Neutral Citation Number: [2014] EWHC 3611 (Comm)

Case No: 2011 Folio 357

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2014

Before :

MR JUSTICE COOKE

- -

Between:

1) LAKATAMIA SHIPPING CO. LTD
(2) SLAGEN SHIPPING CO. LTD
(3) KITION SHIPPING CO. LTD
(4) POLYS HAJI-IOANNOU

Claimants

- and -

(1) NOBU SU/HSIN CHI SU
(aka SU HSIN CHI; aka NOBU MORIMOTO)
(2) TMT CO., LIMITED
(3) TMT ASIA LIMITED
(4) TAIWAN MARITIME TRANSPORTATION CO., LIMITED
(5) TMT COMPANY LTD, PANAMA S.A.
(6) TMT CO., LTD, LIBERIA
(7) IRON MONGER I CO., LTD

Defendants

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SJ Phillips QC, NG Casey and Clara Benn (instructed by Hill Dickinson) for the claimants
John Jarvis QC, Josephine Davies and Leonora Sagan (instructed by Cooke, Young & Keidan) for the defendants

Hearing dates: 21st, 22nd, 23rd, 24th, 27th, 28th, 31st October and 5th November 2014

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Approved Judgment

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE COOKE

Mr Justice Cooke:

Introduction

1. It is common ground between the parties that during the weekend of 5th and 6th July 2008 an oral agreement (the FFA Contract) was reached by which, in return for one world scale point (equivalent, in the event, to $1.8 million) an FFA position (600,000 mt/month in the calendar year 2009 on Route TD3) would effectively be transferred for a one month period from persons/entities on the defendants' side of the fence to the first claimant (Lakatamia) which was controlled by the fourth claimant Mr Haji-Ioannou. One of the major issues in this action is the identity of the parties to that contract, it being the claimants' case that the first defendant, Mr Su and all of the defendant companies in the group under his control (the TMT Group) were parties to a contract with Lakatamia and Mr Haji-Ioannou, whilst the defendants contend that only the sixth defendant (TMT Liberia) entered into the contract with Lakatamia.

2. The arrangements were brokered by Mr Vassilis Karakoulakis of Clarkson Securities Ltd in London (Clarksons) who dealt with Mr Su and Mr Haji-Ioannou, neither of whom spoke directly to each other at any stage during the period when the contract was being negotiated. The terms of the FFA Contract are reflected, to some extent at least, in e-mail exchanges passing between them and Mr Karakoulakis and in a guarantee given by the seventh defendant (Iron Monger) to Lakatamia. There are also transcripts of telephone conversations and a fax cover sheet upon which the parties rely in relation to the terms of the contract and the identity of the parties thereto. Additionally I heard evidence from Mr Haji-Ioannou and Mr Su, but not from Mr Karakoulakis, whom neither party sought to call. There was evidence under the Civil Evidence Act as to what he had said 3 years later to the claimants' solicitor and a representative of the claimants however.

3. The guarantee appears as Appendix 1 to this judgment (signed on behalf of Iron Monger and Lakatamia). It contained an undertaking on the part of Iron Monger to "guarantee the good performance, execution and undertaking" of a contract by "messrs TMT". The contract is described as an "agreement reached between yourselves and messrs TMT concerning the sale to yourselves and respective buy back of a certain quantity of FFA's on cal09 vlcc td3 route". The terms of that agreement were expressed in the guarantee in the following manner:

> "8th July 2008
>
> Lakatamia buys via RBS/LCH and TMT sells via LCH following quantity of FFAs:
>
> 600kt/month of cal09 td3
>
> purchase price for Lakatamia: ws 100.65 including RBS cost
>
> following such transaction having taken place, TMT to undertake to buy back from Lakatamia same quantity as per above as follows:

> TMT buys via LCH and Lakatamia sells via RBS/LCH again 600,000mt/month of cal09 td3 purchase price for TMT: ws 101.65
>
> TMT to undertake to repurchase of above quantity from Lakatamia by no later than 8th August 2008 ie within latest 1 month after original purchase of same quantity by Lakatamia from TMT.
>
> above two FFA trdes between the two parties to be mutually reliant and interlinked, therefore first one cannot take place without the second one."

4. Lakatamia held a clearing account with RBS but had to provide extra collateral for margin purposes of $10 million in order to take this trade. TMT Liberia also held a clearing account with RBS, on which Mr Su alone could give instructions. The guarantee referred to Lakatamia both purchasing and selling through RBS and LCH whilst referring to "TMT" selling and purchasing via LCH alone. It is not contended that "TMT" was bound to use RBS for either the sale or purchase. In fact, as emerges clearly from the correspondence, Mr Karakoulakis stressed the need for the "buy-back" element of the deal to be hidden from RBS altogether, at the time it was made, and which, when revealed to RBS in August, led to an explosion on the part of Mr Joynson of RBS, according to Mr Su.

5. In practice, what occurred on 8th July 2008 was that TMT Liberia sold the relevant FFAs to RBS and RBS sold them to Lakatamia, making a profit of 0.65 world scale points on the turn. Lakatamia paid Clarksons a commission of $100,000. On 8th August 2008 the buy-back did not take place. TMT Liberia was, it is said, unable to buy back the positions held by Lakatamia because RBS would not permit it. It is clear that TMT Liberia was, throughout this time, being subjected to pressure by RBS in respect of margin requirements and, because TMT Liberia was unable or unwilling to put up further margin, RBS would not clear a re-purchase of the positions in circumstances where the market value had fallen.

