ship to Ship Transfer Guide (Petroleum) – hereafter "the Guide" – referred to in clause 8 of the BPVOY 4 terms and in the STS lightering clause is a standard reference publication which, in 2010, was in its 4th Edition (2005). The Guide, which is a substantial document, is what its name implies. It is not a set of rules.

10. Chapter 3, headed "*Safety*" includes the following:

> "*3.1. General Safety*
>
> *For all STS transfer operations each Master remains at all times responsible for the safety of his own ship, its crew, cargo and equipment and should not permit safety to be prejudiced by the actions of others. Each Master should ensure that the procedures recommended by this guide are followed and, in addition, that internationally accepted safety standards are maintained.*
>
> *3.1.1 Risk Management*
>
> *Before committing to an STS Transfer operation, the parties involved should carry out a risk assessment that should include sufficient information to ensure a good understanding of the operation.*"

There are then details of what the risk assessment should include as a minimum.

> "*The level of complexity required will depend on the type of operation. For a particular transfer area utilising standard approved STS equipment and ships that are fully operational, a generic risk assessment might be appropriate. For STS operations being undertaken in a new area, or in the event of deviation from routine STS transfer, a risk assessment should be carried out for each "non standard" activity…*"

11. The Guide in its then form contained no section specifically dealing with STS transfers between ships of the same size. As the judge found [25-6] it did not, however, preclude such transfers, which were not uncommon, although less common

than transfers from a larger to a smaller vessel. Nor does the absence of such a section mean that VLCC – VLCC transfers cannot be conducted in accordance with its recommendations. So far as SafeSTS and the Charterers were concerned, in 2010 SafeSTS had conducted 200 STS operations at Pasir Gudang, of which only two were VLCC – VLCC; in the same year the Charterers had conducted 58 STS transfers of which 2 were at Pasir Gudang.

13 December 2010

12. On 13 December the Charterers obtained the approval by the owners of the *Front Queen* as a receiving vessel for an STS transfer from the *Falkonera.* They also sought the approval by the Owners of the *Falkonera* and of the *Front Queen* for such a transfer. Attached to the email making the request was a copy of the *Front Queen*'s Q88 form. This is a standard form tanker chartering questionnaire which, when completed, sets out detailed information about the vessel. The form recorded that the vessel complied with the recommendations of the Guide, had been subject to a SIRE inspection on 19 July 2010, and had been vetted and approved by a number of oil majors.

Owners' first response

13. The email seeking approval was forwarded to Captain Papapostolou, the Operations Manager at Andros Maritime Agencies Ltd ("Andros Maritime"), Owners' London agents. Half an hour later he responded as follows:

> "*With regards to Charterers request for Owners acceptance to discharge into another VLCC Front Queen, we would like to discuss some subjects in relation to this STS operation between two (2) VLCCs.*
>
> *We having reviewed the ICS/OCIMF Ship to Ship Transfer Guide (Petroleum) do not, at this juncture, consider that discharge of the vessel by ship-to-ship transfer into another VLCC is permitted.*
>
> *The ICS/OCIMF Ship to Ship Transfer Guide (Petroleum) does not contain any recommendations for Ship-to-Ship transfer between two VLCC's and, additionally, when reviewing these guidelines it is apparent that the requested operation may fall outside the parameters of the recommendations in respect of both the manoeuvring operation and Fender requirements. There are also no recommendations contained within the Guide in respect of the mooring recommendations, which only refer to VLCC's being lightered into Aframax vessels.*
>
> *A further consideration, which Owners know from a difficult past experience, is the fact that Front Queen (another VLCC) is identical in size to M.V Falkonera and hence it will be impossible to obtain satisfactory leads for both head lines and stern lines, coupled with the fact that upon commencement and completion of the operation the leads of other moorings, springs and breasts, will have a poor vertical aspect.*
>
> *Thank you very much for your kind attention and understanding to this very-very important matter.*"

The judge did not treat this as a withholding of approval because it contemplated further discussion. He characterised it as a first response.

14. The "*difficult past experience*" to which Captain Papapostolou referred was an incident in February 2007 when he was the Master of the *Kos*, a VLCC, which discharged cargo by an STS to another VLCC acting as a floating storage unit, slightly smaller than the *Kos*, off Pasir Gudang. That vessel was the *Aker Smart 3*. The *Kos* was owned by a company in the group of companies for which Embiricos Shipbrokers Ltd ("ESL") acted. ESL were the exclusive shipbrokers for a number of vessels managed by Andros Maritime who were Owners' London agents.

15. On two occasions during the mooring operation contact was made between hulls causing very minor structural damage to both vessels. The STS transfer did not continue. It appears from what Captain Papapostolou said in his conversations with Captain Gilchrist (see [24] below) and the evidence of Mr Philip Embiricos of ESL as to what he had said at a meeting with representatives of Charterers in Singapore in October 2010 ("*I would not have taken discharge into VLCC because we had a problem with VLCC to VLCC discharge*") that it was in the light of that incident that Owners had a blanket policy of declining VLCC to VLCC transfers. The judge thought that that seemed to have been the case, but regarded it as unnecessary to make a finding to that effect.

16. To similar effect Mr Embiricos said in the course of his cross examination that "*I would not have taken discharge into a VLCC*" because of the *Aker Smart 3* incident "*and it was a non-starter*". When asked whether the Embiricos Group had a policy of not discharging into VLCCs, he said that he did not know whether there was a policy or not; but he added "*The policy with that would be something that would be immediately rejected because of our experience*".

17. In any event, as the judge found, there were special reasons why the incident occurred. The *Aker Smart 3* had, as Captain Gilchrist explained, a square bow, which made her very directionally unstable and, for that reason, prone to fishtailing. She was notorious for steel to steel incidents. Mr Hancock submitted that this circumstance was irrelevant because it was not established that Owners knew of these characteristics. Captain Papapostolou said in his evidence that he was not aware that the vessel had a very square bow or had had a number of incidents. It seems to me, however, that Owners cannot have been unaware of the characteristics of the receiving vessel at any rate after the incident. In any event Captain Papapostolou described her in his statement as "*unable to provide a stable berthing platform, particularly in the event of strong tidal currents and/or poor weather*". There is no evidence that the *Frontline* vessels had any similar infirmity.