6. There are three main issues which the Court has to determine:

   i) Who was party to the FFA contract? Was it merely Lakatamia and TMT Liberia, as the defendants contend or was there a personal contract between Mr Su and Mr Haji-Ioannou in addition and were other TMT companies in the TMT Group also bound?

   ii) What is the measure of loss suffered by Lakatamia and/or the other claimants?

      a) It is the defendants' case that recovery is limited to the difference between the contract and market value of the relevant FFA positions at the date when the repurchase should have taken place, namely 8th August 2008 (or at least the value to be ascribed at that date for effecting an orderly disposal of the large quantity of forward positions over an appropriate period following that date).

b) The claimants seek recovery of sums far in excess of that on the basis that, in the period following August 8th 2008, Mr Su and/or companies in the TMT group were giving assurances that the buy-back would take place and did in fact effect repurchase of 200,000 mt or more, usually at or around the market price, making balancing cash payments to compensate for the difference between that and the contract price. In addition other TMT companies gave freight discounts to Lakatamia to offset the liability arising under the FFA contract. 100,000 mt were repurchased on 18th August 2008, 50,000 mt were repurchased on 16th September 2008 and 50,000 mt on 16th October 2008. An additional 50,000 mt was bought back by RBS from Lakatamia but there was some doubt as to whether this reflected purchases by TMT companies or third parties. Payments of cash were made on dates between 8th October 2008 and 9th October 2009 totalling $32,303,195. Discounts on freight and hire were given by the companies in TMT group to Lakatamia which, it is agreed, totalled $11,276,033.01.

c) The balance of the FFA positions were closed in the respective calendar months in 2009 and the overall loss on the positions amounted to $79,633,538.25. Allowing for the sums paid and the discounts from freight, the balance which is claimed is $36,054,310.24.

d) It is the defendants' case that Lakatamia would have been able to sell all the FFA positions in a period of approximately 30 days at an average rate of 20,000 mt per day, without distortion of the market and should have done so by 19th September 2008, thereby suffering a loss of approximately $27,350,340, which is less than the sums already paid. TMT Liberia reclaims sums paid in excess of this on a restitutionary basis.

iii) Whether Lakatamia is, by virtue of Novation Agreements concluded on 8th November 2008, entitled only to claim loss in respect of 20% of the FFA positions because the other 80% of positions with RBS which were closed out thereafter were transferred to the second and third claimants (Slagen and Kition) because of RBS' collateral requirements and the security that RBS was prepared to accept from these other two companies in Mr Haji-Ioannou's group, as each had ships which could stand as collateral. The defendants contend that, by these Novation Agreements, Lakatamia's obligations to RBS in respect of the FFA positions were extinguished and replaced by obligations owed by Kition and Slagen, so that Lakatamia has no further claim beyond the 20% of the FFA positions which it retained. The claimants submit that Lakatamia is still entitled to claim for the full amount and that, if necessary, an indemnity should be implied into the arrangements between it and Kition/Slagen or alternatively an assignment to those companies of its right to claim for loss should be implied. If Mr Haji-Ioannou is entitled to claim for his own loss, then as the ultimate owner of the Cyclops Ship Group of which all these companies form part, it is said that his loss and damage is unaffected by the novations.

The parties to the FFA contract

The background to the FFA contract

7. The claimants' case, as pleaded originally, alleged a contract between Lakatamia alone and the TMT group, which was said to comprise the first-sixth defendants, including Mr Su. By an amendment made on August 1st this year but put forward in a draft pleading in May, the contract was alleged to have been concluded by Lakatamia and Mr Haji-Ioannou. In further information served on 7th October, less than two weeks before the trial, the claimants asserted that Lakatamia was a party to the FFA contract in its own right, rather than as agent for another entity and that Mr Haji-Ioannou was a party as a natural person acting on his own behalf. Mr Haji-Ioannou was alleged to have undertaken "to procure Lakatamia's purchase and subsequent sale" of the FFA positions. Mr Haji-Ioannou's loss was said to be the same loss as that suffered by his companies, because he was the ultimate beneficial owner of Lakatamia, Kition and Slagen and the value of his stake in those companies would be reduced by the amount of that loss.

8. In his first witness statement dated 21st July 2011, the claimants' solicitor Mr Gardner, in the context of seeking permission to serve proceedings out of the jurisdiction, referred to the FFA contract as being made between Lakatamia alone and the first to sixth defendants. In an affidavit for the purpose of obtaining a freezing injunction, he referred to the foreseen dispute as to the entity which had concluded the contract on the defendants' side of the fence. He stated that it was Mr Karakoulakis' understanding that when Mr Su made the contract he was acting on his own behalf and on behalf of the companies within the TMT group. By contrast, the claimant was Lakatamia alone and Mr Haji-Ioannou was said to be acting on its behalf in agreeing both to the transaction and the guarantee.

9. Despite the challenge made by the defendants, I am satisfied on the evidence given before me, including that of Mr Haji-Ioannou, that he is the 100% beneficial owner of Cyclops Ships Ltd, which itself is the 100% owner of Lakatamia and other ship-owing companies in the Cyclops group, for which Troodos Shipping Company Limited, with its office in Monaco, acts as the treasury arm. Whilst the claimants have been coy about providing documents in support of this position and referred to bearer shares being issued, the position which emerged at trial is that Mr Haji-Ioannou was the assignee of subscription rights in Cyclops Ships Ltd, the holding company which owned either the issued shares or the subscription rights in each of the companies listed in the audited Group Accounts as 100% owned by it. The claimants' lack of disclosure did them no credit and caused suspicion on the part of the defendants, but the defendants' submissions on the subject were, in my judgment, unrealistic as I was left in no doubt that Mr Haji-Ioannou was, as he said he was, the ultimate beneficial owner of the Cyclops Group.

10. A note in the 2008 accounts of Lakatamia referred to it as having entered into FFAs with RBS "as agent of the ultimate shareholder of the company for the latter's own benefit and at his entire risk". The relevant paragraph continues:

> "The fair value of the FFAs (which at 31 December 2008 was negative at US$17,328,162) has not been recorded in the books of the Company since the settlement of the FFA will be entirely funded from the supply of capital from the ultimate

> shareholder's personal sources in accordance with his existing commitments to Cyclops Ships Ltd and the group companies."

11. In similar vein the 2008 accounts of Kition and Slagen refer to the effect of the novations in November 2008 as giving rise to contracts concluded by them as agent for the ultimate shareholder of the company for his benefit and at his entire risk, with wording as to the fair value and funding of the settlement of the FFA positions in similar form to the Lakatamia 2008 accounts wording. These accounts appear to have been supported by the Attestation dated 13th May 2009 made by Mr Haji-Ioannou at the request of the auditors, in which he stated that the FFAs (and an additional FFA concluded on 11th June 2008 for 50,000 MT cal09TD3) were concluded for his sole benefit and at his entire risk and that he had authorised and approved the use of the three companies to provide banking facilities, including ISDA Margin Agreements and Supplements with RBS in support of those trades. The document went on to state that margin utilised would be funded from "the agreement (private)" and supply of capital from personal sources. The private agreement referred to can only be taken to mean his agreement relating to the buy-back.

12. The evidence of Mr Bull, the Cyclops Group accountant was that:

    i) The FFA contract "was considered to be a group finance deal outside of normal vessel operations. Lakatamia was chosen as the corporate vehicle for the transaction as it already had a derivatives trading account with RBS." The FFA contract "was therefore not considered to be a Lakatamia transaction and for this reason it was not notified to [the vessel's managing agents] who kept Lakatamia's company books."

    ii) Margin put up by Lakatamia and/or Kition and/or Slagen was reported in their accounts as assets of those companies in the form of blocked deposit accounts with RBS. If the assets represented cash supplied by the owner of the holding company, there were entries in the companies' accounts which appeared to that effect.

    iii) Cash accounting was effected for the FFA contract (and the other FFA arrangements made in the name of Lakatamia) on the basis that they were the transactions of Mr Haji-Ioannou. Mr Bull conferred with the directors and Mr Haji-Ioannou in treating the transactions in this way and when profits were made or cash was paid by or on behalf of the defendants, the company's accounts reflected the cash position as between themselves and the owner.

    iv) Mr Bull explained the underlying transaction to the companies' auditors as being that of the owner of the companies, not the companies themselves. This had the result that the transactions were kept out of the accounts, as appears from the notes in those accounts to which I have referred. The owner had, according to Cyclops Ships Group accounts, provided funds of some $47.5 million as at the beginning of 2008, a further $100 million approximately during the year and had withdrawn $33.65 million approximately in the same period.

    v) Mr Bull's understanding from the outset was, he told the court, that the FFA contract was between Mr Haji-Ioannou and Mr Su and that Lakatamia was

utilised for banking purposes. Because Lakatamia was only an agent, it was not required to include entries in its accounts relating to the transaction. This was accepted by the auditors.

vi) The words "group finance deal" in his witness statement were, in his view, apt to include a deal made by the owner.

13. The defendants point out that any contract concluded by a company has to be made by natural persons acting for it – commonly its directors or employees. It would, moreover, in the world of business, shipping and derivative contracts, be unusual for an individual owner of a group of companies to enter into a personal engagement in addition to engaging the liability of one of his companies. An owner or director does not ordinarily agree to be jointly liable with a corporate entity owned by it nor agree to procure the performance by it, save in the context of giving a guarantee in respect of that performance, for which formalities are required. If personal liability is sought by the other party because it is perceived that a company's engagement is insufficient, the usual way is to obtain a guarantee of the company's liability from the owner himself. That, it was said, was not done here.

14. The circumstances in which the deal was concluded over the weekend of 5th/6th July 2008 are undoubtedly unusual. It is clear from the documents before the court that TMT Liberia had substantial open positions in the forward market in dry and tanker freight rates and was in trouble in meeting the margin calls on its trading accounts. According to particulars of claim in another action begun by TMT Liberia against RBS, in July 2008 it was unable to meet the margin requirements on open positions and was coming under great pressure from RBS to limit its exposure. This would have required it to liquidate positions when it did not wish to do so and, in consequence, "TMT agreed with [Lakatamia] that, for a premium [Lakatamia] would take over some of TMT [Liberia's] positions for one month. There was no formal documentation apart from a guarantee given by a TMT associated company (Iron Monger)."