18. In addition, as appeared from the evidence of Captains Papapostolou and Gilchrist, the fendering on the *Aker Smart 3* was, at the time of the incident, inadequate: only four fenders were used which was not consistent with the Guide, and secondary fenders on the *Aker Smart 3* were positioned too far up to offer any protection during berthing. It was also unclear how many (if any) tugs assisted in the operation and whether or not an independent STS provider had been used. In the light of those factors the judge found that the experience of Captain Papapostolou and Owners in respect of this incident provided no reasonable basis for withholding approval of the proposed STS operation between the *Falkonera* and the Frontline vessels.

14 December 2010

19. Charterers had consulted SafeSTS Ltd. On 14 December Captain Gilchrist of SafeSTS emailed to Charterers in relation to Owners' concerns:

> "*Fully understand their concerns regarding VLCC to VLCC. These operations should not be undertaken lightly, although they are conducted on a regular basis both underway and at anchor.*
>
> *Each operation needs to be risk assessed individually and mitigation measures put in place.*
>
> *The OCIMF STS guide does provide guidance for all STS operations, including same size vessels, but quite rightly it is pointed out that this information is very generic in that it does not specify VLCC same size operation. This is going to be addressed through the Implementation of Marpol Chapter 8 in that the OCIMF Guide will complement the Vessel Specific plan that needs to be written for every vessel over 150 GRT.*
>
> *So far a number of VLCC to VLCC operations have been carried out at Pasir Gudang including for Oil Majors. These operations have all been carried out without problems.*
>
> *Part of the risk assessment process is attached along with reports on the pilots etc.*
>
> *Any further questions can be directed to me and more than happy to discuss and explain.*
>
> *If we have the vessels plans sent to the office we can draw up the mooring plan in advance, otherwise the Mooring Masters will prepare this at pre-transfer conference.*"

20. Captain Gilchrist's email attached (a) information about the local pilots; (b) details of the available "*oil spill response*" (OSR) equipment; (c) a fender rigging diagram for a VLCC to VLCC operation; and (d) an environmental assessment of the STS anchorage at Pasir Gusang. .

21. Charterers forwarded this email to Owners together with a covering email which said:

> "*We refer to owner's response yesterday on subjects in relation to the STS operation between two (2) VLCCs. To that extent, we have discussed your concerns with the STS company (SafeSTS) attending all our STS operations at Pasir Gudang and reference below is their input which hopefully will address the owner's concerns.*
>
> *Please note that Captain Robert Gilchrist has kindly offered his assistance to answer any other questions related to this issue. We await owner's reconsideration for granting approval of proposed STS operations between MT. Falkonera and MT. Front Queen to proceed around 17-18 December*"

Withholding 1

22. Very shortly thereafter Captain Papapostolou replied:

> "*We refer to charterers below message, Owners concerns, flowing from a past difficult experience in similar sheltered waters, regarding the fact that the vessels are identical in size and the difficulties this poses in respect of leads for both head lines and stern lines, coupled with the fact that upon commencement and completion of the operation the leads of other moorings, springs and breasts, will have a poor vertical aspect, have not been allayed at all.*
>
> *Regrettably, Owners, following careful consideration of all safety considerations in respect of the vessel, cargo her personnel and the environment, must therefore decline Charterer's request for acceptance to discharge into another VLCC.*
>
> *Contractually, there is agreement under the Charter Party which allows for the vessel to discharge the cargo by trans-shipment and that this shall be carried out in accordance with the recommendations set out in the latest edition of the ICS/OCIMF Ship to Ship Transfer Guide (Petroleum) and it is clear that this does not contain any references/recommendations for Ship to Ship transfer between two VLCC's.*"

The judge treated that as the first withholding of approval – Withholding 1.

23. On the same day Captain Gilchrist spoke to Captain Papapostolou by telephone. As to that the judge said this:

> "*...Capt Gilchrist would seem to have summarised the role of SafeSTS; and … they also discussed the position of the Owners viz that the Owners would not allow a VLCC-VLCC operation and his (ie Capt Papapostolou's) previous experience with the Kos. According to Capt Papapostolou, Capt Gilchrist agreed that STS operations were difficult at Pasir Gudang due to congestion and strong currents. Capt Gilchrist agreed that he may well have said this but (as I accept) he did not say that the current was too strong to perform STS operations safely which was his view provided, of course, this was properly planned and appropriate precautions taken in accordance with the Guide. The conversation ended with Capt Gilchrist requesting the mooring arrangements of the vessel to enable him to prepare a mooring plan; and saying that he would send through some further information and risk assessments in writing.*"

24. This conversation was referred to in an email from Paul Cash of Blue Ocean (Charterers' port agent) to Ms Ong of Charterers in these terms:

> "*Bob has spoken to Capt Christos at the owners and seems they are adamant that they will not allow a VL to VL op. The reason being is that they had a steel to steel in Pasir Gudang recently (on a Titan vessel) where the fendering was not done properly. These owners have also refused to allow a V to V op in the Gulf of Mexico recently, although over there STS is done underway, not at anchor.*

> *Anyway, Bob is still talking with Capt Christos and is going through the mooring plan for both vessels and will send owners a copy of the fendering plan as well in the hope that they will change their mind.*"

25. In evidence Captain Papapostolou disagreed that he had said that Owners were "*adamant*" that they would not allow a VLCC – VLCC transfer. He said that the decision was made by the management and not him. The judge accepted that that might be so but regarded the email as strongly suggesting that Captain Papapostolou must have expressed himself in terms which made it plain that Owners' position was that they would not allow a VLCC – VLCC transfer.