15. The idea of approaching Mr Haji-Ioannou to assist directly appears to have been that of Mr Karakoulakis of Clarksons after Mr Su had suggested approaching him to lend to Andreas Haji-Giannis who could then assist him. On Mr Haji-Ioannou's evidence, Mr Karakoulakis had been seeking to involve him in the freight forward market for some time and to bring about business between him and Mr Su. On Mr Haji-Ioannou's evidence, in 2007 and 2008 he had been dipping his toe in the forward freight market with a view to gaining experience in order to effect a large deal with Mr Su. On 3rd July 2008, Mr Karakoulakis emailed Mr Su asking whether he should make an approach to Mr Haji-Ioannou in circumstances where, according to Mr Su's witness statement, other efforts to ease TMT Liberia's position had come to nothing.

16. Mr Haji-Ioannou and Mr Su had met socially with their wives (though there had been general discussion of freight markets) earlier in the year, according to the former. These meetings took place on 23rd February and 15th March. Mr Su in his witness statement referred to a dinner with Mr Haji-Ioannou in June 2008, with Mr Karakoulakis present who explained TMT Liberia's situation, suggesting that one of Mr Haji-Ioannou's companies could purchase the FFAs from TMT Liberia for a short time with TMT Liberia agreeing to re-purchase at a later date, allowing Mr Haji-Ioannou's company to make a small guaranteed profit. Mr Haji-Ioannou strongly

denied any such meeting in June 2008 or that any such explanation was given to him of the difficulties that TMT Liberia was facing. He was not cross-examined on this and Mr Su in his evidence in chief accepted that his statement was wrong on this point and that there had never been such a meeting between them at which TMT Liberia or its need for cash to alleviate its margin obligations had been discussed. His statement of 6th May 2014, confirmed in this respect by a further statement of 7th October 2014 was the basis of Mr Su's contention that, of the defendants, TMT Liberia alone was party to the FFA contract. He abandoned that evidence following late disclosure of Clarksons' documents which revealed that there had been no such meeting because, at the relevant time, Mr Haji-Ioannou was on holiday in Cyprus and later emailed to apologise for being unable to meet.

17. Clarksons and Mr Karakoulakis have not been co-operative in the provision of evidence or documents. About a week before the trial Clarksons produced five lever arch files to the defendants' solicitors which included a very large number of emails between Mr Karakoulakis and Mr Su which had not been disclosed by the defendants. No records have however been disclosed of the telephone conversations which took place on Saturday 5th and Sunday 6th July 2008 between Mr Karakoulakis, Mr Haji-Ioannou and Mr Su. It may well be that this is because Mr Karakoulakis conducted these calls outside his office. On 5th July however there is an email from Mr Karakoulakis to Mr Su which reports the basic agreement in the following terms:

> "Polys agreed 2 my polite pressure so Monday we sell to him 600 mt/month cal09 t3 at ws 100 and you buy it back from him latest Thursday 7th August at ws 101 same quantity."

18. The effect, as revealed by exchanges between Mr Su and Mr Karakoulakis on 6th July 2008, from Mr Su's perspective, was to release about $30 million as margin which would cover a loss on an option deal through Clarksons. In an email of 6th July 2008, Mr Karakoulakis explained to Mr Su that the deal was to be mediated by RBS/LCH. He explained that the buyers had a credit line with RBS but would be charged "sleeve" differential on every trade which meant that, in order to obtain one world scale point net, the sale and resale prices would be increased by that "sleeve" differential. The email specifically refers to Mr Karakoulakis' intention to keep the repurchase arrangement from RBS.

19. The trade of 600,000 mt per calendar month over a year was, on any view, a large transaction in the FFA market. It is the equivalent of 3 VLCCs trading for the whole year and RBS was not prepared to allow Lakatamia to enter into this transaction without putting up $10 million collateral, which led to various exchanges on Monday 7th July. In a telephone call between Mr Karakoulakis and Mr Parker, according to the transcript, Mr Karakoulakis ran through the basis of the deal with him, stating that the idea was that "you guys" would buy quite a chunk of the cal09 on the VLCC route – either 600,000 tonnes a month or up to 900,000 tonnes a month "and actually what will happen, the same seller to you will buy it back but that's something you don't need to tell anything to RBS. RBS does not need to know that. We'll buy it back within a month at 1 point difference, so you'll basically be making a point of a profit". On being asked whether it was "like guaranteed … that they're going to buy it back", Mr Karakoulakis responded: "Yeah, yeah, yeah. It's a deal that has been done between Polys and the other gentleman who is a client of mine, but it's something that RBS does not need to know if you see what I mean." In another conversation with

Mr Parker he referred to " the same guy" coming to buy the positions back for a one point difference. Mr Parker's evidence was that the deal was explained to him by Mr Karakoulakis as a personal deal between Mr Haji-Ioannou and an individual who was a client of Clarksons which led him to stress to Mr Haji-Ioannou the need to be able to trust the individual. Mr Haji-Ioannou similarly confirmed to him the personal nature of the deal.

20. The transcript of Mr Karakoulakis' call with RBS in the early morning of 7th July 2008 shows him telling RBS that Lakatamia would buy 600,000 mt per month from "my client who is through your LCH clearing". The RBS employee responded "TMT?" and was given an affirmative reply. As companies which could clear trades were required for the ISDA transactions themselves, the terms of this call are consistent with both the claimants' and defendants' cases. There was then discussion as to whether it was to be dealt with as LCH buying from an LCH client or RBS buying from an LCH client and it was left on the basis that the cheapest option would be adopted. Allowing for the RBS turn, the figures for the sale and resale became 100.65 ws and 101.65 ws.