26. Captain Papapostolou sent Captain Gilchrist a diagram of the mooring arrangements of *Falkonera*. This did not include dimensions. Captain Gilchrist asked if it was possible to send him the dimensions for the mooring plan as in a drawing in respect of the *Front Queen* which he attached. To this Captain Papapostolou replied "*unfortunately are not available all these dimensions*". His evidence at trial, which is somewhat unclear, was that they had a general arrangement plan, which they would send to charterers, from which dimensions could be measured by using the scale; but not a plan similar to that for the Front Queen. He did not send the former plan, which was not the type of plan asked for.

27. Captain Gilchrist then sent Captain Papapostolou details of his proposed mooring arrangements. His email had a number of attachments, including location information and various SafeSTS assessments and began:

> "*I have used the information as best I can and I can reasonably assume that the following minimum lines can be deployed. Accurate plans would be required to validate my estimates,*"

28. He then set out details of what he proposed, specifying 16 lines, which are diagrammatically represented in the figure in [8] above. He observed "*Total min 14 lines can be deployed, possibly 16, giving a safe effective mooring pattern for Ship to Ship transfer*".

29. His email contained a number of other observations which, as quoted by the judge, included the following:

> "*... We have done a number of VLCC STS operations at this location, including one for Shell, after which they gave the area full approval...*
>
> *1 Pilot competence*
>
> *..... Our mooring masters are all themselves experienced pilots for STS and it has been suggested by the Port Authority we provide some of the training for new pilots.*
>
> *We can request particular pilots from the port authority, for the VLCC job, who we deem the most competent and experienced.*
>
> *...*
>
> *2 Fender rigging*

As mentioned I know that previously only 4 fenders are used when the steel to steel incident occurred. This is outside OCIMF recommendations and steel to steel is not surprising. SafeSTS utilise six pcs of 3.3 x 6.5 fenders plus secondary fenders and provides good protection from steel to steel occurring.

Our fenders are all in excellent condition with valid test certificates.

3 Congestion

The location SafeSTS carry out the operation is at the most easterly area of the port. Congestion is not an issue in this area as the port and SafeSTS work together to police traffic and the coastguard will immediately go on board any vessel who anchors nearby illegally. Lines of communication are excellent with the port authority and security forces who patrol the area constantly.

Typically the nearest anchored vessel is 1nm

Vessels are not allowed to anchor between the Traffic separation scheme and the STS area so it is a straight run in for the arriving vessel.

...

5 Tugs

Four tugs would normally be used for berthing although additional tugs are available.

6 Risk assessment

Attached to this email are the generic SafeSTS risk assessments

Pasir Gudang risk assessments

Pasir Gudang location information...

...

If there are any elements we missed that you require to review please contact me directly."

30. Capt Gilchrist made a further telephone call to Capt Papapostolou. In it, as the judge found, Capt Papapostolou stated that the Owner's position had not changed due to the company policy of not permitting VLCC – VLCC operations to be carried out. He specifically mentioned that the decision regarding the consent of the proposed operation was not his to make; that his owner in America would not allow VLCC – VLCC STS operations; and that it was very unlikely he would change his mind although Capt Papapostolou said that he would send the information supplied to his owner.

31. It seems to me apparent from that conversation and the evidence of Captain Papapostolou and Mr Embiricos referred to in [15, 16 & 24] above that Owners did, indeed, have a settled policy or at the lowest had reached a clear position that they

simply would not allow such a transfer. That does not inevitably mean that a refusal of permission in relation to this charter was unreasonable but it supports the inference that Owners' refusal was, in truth, based on their aversion to any VLCC – VLCC transfer rather than any particular characteristics of the transferee vessel.

Plan B

32. Faced with these difficulties Charterers began to consider how they could discharge *Falkonera*. A Mr Yap wrote to a Mr Han saying "*[s]hort of any other cheaper freight options, we will move on for Plan B (True). But still not giving up on our efforts to convince Falkonera (Die Hard fan)*". The *True* was a vessel that had been chartered in to replace the Olympic Sponsor, a vessel chartered by Charterers for use as another storage vessel which had been delayed on her trip to Pasir Gudang. When it became apparent that Owners would not allow the *Falkonera* to discharge into the Frontline Vessels, it was decided that rather than charter in yet more tonnage to shuttle the cargoes between the VLCCs, Charterers would get the *True* to perform this task.

33. On 15 December, Ms Ong asked Owners to confirm that the *True* would be an acceptable candidate for STS transfers with the *Falkonera*. At the same time she invited Owners to approve the *Front Ace.* Owners themselves were pressing for discharging instructions for the *Falkonera* (now nearing Pasir Gudang). In response, Ms Ong stated that Charterers still required the *Falkonera* to discharge into the Frontline Vessels; and pressed Owners to confirm acceptance of those vessels.

Withholding 2

34. In response, Owners rejected both vessels in an email at 08:46 on 15 December. This stated, in material part, as follows:

> "*We refer to charterers below message. Owners concerns, flowing from a past difficult experience in similar sheltered waters, regarding the fact that the vessels are identical in size and the difficulties this poses in respect of leads for both head lines and stern lines, coupled with the fact that upon commencement and completion of the operation the leads of other moorings, springs and breasts, will have a poor vertical aspect, have not been allayed at all.*
>
> *Regrettably, Owners, following careful consideration of all safety considerations in respect of the vessel, cargo, her personnel and the environment, must therefore decline Charterer's request for acceptance to discharge into another VLCC.*
>
> *Contractually, there is agreement under the Charter Party which allows for the vessel to discharge the cargo by trans-shipment and that this shall be carried out in accordance with the recommendations set out in the latest edition of the ICS/OCIMF Ship to Ship Transfer Guide (Petroleum) and it is clear that this does not contain any references/recommendations for Ship to Ship transfer between two VLCC's.*

> *We trust that Charterers fully appreciate and understand the reasons behind Owners' decision, which has only been taken after deep and careful consideration of all factors involved.* "

Owners thus repeated their first withholding word for word – the judge called this "Withholding 2". In effect Owners were declining to take part in any process of discussion about a transfer from the *Falkonera* to the *Front Queen* and claiming (wrongly) that the Guide did not contemplate it – pursuant to their policy or settled position that they would not accept VLCC – VLCC transfers.

Withholding 3

35. Charterers made a further unsuccessful attempt to secure Owners' approval by offering to execute a Letter of Indemnity (LOI). That led to Withholding 3. Since it is not suggested that the offer of an LOI made a prior reasonable refusal unreasonable it is not necessary to go into the details of what occurred.

36. On 15 December Captain Papapostolou approved the *True* for STS operations with the *Falkonera*. On 16 December the *Falkonera* arrived at Pasir Gudang where Charterers gave orders for her to perform an STS transfer onto the *Kythira* and the *True*. On 30 December the *Falkonera* departed Pasir Gudang after completion of discharge.

37. Charterers' case is that they had to take a number of steps to implement Plan B which they say involved significant delay and increased cost which are for Owners' account.

The issue

38. The question for the judge was whether or not in refusing to approve the Frontline vessels Owners acted reasonably. He held, in my view rightly, that it was for Charterers to prove that Owners had acted unreasonably. In order to entitle them to withhold approval it was not necessary that Owners' conduct was correct or their conclusions right. They would only be in breach if no reasonable shipowner could have regarded their concerns as sufficient reason to decline approval.

Ground 1 of the Appeal

39. Owners made what Mr Baker QC, who appeared for them below, described as a general and sufficient submission, which the judge summarised as follows:

> "*a. Discharging a VLCC by STS transfer into another VLCC of materially identical size was <u>not</u> a routine or standard operation. It required the additional complexity and uncertainty of an operation-specific risk assessment. It was not the sort of industry-wide, tried and tested, operation for which generic risk assessments could be relied on. That was a major thrust of Capt Ireland's evidence throughout, which Mr Baker QC invited the court to accept. It is borne out directly by the DNV model Marpol plan*[2] *and Capt*

[2] A document promulgated by DNV, the Classification Society, providing technical advice and guidance to its tanker owners. The plan was designed to be filled out with ship specific details and sent to DNV for approval. It included the advice that "*in the event of a deviation from a routine STS transfer, e.g. VLCC to VLCC operation,*

Ireland's evidence as to why VLCC-VLCC operations were not specifically mentioned in the Guide.

b. As such, it entailed the disadvantages acknowledged by Capt Battye (and which are in any event obvious). That VLCC-VLCC STS operations had been carried out without incident, following individual risk assessment, vessel approvals and agreement of final operational details, does not mean they entailed no non-standard risk or involved no non-standard complexity. It does not mean they were not trickier, riskier and more complex than a routine lightening, e.g. VLCC-Suezmax or VLCC-Aframax.

c. There is no one attitude of willingness or unwillingness amongst VLCC owners towards such VLCC-VLCC operations.

d. In light of (a)-(c) above, it was not unreasonable for a VLCC owner to take the view that he was unwilling to accept another VLCC of materially identical size as receiving vessel for an STS discharge".

40. Ground 1 of Owners' appeal is that this submission was well founded and that the judge was wrong to reject it. He accepted that there might be some force in the proposition that a VLCC – VLCC transfer was in a sense "non-standard" but said that, in his view, it did not follow from that that Owners were acting reasonably in withholding their approval of the Frontline vessels. It was necessary to consider what particular grounds, if any, there might be for Owners to withhold their approval. In so holding the judge is said to have misconstrued the clause by limiting Owners' freedom beyond the simple requirement that they should not behave unreasonably.

41. The judge was not, in my view, in error. The right to transfer was a right to transfer to any vessel, including a VLCC. The fact that the proposed transfer was to such a vessel, and could in a sense be regarded as non-standard was not of itself a reasonable ground for refusal, not least because, if that were so, the right, insofar as it embraced VLCC – VLCC transfer, would be illusory. Under the contract Owners must be taken to have accepted such risks as are inevitably attendant on any VLCC – VLCC transfer. In the light of that conclusion it was necessary to see whether there was some other basis on which the withholding of approval of the transferee vessel could be regarded as reasonable.

Owners' submissions

42. Mr Christopher Hancock QC, for Owners, submitted that the matters which concerned Owners did indeed provide grounds for withholding approval which could not be regarded as unreasonable, whether correct or not, and whether or not other owners would have refused their approval on the same grounds. He did so for the reasons set out below.

43. The non-standard nature of a VLCC – VLCC transfer meant that there were risks involved which did not apply to a transfer from a VLCC to a smaller Panamax or Aframax vessel (hereafter a "standard transfer"). The transfer was to take place in a

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a risk assessment should be carried out for each 'nonstandard' activity and the Master shall advise the Company".

location where the predominant force would be the current. In such circumstances any mooring arrangement would have to withstand predominantly longitudinal forces. The mooring plan indicated that there were to be no head lines and stern lines in the sense that those descriptions are used in relation to a standard transfer. The plan was inchoate. It provided a general description of the contemplated lines but without detail. The number of VLCC – VLCC transfers that had taken place at Pasir Gudang was small. The Guide, as it then stood, provided no specific guidance in relation to such transfers, so that the mutual promises of Owners and Charterers to abide by it provided scant assurance to Owners that the operation would be safe. Owners were entitled to decide whether or not to take the risk of a VLCC – VLCC transfer at that location. They could not be treated as having made a decision which no reasonable owner would have made if they withheld their approval, particularly in circumstances where they had had a previous bad experience in respect of the same type of operation in the same area.

Discussion

44. In order to evaluate these submissions it is necessary to examine the contractual provisions to which they relate. These have a number of significant features.

45. First, clause 8.1. gives Charterers the option of transferring cargo to "*any other vessel including, but not limited to, an ocean-going vessel*". A VLCC is an ocean going vessel such that, subject to what follows, Charterers were, as I have said, entitled to transfer their cargo to such a vessel.

46. Second, Owners' right was to give or withhold approval of the tankers nominated to receive the transfer of cargo and not to do anything else.