21. Another aspect of the deal which concerned Mr Haji-Ioannou and/or Mr Parker was the possible need to provide additional margin during the one month in which it was intended that Lakatamia would warehouse the FFA positions. Mr Karakoulakis assured Mr Haji-Ioannou that not only would the transactional fee of 0.65 ws be borne by the sellers but that, if the market moved against Lakatamia, TMT would come into the market to prop up the price, so that no additional margin was required. "This is something else which I've agreed with Nobu. Every time we see the calendar come down we will be buying it in small lots to support the calendar trade. … I will be buying it with Nobu … If the calendar comes down to 98, I will be buying the calendar in small lots of with TMT so that the calendar moves back to 100."

22. The rationale for the deal, as explained by Mr Karakoulakis to Mr Parker was that Mr Su had got "some tax issues over there" and needed to show that he had not got as big a profit as he had and therefore wanted to close positions and then open them again later. "It's a little game with tax, basically." There was no truth in that suggestion.

23. In other conversations with Mr Parker, Mr Karakoulakis sought to ensure that information about the deal did not leak out to Clarksons' Greek office, referring to the deal as "a private deal between my client and Polys" with nothing to do with the Greek office. This appears to have been with a view to avoiding paying commission to that office as well as to avoid news of the deal leaking out. Mr Karakoulakis also referred in an email to Mr Su on 7th July to producing the text of a document which would satisfy Mr Haji-Ioannou in order to execute the deal the following day and stating that the latter would not wish to pay commission because "it's a facility to you and a favour to me" with the result that Mr Karakoulakis was looking to Mr Su to cover Clarksons appropriately. He also asked for confirmation of the commitment he had given to Mr Haji-Ioannou to prop up the market price in order to avoid the buyers having to produce additional margin in the one month period. That email concluded by saying that he would revert with the text of the document and asking for "the name of a ship-owning entity say of the conversion double-hull VLCC on which respective wording of performance guarantee of this PNC [private and confidential] agreement will be written."

24. Mr Parker had asked Mr Karakoulakis about the buy-back being "guaranteed", by which it is clear that he meant "guaranteed to happen" rather than asking for a guarantee by a secondary party of a primary party's liability. Mr Su suggested to his employees that the guarantee be recorded on "grand lady letterhead" which explains why the Iron Monger guarantee came into existence since Iron Monger owned the Grand Lady. In summarising the terms of the agreement in an email sent from his Blackberry to his employees, Mr Su, in characteristically terse terms stated:

> "1. Volume 600k per month
>
> 2. Period 2009.
>
> 3. TMT sell Poly buy.
>
> 4. Date July 8 2008.
>
> 5. TMT buy Poly sell August 8 2008."

25. Based upon this, the TMT employee drew up two documents reflecting a purchase of the FFA positions by Lakatamia from Iron Monger and a re-purchase from Lakatamia by Iron Monger. Mr Karakoulakis then produced a revised draft which became the Iron Monger guarantee which appears in Appendix 1. The revised wording was then forwarded to Mr Parker by fax with a cover sheet which Mr Karakoulakis also approved. The fax cover sheet was on the letterhead of the second defendant (TMT Taiwan) and was addressed to Troodos Maritime International SA in Monaco, marked for the attention of Mr Parker. It read:

> "Herewith please receive good performance guarantee of respective FFA trades as agreed between principals of Messrs Troodos and TMT with the intervention of Messrs Clarkson Securities of London … Kindly sign respective document on behalf of Lakatamia and forward by fax to our office."

26. The guarantee itself can only be taken to be addressed to Lakatamia and refers variously to the buyer in the guaranteed transaction as "Messrs TMT" or "TMT". Whilst in the draft of the document sent by Mr Karakoulakis early in the morning of 8th July 2008 to one of the defendants' employees, he inserted the words "(pls put respective ffa trding style)" immediately following the second reference to "messrs TMT" in the second paragraph, the final form of the guarantee however, approved by Mr Karakoulakis and Mr Su, simply referred to "messrs TMT" at the end of that paragraph without any reference to any particular company.

Mr Karakoulakis

27. It is common ground that the FFA contract was made orally, albeit reflected to some extent in writing. There is only one person who was party to what both Mr Su and Mr Haji-Ioannou said, namely Mr Karakoulakis, whom neither side called to give evidence. Hearsay evidence from him was adduced by the claimants however.

28. I heard evidence from Mr Panayiodou, the General Manger of the claimants' London Agents and from Mr Russell Gardner, the claimants' solicitor who had together met with Mr Karakoulakis on 11th May 2011. Mr Gardner is a solicitor of 30 years' qualification with considerable experience in the world of shipping and litigation. The evidence was that, following the issue of a claim form on 24th March 2011 against all seven defendants on the instructions of Mr Haji-Ioannou who maintained that Mr Su was personally liable, Mr Gardner wished to meet with Mr Karakoulakis informally with two purposes in mind. The first was to ascertain if Mr Karakoulakis could facilitate a settlement, even at that late stage. The second was to ensure that the claim was based on a proper understanding of the facts. Mr Gardner had been instructed by Mr Haji-Ioannou that the deal was essentially personal between him and Mr Su whilst solicitors then acting for the defendants had maintained that TMT Liberia was the only proper defendant to the claim, even though payments had been made and documents existed which referred to the second to fifth defendants also. Mr Gardner knew that Mr Karakoulakis had been endeavouring throughout to persuade Mr Su to complete the buy back obligation and thought that a meeting with him would be an opportunity to explore whatever prospects there might still be for amicable settlement. He also wanted to ensure that he had the fullest possible picture of the events surrounding the negotiation of the deal. Mr Panayiodou considered this a good idea and arranged for the meeting with Mr Karakoulakis.

29. On 11th May 2011, the two of them met with Mr Karakoulakis who, to Mr Gardner's surprise, was on his own and wished to meet in his office, rather than in a more informal set up. Mr Gardner deliberately did not take a notebook with him nor any documents other than a copy of the Iron Monger guarantee and covering fax. At the outset he stressed to Mr Karakoulakis that it was an informal meeting and throughout he took no notes. Although he had dealt with Clarksons over many years, he had never before met with Mr Karakoulakis.

30. On his evidence, he told Mr Karakoulakis that the claim form had been issued against Mr Su personally because it was considered that he was a party to the FFA contract and that enforcement action would be taken against Mr Su's personal assets. He asked Mr Karakoulakis to confirm that, so far as he was concerned, Mr Su was personally liable on the deal and was told by Mr Karakoulakis that Mr Su had contracted personally. Mr Karakoulakis volunteered that he had drafted the Iron Monger guarantee and the fax cover sheet, saying that it was at his insistence that the deal was documented to protect the interests of Mr Haji-Ioannou. He said that, when he had referred in the fax cover sheet to the agreement as being made between "principals of Messrs Troodos and TMT" he intended that reference to signify that the principals had entered into personal obligations. Moreover, one of the reasons that Mr Su had failed to pay sums due was because he considered Mr Haji-Ioannou a friend who was prepared to wait for his money.

31. Following the meeting, both Mr Panayiodou and Mr Gardner made notes recording what had been said. In Mr Gardner's note, which was drafted before 17:18 that evening and appears at Appendix 2 of this judgment, he recorded that Mr Karakoulakis had said that the agreement was made after two telephone calls between himself and Mr Su and himself and Mr Haji-Ioannou over the weekend preceding 8th July 2008. He had drafted the fax cover sheet and the Iron Monger agreement. He stated that the agreement was with Mr Su personally and nobody could deny Mr Su's

liability to pay damages for breach. He said that the reference to the "principal of TMT" I the fax was intended to convey that, whilst the expression "messrs TMT" had been used deliberately in the Iron Monger guarantee document so as to be as wide as possible to include the TMT group. The document was deliberately drafted as both a performance guarantee and to record the contract. Mr Panayiodou drafted his own note the same evening but had left his office by the time of receipt of Mr Gardner's note in an email. He had intended to check his own note the next morning and sign it which he did. His note recorded that Mr Karakoulakis had said that the deal had been set up by him in order to help Mr Su with his involvement in the FFA markets and it was done as a private deal between Mr Haji-Ioannou and Mr Su so that Mr Su could release cash from his tanker FFA position to use in the dry sector FFA market. The deal was more a finance deal than an FFA deal. He, Mr Karakoulakis, had drafted the guarantee and cover letter to safeguard Mr Haji-Ioannou so he had something in writing. The "guarantee" was also meant to be the agreement and was drafted deliberately in the way it was so that it encompassed all of the TMT companies as well as Mr Su. He said that he had informed Mr Su of the meeting in advance and would speak to him again. Both Mr Gardner and Mr Panayiodou's notes record that Mr Karakoulakis said that he was prepared to give a statement if required. He was prepared to review the particulars of claim when drafted though he did not want Clarksons involved. That note appears as Appendix 3 to this judgment.

32. I am left in no doubt at all that Mr Gardner and Mr Panayiodou have accurately recorded what they were told by Mr Karakoulakis, despite attempts on his part, that of Clarksons and of their solicitors to row back from this at a later stage.

33. On 12th May 2011, Mr Gardner sent an email to Mr Karakoulakis asking for further information and recording the principal points that had emerged from the meeting including the fact that Mr Karakoulakis had said that "the agreement was with Mr Su (as principal of TMT) and that was reflected in your wording". In his email in response on 18th May 2011, Mr Karakoulakis did not object to that account. On 26th May 2011 following chasing messages from Mr Gardner in relation to the further information sought, he again raised no challenge to the earlier account of the meeting. On 6th June 2011, he said that he did not feel that the summary entirely reflected what he said but did not specify any aspect of it with which he did not agree. On being asked to identify the part with which he took issue, Mr Karakoulakis said that he had referred the matter to Clarksons' legal department.

34. On 15th July 2011 Mr Gardner sent Mr Karakoulakis a draft of the particulars of claim which identified Mr Su as the first defendant and asked him to confirm their factual accuracy. On 18th July 2011 a representative of Clarksons' legal department advised "that no assumption should be made as regards the factual accuracy of your draft particulars of claim". That was expanded three days later by saying that the claimed particulars did not reflect the operation of the FFA markets with regard to cleared transactions because there were two legs to the overall transaction with one series of trades on 8th July 2008 where Lakatamia bought and TMT sold and the second series where Lakatamia was to sell and TMT was to buy at a price representing an increase of ws 1. The point being made was that the FFA contract did not cover just a single transaction where one party buys and then sells back and that both series of transactions had to be cleared. At no point was it suggested however that Mr Su should not be a defendant or that he was not personally liable.