47. Third, there is an obvious distinction between approval of the tanker into which the cargo is to be discharged and the STS operation itself. The distinction is apparent in the STS clause itself ("*if the charterers require a ship-to-ship transfer operation ...to be performed then all tankers …to be used in the transhipment…shall be subject to prior approval of owners, which not to be unreasonably withheld*"), which noticeably does not give a right of prior approval of the transfer operation. The transfer operation is the subject of para (ii) of the clause ("*all ship-to-ship transfer operations shall be conducted in accordance with the recommendation set out in the latest edition of [the Guide]*") and the second and third paragraphs of clause 8.

48. The effect of the latter provisions is, as the judge held [19], that Owners are responsible for ensuring that the *Falkonera* and her crew comply with the Guide and Charterers are responsible for ensuring that the nominated vessel and her crew also comply. For this purpose both parties would have to ensure that the operation was properly planned in accordance with the Guide – a process which would involve substantial cooperation and exchange of information between the parties. The approval of the receiving vessel would not relieve either Owners or Charterers of their obligations in relation to the planning of the operation. Further, if it transpired that the proposed operation presented a risk that could not adequately be mitigated then, as Charterers accepted, Owners would have a safety veto. The Guide provides in terms (Clause 3.1.) for the Master to remains "*at all times*" responsible for the safety of his ship, crew, cargo and equipment and is required "*not to permit safety to be prejudiced by the actions of others*".

49. The planning and conduct of a transfer operation is a complex exercise. It is not limited to making a plan. So far as SafeSTS was concerned it involved, as Captain Gilchrist's statement explained: (a) obtaining details of the ships involved (including the relevant Q 88), the cargo being transferred and the location; (b) conducting a risk assessment which involved making the client informed of any risks; (c) sending a Ship Standard Questionnaire to the ships involved, setting out questions about the ship's physical characteristics and whether she complies with various aspects of the Guide and addressing and managing any risks revealed therefrom; (d) once the STS process commences conducting a dialogue with the Masters of the two vessels involved; (e) before operations actually commence requiring both vessels to fill in a checklist designed to ensure that the relevant personnel on both sides have been briefed; (f) agreeing a final mooring pattern before run-in and mooring in the light of any adjustments that need to be made to the plan in the light of the conditions then prevailing e.g. if on arrival a winch is not working; (g) completing a further safety checklist once both vessels were connected; (h) holding a pre-transfer conference between officers from both ships before transfer begins; (i) continual monitoring of the operation as transfer takes place including the tension in the lines during the course of operations; and (j) completion of a further safety list before the vessels were unmoored. Any risk assessment would include identifying the risks involved, any measures to be adopted to eliminate or mitigate them, and evaluating the degree of residual risk, if any.

50. Mr Hancock submits that the approvability of the vessel cannot be divorced from the operation of which it is to form part. The approval will be sought in respect of a particular vessel for a discharge into it at a particular place and time and in particular conditions (which may involve the discharge vessel being either at a jetty or at anchor). The question for Owners was whether to approve the *Frontline* VLCC vessels for a transfer when they were lying at anchor at Pasir Gudang in December. I agree that approval was required of the *Frontline* vessels as receiving vessels for a cargo from another VLCC. That does not, however, detract from the fact that what was required was approval of the vessel not the operation.

51. The latter point was recognised by the judge in para 21 of his judgment, where he described Owners' right of approval as limited to a right to review the details of the nominated vessel and to decide whether or not she was suitable for STS operations. Once the nominated vessel was approved as suitable, the STS transfer would then require proper detailed planning.

52. In para 92 the judge considered a submission of Charterers that Owners' contention (a) that it would be impossible to obtain satisfactory leads for head lines and stern lines; and (b) that the other mooring lines would have a poor vertical aspect was irrelevant to the approval of the *Frontline* vessels, although it might be relevant at a later stage in carrying out an appropriate risk assessment in respect of the STS transfer operation proposed.

53. As to that he accepted that the STS lightering clause was looking to a two stage process i.e. (i) the approval of the vessel and (ii) the actual conduct of the transfer operation in accordance with the recommendations of the Guide; and that the right to refuse approval of the vessel was to be determined by reference "generally" to the inherent characteristics of that vessel. The issue was not however to be determined in the abstract, without reference to the STS operation for which the vessel in question

was proposed. The issue was whether it was reasonable to withhold approval for the *Frontline* vessels for the particular STS discharge operation proposed for mid December 2010. There was no warrant for excluding from consideration the nature and requirements, in prospect, of the particular operation, or for artificially limiting the exercise to a verification from the Q 88s in respect of the vessel that, in the abstract, the Frontline vessels were suitable for the operation. Thus, even though the inherent characteristics of the receiving vessel might be entirely suitable in the abstract, Owners might be entitled to withhold approval because "*for whatever reason, it might reasonably be considered that, for some reason the proposed transfer involving that other vessel would in any event be unsafe.*"

54. I understand the judge in that passage to be referring to some characteristic of the vessel which would mean that the proposed operation could not be carried out safely, in which case I agree with him. The suitability of the receiving vessel did not fall to be considered in a vacuum, regardless of the actual use to which she was intended to be put; and it may be that, in certain circumstances, Owners might reasonably refuse to approve if they had such a dearth of information about what was proposed that they were unable to reach a conclusion as to whether the receiving vessel had some characteristic that made her use unsafe.

55. Owners contend – as ground 2 of their appeal – that the judge here misconstrued the clause by confining its application to a case where the proposed transfer would be unsafe thereby imposing a constraint upon Owners other than the sole constraint of reasonableness provided by the clause and requiring them to show that the proposed operation would be unsafe. I do not accept this. In this passage of his judgment he was distinguishing between reasons for refusal based on the inherent characteristics of the vessel (a) "in the abstract" and (b) in the context of the proposed operation and holding that both were relevant. I do not understand him to have been confining a reasonable refusal to one related to safety or requiring Owners to prove that the operation would be unsafe. He was indicating that a refusal might be reasonable if, leaving aside the paper characteristics of the vessel, she had some feature which meant that the proposed operation would have been unsafe.