35. It was in August 2011 that the claimant sought and obtained a freezing injunction against all the defendants, including Mr Su. In his affidavit in support of that application Mr Gardner gave an account of his conversation with Mr Karakoulakis in which he had said that Mr Su was personally liable. It was on 26th of that month that solicitors acting for Clarksons stated that Mr Karakoulakis had instructed them that he had explained to Mr Gardner on 11th May 2011 "that the agreement was discussed and negotiated with Mr Su as principal of TMT", which was said to be "consistent with Mr Gardner's email to Mr Karakoulakis on 12th May." It appeared that it was being said by those solicitors that the wording reflected corporate but not personal liability. On Mr Gardner writing back to explain that Mr Karakoulakis had told him that the deal was with Mr Su personally and that both Mr Karakoulakis and Mr Robertson (of Clarksons' Legal Department) had been given every opportunity to comment on the accuracy of his record of the meeting and the particulars of claim, Clarksons' solicitors replied on 2nd September 2011 saying that Mr Karakoulakis had instructed them that he did not tell Mr Gardner that his understanding was that Mr Su had contracted on his own behalf.

The Evidence of Mr Haji-Ioannou

36. It is against this background that the failure of either party to call Mr Karakoulakis has to be seen and the evidence of Mr Haji-Ioannou and Mr Su falls to be considered. Mr Karakoulakis telephoned Mr Haji-Ioannou on Saturday 5th July 2008 when the latter was in Cyprus on holiday. He was not cross-examined about his evidence that he was told that Mr Su needed "a big personal favour from me for just one month only and would be very grateful for my help." He was told that Mr Su had a short-term cash flow situation where he urgently needed to reduce his FFA exposure and that he had tax issues which the deal was intended to ameliorate.

> "We had a number of calls over that weekend and I eventually agreed to help. It was not a complicated deal. I was to buy on 8th July 2008 a quantity of 600,000 mt per calendar month of cal09 td3 (Ras Tanura Chiba) at WS 100 per mt and one month later, on 8th August 2008, Mr Su would buy back at WS 101. Those numbers were net of bank charges; we had a facility with RBS. I agreed on the basis that I would not need to be involved. I would buy Mr Su's tanker position on the FFAs and he would buy them back one month later at a higher rate. Considering the size of the position, the profit (1 WS point per metric tonne) was small but Mr Karakoulakis promised that it would be just for one month and that Mr Su would owe me which could be good for future business. That was my reason for agreeing to help Mr Su. It was a personal and private deal between me and Mr Su and as such Mr Su would be grateful for the favour. I took Mr Karakoulakis at his word: he told me that Mr Su was very strong financially (he told me at one stage that he had a net worth of at least $2 billion) and that I had nothing whatsoever to worry about. I had no direct contact with Mr Su at any time but Mr Karakoulakis talked a lot about his holdings and his great wealth and I was persuaded to go ahead."

Mr Karakoulakis explained that the purpose of the deal was to enable Mr Su temporarily to release money from the tanker market to use in the dry bulk market.

37. Mr Haji-Ioannou explained that the reason he used Lakatamia for the contract was that he did not have a personal trading account with RBS in his own name and it would have taken time to open that up and provide the necessary collateral. By using Lakatamia the deal could be done with the urgency which was required. Although he understood that Mr Su was not concerned about the identity of the purchaser, it was always Mr Haji-Ioannou's understanding with Mr Karakoulakis that he was dealing with Mr Su personally. In his witness statement, Mr Haji-Ioannou said that "There was no discussion about the parties to the contract: it was Mr Su and me." Although initially Mr Haji-Ioannou had told Mr Karakoulakis that he did not need any document to record the agreement because he trusted Mr Su implicitly, at some later point (probably at the instigation of Mr Parker, the Cyclops Group's Investment Manager) he accepted Mr Karakoulakis' suggestion, that he would need something in writing to confirm the deal – some guarantee of the buy-back obligation. This was a matter which was then pursued by Mr Parker on the Monday morning. Mr Parker dealt with Mr Karakoulakis in relation to the terms of this guarantee but Mr Haji-Ioannou's witness statement shows that he accepted the format of it. He understood the reference in the guarantee to "Messrs TMT" to refer to Mr Su and his various TMT group companies. He assumed that Mr Su would have the choice of which particular company or companies to use to trade the FFAs, although he was personally responsible. Although the Iron Monger guarantee did not mention Mr Su or Mr Haji-Ioannou by name, Mr Haji-Ioannou's witness statement says that it was understood and intended to be between him and Mr Su.

38. Later in his witness statement, Mr Haji-Ioannou stated that there was no discussion about the particular counterparty and no negotiation on that because there was no need as it was a personal deal between himself and Mr Su. He was told by Mr Karakoulakis that the latter had spoken to Mr Su and that Mr Su had given his personal assurances "that he would go ahead exactly as agreed". It made sense to him for the agreement to be signed by a guarantor company, another company owned by Mr Su, as a formality whilst the guarantee "recorded an agreement with Messrs TMT which I took to refer to Mr Su and his various TMT group companies". He considered that Mr Su must have had his own reasons for not putting his name personally in the document because he and Mr Karakoulakis were desperate to keep the deal confidential and he took it that no specific TMT company was named so that Mr Su would have the choice of which particular company or companies to use to trade the FFAs, for which he was personally responsible. If the agreement had not been with Mr Su, he would not have done the deal. No mention was ever made of TMT Liberia in any conversation and the whole point of the agreement was that it was a personal and private deal done as a favour from him to Mr Su. A key element in it appeared to be Mr Su's and Mr Karakoulakis' desire to keep everything strictly private and confidential.