56. At the same time it is difficult to postulate reasonable grounds for a refusal to approve the receiving vessel which would not relate to safety, whether of the two vessels, the cargo or those involved in the operation. The issue between the parties both in December 2010 and at trial related to safety. No suggestion was made on either occasion of any matter that was not so related which rendered the refusal reasonable.

57. As it was there was no suggestion that the Frontline vessels had some peculiarity or defect that rendered them unsuitable for STS transfers. Both the *Front Queen* and the *Front Ace* had been screened by a number of oil majors including Shell and BP and had been maintained to their exacting standards. The main thrust of Captain Ireland, the Owners' expert's, first report was that a VLCC – VLCC STS operation required a significant amount of planning (for which there was inadequate time); but he did not suggest that the proposed operation posed any risk that could not be mitigated by adequate planning. This implicitly accepted that the *Falkonera* could have safely performed the operation with the Frontline vessels. Further he agreed in terms that there was nothing in the characteristics of the vessel that prevented the operation intended. Accordingly, as the judge found, there was no basis for Owners to withhold their approval to the Frontline Vessels when they were nominated with "flawless" Q

88s. Owners should then have started an iterative process of operational planning in cooperation with Charterers.

58. Owners also contend that the judge erroneously assumed that in order for a withholding to be reasonable it was not sufficient that it remained uncertain as to whether or not a suitable plan was capable of being devised. Owners' skeleton argument suggested that Owners were not unreasonable in refusing approval of the vessel in the absence of a "*sufficient risk assessment that might determine if a plan was capable of being devised that would bring the risks within acceptable proportions*".

59. Mr Hancock developed this in his oral submissions when he contended that Owners could not be called upon to approve the receiving vessel until they had all the information necessary to assess whether the proposed operation could be carried out safely with that vessel, including details of the environmental conditions i.e. the forces to be expected (principally the current); the proposed mooring arrangements for both vessels; full details of the mooring fittings (drums, winches, bights, fairleads, rollers and the angles involved); and the arrangements proposed for pilotage and tugs. The Q88 questionnaire only told Owners that the receiving vessel had mooring fitments for a standard STS transfer. Charterers' first request told Owners that the Front Queen had received a SIRE inspection and had been approved by two oil majors; but gave no detail of the proposed mooring arrangements, the environmental conditions, and the proposed method of carrying out the operation or how the freeboard of the vessels would vary from time to time. Owners could not be called on to make a decision whether or not to approve the receiving vessel without full knowledge of the plans for mitigating risk; nor required to accept a VLCC transfer on the hypothesis that proper planning would be carried out without any clear remedy if it was not. The plan that was presented was preliminary only, not final and even the author expressed some concern about it.

60. As to this Charterers call attention to the changes in Owners' case. In 2010 Owners refused to approve the nominated vessels on the grounds that the charter party by its terms prohibited VLCC to VLCC transfers (when it did not) or that such transfers posed insuperable difficulties because of the impossibility of obtaining head lines and stern lines and because the moorings would have a "*poor vertical aspect*". They did not mention planning for the operation.

61. In his first report, however, Captain Ireland concluded that (i) a prudent Owner would not be in a position to confirm approval of the operation because the operation was requested without regard to the time required to conduct a proper assessment; (ii) there was no proper and full exchange of detailed information for the vessel proposed; (iii) no individual risk assessment had been undertaken; (iv) there was no properly considered plan put forward and no load/ballast plan to control the potentially large freeboard difference between the vessels. In short he was not saying that the operation **could not** be carried out safely but that the necessary assessment and planning had not taken place.

62. However at the end of cross examination he said (a) that an owner should not necessarily approve a vessel until he was suitably satisfied that the vessel was safe to carry out the operation; but (b) that he was not saying that an Owner acting reasonably should refuse to carry out the operation before any risk assessment had

been completed. What, he said, he should do was to provide any information that was requested of him by the service provider to enable the service provider to conduct the planning. These answers appear to me more accurately to reflect the distinction in the STS clause between the vessel and the STS transfer operation.

63. Both Owners' contention (which assumes that they would be justified in withholding approval of the tanker(s) if there was uncertainty as to whether a suitable plan could be devised) and Captain Ireland's evidence in effect mean that Charterers had to seek Owners' approval of the plans for the STS operation. But they did not. The approval to be sought related to the receiving vessel. It was not, as it seems to me, the function of the STS clause to allow Owners to vet the plans for the STS operation before deciding whether to approve the transferee vessel. The question was whether there was some characteristic of the receiving vessel that meant that the proposed STS transfer would be unsafe in the sense that it would give rise to a degree of risk which a prudent owner who had agreed to allow VLCC – VLCC transfers would (or could), acting reasonably, not be prepared to accept.

64. This conclusion appears to be consistent with the structure and wording of the STS clause and to make commercial sense. Any STS operation would require careful planning and monitoring which would continue up to and during the course of the operation: see [49] above. It is a collaborative and iterative process. If Owners were entitled to reserve their approval until after the detailed planning had been carried out the position, the judge held, would be nonsensical. The owners of the discharge vessel would be under no obligation to cooperate in the planning until the vessel was fixed; if she was fixed and, at the end of the planning process, Owners refused to allow the transfer, Charterers would be left with a vessel for which they would have no use. Owners contend that this difficulty could be avoided by Charterers by not fixing the receiving vessel before (a) Charterers had fully worked out the operation; and (b) Owners had accepted the risks of carrying it into effect. This does not, however, seem to me to meet the point that the owners of the receiving vessel would have no obligation to cooperate in the planning before any fixture.

Specific criticisms of the mooring plan

65. The judge went on to consider the specific concerns raised by Captain Papapostolou in relation to (i) head lines and stern lines; and (ii) the mooring arrangement generally and their alleged poor "*vertical aspect*". It is material to note that, if these concerns made a withholding of approval reasonable, it would seem that approval could reasonably be withheld in practically every case of a VLCC – VLCC transfer.

66. In this respect Owners submit that the judge fell into error in that he did not consider whether or not Owners' concerns were reasonable but whether they were well founded. I do not accept that he did so. The judge was well aware, and recorded, that the issue was whether or not Owners acted reasonably (or at least not unreasonably) [84]; that that was an objective test; and that the question was not whether Owners' conclusions that led them to refuse consent were justified, if they were conclusions that might be reached by a reasonable man in the circumstances, even though that conclusion might in fact be incorrect or some other person might take a different view; and that Owners would only be in breach if no reasonable shipowner could have regarded their concerns as sufficient reason to decline approval: [85].

67. However, the fact that the relevant question was as summarised in the previous paragraph did not mean that the judge was not entitled to consider whether the concerns adumbrated by Owners were in fact unfounded; since, if and to the extent that they were, that would inform (but not necessarily determine) the issue as to whether or not Owners' refusal was reasonable.

Head Lines and Stern Lines

68. As to head lines, it is, as the judge recognised, obvious that, if the vessels are of identical or similar size, there cannot be head or stern lines, in the conventional sense, i.e. a line running diagonally forward from the bow or stern of the shorter to the bow or stern of the longer vessel at an angle of about 45°. A line from bow to bow or from stern to stern will run roughly perpendicular to the heading of the ship. It was however, as he found, (a) wrong and (b) unreasonable to assume that this was a problem.

69. In this respect he accepted the evidence of Captain Battye that breastlines are in fact preferable to head line and stern lines ("*the idealised or best way of mooring a ship is actually having breast lines perpendicular to the ship*"). His evidence was that in most cases head lines and stern lines were the least effective mooring leads because they shared the longitudinal and transverse loads on a ship – as opposed to a combination of breast lines for the transverse load and spring lines for the longitudinal forces – so that a mooring arrangement to a jetty would if possible avoid using head lines and stern lines altogether. The exception that he contemplated was if the wind and current both came from right ahead of the vessel and remained so head lines and stern lines, if it was possible to run them between two vessels (which in the case of two VLCCs it was not), would be the most efficient.

70. Captain Battye referred to an OCIMF publication entitled "*OCIMF Mooring Equipment Guidelines*" (which showed an idealised mooring line layout which had no head lines or stern lines but only breast lines and spring lines (i.e. lines that run almost parallel to the heading of the vessel). Mr Hancock submits that it does not make sense to say that breast lines were always preferable because it must depend on the applicable environmental forces, especially because breast lines will not counteract longitudinal forces. But, as it seems to me the judge was entitled to accept Captain Battye's evidence as summarised above, which, itself, contained the qualification to which I have referred.

71. The layout in the OCIMF publication was, of course, a mooring at a static berth and did not replicate a dynamic STS operation. The judge was fully aware of the distinction, as was Captain Battye, who said that the most flexible mooring arrangement for two vessels which might weathervane with the wind coming from different directions at different times consisted of breast lines and spring lines, although other lines - which I take to mean "effective head lines and stern lines", would also be important. The judge concluded [105] in the light of the evidence of Captains Ireland, Battye and Gilchrist that the absence of head lines and stern lines in that situation was not something which gave any reason for concern and that the mooring arrangement proposed was safe in principle.

72. In so doing he noted that Captain Ireland in his first report did not suggest that the lack of head lines and stern lines would in fact be a problem. The Report did refer to

Owners' concerns as to the "*ability to obtain an effective mooring configuration*" and that the reasons were perfectly understandable because the similarity in size of the vessels posed difficulties for leads for both head lines and stern lines (a matter not in dispute) and that the leads of other moorings would have a poor vertical aspect. The gist of his report (see [57] above) was (a) that the operation was required without regard to the time needed for a proper assessment; (b) that there was insufficient planning of it; (c) that Captain Gilchrist should have addressed Owners' concerns by performing an individual risk assessment and (d) that the concerns put forward by Owners were not adequately addressed. This as the judge observed was not the same as saying that Owners' complaints were legitimate or reasonable and the judge regarded his criticism as unfair [104].

73. What Captain Ireland did not say in his report was that the mooring arrangement proposed by Charterers was inadequate by virtue of the lack of head lines and stern lines or for any other reason. Captain Papapostolou accepted that there was nothing in the Q 88 for the Frontline vessels which would suggest that they were unsuitable for an STS transfer apart from their length, which was what gave rise to the absence of head and stern lines, properly so called.

The "*vertical aspect*"

74. The "*vertical aspect*" problem was explained by the judge in the following terms:

> "*the suggestion is that where a laden VLCC discharges the entirety of its cargo to a VLCC in ballast, at the start of the operation the laden vessel will be sitting low in the water, and the ballast vessel will be sitting relatively high in the water. All other things being equal, the mooring ropes will not run horizontally between the two vessels, but rather will be at an angle to the horizontal plane. As the STS transfer proceeds, the drafts of the two vessels will change, as the discharging vessel discharges the cargo and the receiving ship becomes increasingly more laden; and the mooring ropes will pass through the horizontal plane. By the end, the mooring ropes will again be at an angle to the horizontal. However, this is not rocket science – and it is not exclusive to a VLCC to VLCC transfer. The Owners' complaint is not directed at VLCCs in particular, but rather to a general feature of STS operations*."

75. The judge did not accept that this provided any reasonable basis for withholding approval for a number of reasons. First, the phenomenon described was not restricted to a VLCC – VLCC transfer. Second, Captain Battye pointed out that smaller ships have a smaller laden freeboard than larger ships such that the difference in freeboard at the start and at the end of the operation will be greater than in the case of transfer from/to a larger ship. So the vertical aspect of the lines would be worse if discharge was to a smaller vessel. Third, insofar as it was suggested (by Captain Ireland) that the head lines and stern lines between similar sized vessels would be considerably shorter, this was no reasonable basis for withholding approval of the vessel since it was all a matter of proper planning and, if necessary, adjustment.

76. The judge was fortified in his conclusions that the Owners' expressed views were without foundation by a consideration of the mooring arrangement prepared by Captain Gilchrist on 14 December showing a minimum of 14 and a maximum of 16 lines which included lines running from the bow of *Front Queen* to the forward breast of *Falkonera*, and from the stern of *Front Queen* to mooring points to the aft of *Falkonera*. They were supplemented by additional (a) breastlines running between the

centre panamas and the poops of the two vessels and (b) spring lines running nearly parallel to the centre lines of the two vessels. Apart from his general objections (no head and stern lines, poor "*vertical aspect*") no specific objection was raised at the time by Captain Papapostolou or Owners that such arrangements were inadequate. Nor was it suggested at trial that this arrangement was or could be unsafe. Captain Ireland said he could not comment one way or the other until the planning was complete.

77. Concern was expressed in evidence about the vertical aspect of two sets of lines, being the effective stern lines with lengths of 25 metres each, which if there was a big change in the relative freeboards of the vessels might mean that the lines were under excessive strain. Captain Gilchrist himself observed that these lines might be too short. Captain Battye agreed that these lines might be a "*little shor*t" and said that although this would not concern him it would be something to look at and maybe adjust. The judge regarded this as incapable of justifying a withholding of approval. At best it would be an aspect of the mooring arrangement that might need adjusting e.g. by using a longer length of rope – as part of the planning process – as Captain Battye accepted. (In fact a calculation carried out for the purposes of the trial revealed that the mooring lines would not exceed the angle of 25° stipulated (ideally) by OCIMF.)

78. Accordingly, the judge concluded, none of the points raised by Captain Papapostolou in Owners' first response provided any reasonable basis for withholding approval to the Frontline vessels.

79. The judge also rejected two further concerns not raised in the first response. The first was that the location of the Frontline vessels was a difficult one for STS operations and the second was that dealing with the *Falkonera* and one or other of the Front Line vessels was beyond the capabilities of the Johor pilots.

80. As to the former he accepted the overall conclusion of Captain Gilchrist, whom he regarded as a very impressive witness with considerable expertise and local knowledge and as "*appropriately cautious*" that the risks and dangers involved at Pasir Gudang were no different from any other STS location in that so long as precautions were taken to manage those risks, operations could be conducted safely there.

81. As to the latter Captain Gilchrist confirmed that any operations at the relevant time were done by a cadre of pilots that his company trusted and were experienced. In the light of that evidence, which he accepted, the judge rejected the suggestion that the alleged concerns with regard to pilotage provided any reasonable basis or justification for Owners withholding approval. I note that no reference had been made by Owners in December 2010 communications to any concern about the competence of pilots.

82. The judge also rejected the suggestion that there was insufficient time to plan any STS operation. Approval of the *Front Queen* was first sought on 13 December. At that stage cargo operations were scheduled for around 17-18 December. He accepted Captain Gilchrist's evidence that a couple of days was ample time for planning. In any event, even if the planning might have taken longer that was not a reasonable basis for withholding approval.

83. In the light of those findings the judge concluded that all three of the withholdings were unreasonable.

Conclusion

84. In my view the judge was entitled to reach this conclusion, which was one of fact. It was one reached by an experienced commercial judge after hearing evidence over four days about the vessels concerned and the operation intended. Much of the evidence was expert evidence, whose significance it was for the judge to assess, in the light, *inter alia*, of his assessment of the quality and the cogency of what the witnesses had to say[3]. His conclusion involved the consideration and weighing of a number of factors. This court should, in my judgment, be reluctant to overturn his conclusion unless it was shown that he had misunderstood or misapplied the relevant legal principles, ignored some relevant, or taken account of some irrelevant, consideration, or reached a conclusion that was clearly erroneous or outside the bounds of what it was open to him to decide. The judge was guilty of none of these things.

85. In addition, as it seems to me, the judge was entitled to take into account, when determining whether the withholding of approval by Owners had been reasonable, the approach which they took in December 2010. That approach was, in essence, (a) to claim (wrongly) that VLCC – VLCC transfer was not permitted and (b) in pursuance of what amounted to an *idée fixe* about VLCC – VLCC transfers, to abandon discussion about the operation and repeat points about head lines, stern lines, and vertical aspect, which, on analysis, formed no reasonable basis for rejecting the *Front Queen* on account of any characteristic of that vessel. Mr Hancock's submission in [59] above appear to me largely to relate to matters which did not actually form the basis of Owners' refusal and/or to the planning of the STS operation rather than the characteristics of the receiving vessel.

Postscript

86. On 22 November 2013 a new edition of the Guide was published, which we were invited to admit in evidence. It contains a section dealing with ship to ship transfers involving vessels of a similar length. It calls for mitigation measures for STS operations in respect of such vessels such as: (a) identification of optimum mooring arrangements and the possible necessity of lines additional to the breast lines in a fore and aft direction[4]; (b) identification of optimum securing arrangements for fenders to ensure that mooring arrangements are not compromised due to a lack of useable chocks/fairleads; (c) consideration of the need for extra head lines for transfer operations conducted at anchor with one of the vessels offset to counter the additional forces on the vessel with the exposed bow; (d) reduction of limiting parameters once the lead and effectiveness of the mooring line configuration has been considered.

87. I do not regard the new Guide as casting any doubt on the judge's decision. It underscores the judge's decision that its predecessor did not intend to outlaw VLCC –

[3] Thus he accepted Captain Battye's evidence that it was not reasonable for an owner to be concerned about the inability to have head line and stern lines in this location and his expression of surprise that any owner would express concern at the "*pretty typical*" (as he described it) layout proposed by Captain Gilchrist.

[4] A function which spring lines could perform.

VLCC transfer; and provides guidance in relation to the planning of such transfers. It does not, however, lend support to, much less compel, the conclusion that there was some characteristic of the *Front Queen* which rendered reasonable the withholding of approval in respect of that vessel. Having considered the 2013 Guide I would not admit it in evidence because, in my judgment, it is not something calculated to have an important influence on the outcome of the appeal.

88. Accordingly I would dismiss the appeal.

SIR STANLEY BURNTON

89. I agree.

LORD JUSTICE FLOYD

90. I also agree.