39. In cross-examination Mr Haji-Ioannou reiterated his understanding that Mr Su had bound himself personally to him. Lakatamia was 100% owned by him through Cyclops Ships and the deals it concluded were the mechanics by which the overarching agreement between him and Mr Su was effected. He constantly repeated in his evidence that he trusted Mr Su 100% to fulfil the agreement because he was

known as a man of considerable wealth ("a legend" with $2 billion net worth). He was understood to have sold short on the falling market. Mr Haji-Ioannou did not believe that Mr Su would fail to fulfil his obligations. Following their earlier social meetings, the basis of the deal was effected by telephone calls with the broker as part of their personal relationship and as a personal favour to Mr Su. This theme of the trust which Mr Haji-Ioannou placed in Mr Su was borne out by the evidence of Mr Parker who was much more concerned about the failure to buy back the positions in August than was Mr Haji-Ioannou who constantly told him not to worry because Mr Su would fulfil what he had promised. Mr Haji-Ioannou said that he continued in a friendly manner to Mr Su by allowing him to buy back the positions gradually and make cash balancing payments as necessary, without going to law in relation to the default on 8th August 2008. He was being told that when Mr Su received the $1 billion profit from his short positions he would pay.

40. Points were put to him in cross-examination about the form of the guarantee and the lack of rationale for a guarantee from Iron Monger if he had a personal contract with Mr Su and every TMT company was bound. To this and to questions relating to the way in which the case was put in the pleadings, as compared to what appeared in the various companies' accounts, Mr Haji-Ioannou's response was almost invariably that he trusted Mr Su 100% and that the deal was 100% with him. His initial position in conversation with Mr Karakoulakis had been that he did not need to have anything in writing. So far as he was concerned, it would appear, the documentation added little to what he considered a personal obligation on Mr Su's part. When asked for the basis of his assertion that he was party to an agreement rather than Lakatamia only, he said that he owned Lakatamia 100%.

Mr Su's evidence

41. Mr Su's evidence in his witness statement was that TMT Asia and TMT Maritime had been engaged in over the counter trading from the early stages of the FFA market. It became more important to trade through a clearing house which necessitated being a "clearing member" by registration with the clearing house or to have an account with a clearing member. Brokers continued to be used. It was in May 2007 that TMT Liberia opened an account with RBS Greenwich Futures in the USA so that Mr Su could undertake cleared trades.

42. In Mr Su's witness statement, he said that during 2008, TMT Liberia was experiencing sudden margin calls from RBS without adequate explanation of their calculations. By the middle of June 2008, TMT Liberia had substantial open positions in its RBS account and decided to reduce the size of its long position in the tanker market (specifically on the TD3 route) during the calendar year 2009 for a short period of time so that it could manage the margin calls that were being demanded of it by RBS which were largely attributable to its trading on the dry market. From paragraphs 19-28 of Mr Su's witness statement, it appeared that Mr Su attributed the margin problems largely to the option positions and the margin required in respect of them. Mr Su appeared to blame RBS both for his entrance into the options and for the unexpected margin calls resulting therefrom. Both in and after June 2008 TMT Liberia was receiving significant margin calls from RBS.

43. At the end of June 2008, according to Mr Su's statement, TMT Liberia was seeking to find ways of meeting the margin calls demanded of it by RBS. Consideration was

given to concluding further put options and to moving some of TMT Liberia's existing contracts to "Andreas" or "Theodore". As already mentioned, Mr Haji-Ioannou's name came up in the context of a suggestion by Mr Su that he could fund "Andreas" in any assistance the latter might give. These possibilities were discussed with Mr Karakoulakis. He, in Mr Su's view, was acting as an independent broker without any general authority to act as agent for him or the TMT companies. It was in this context that Mr Su had originally said in his witness statement that he and Mr Karakoulakis had met with Mr Haji-Ioannou in Athens in June and Mr Karakoulakis had explained TMT Liberia's problems. When Mr Su abandoned that evidence, there was nothing left to support his assertion that TMT Liberia was known by Mr Haji-Ioannou to be the holder of the FFA positions and was always envisaged as the seller of them.

44. The negotiations for the deal with the claimants took place over the weekend of 5th and 6th July 2008 through Mr Karakoulakis as the intermediate broker, with telephone conversations passing between him and the parties. In his statement evidence Mr Su said that "The terms of the agreement … are reflected in the Purported Guarantee" and he described "the basic agreement that was reached" in the following way:

> "On 8th July 2008 TMT Liberia would sell half of its existing TD3 tanker position (equally split in volume and time) – i.e. 600ks t/month of forward td3 FFAs to RBS so as to reduce its long position. This would mean that TMT Liberia would hold two equal and opposite positions at different prices so there would be no market risk on these positions … and therefore would be no contribution to the margin call. In order to persuade RBS to buy those positions, Lakatamia would buy the same amount from another RBS broking entity on the same day. My understanding, and I believe also that of Vassilis … was that all of the trading was to be done on a cleared basis through the LCH … It now appears that this was not the case. On 8th August 2008 a further two transactions would take place so as to flatten Lakatamia's position and restore TMT Liberia's position. TMT Liberia did not consider that it was entering into a FFA with Lakatamia. Lakatamia was effectively giving it a FFA bridging loan."

45. Mr Su referred at paragraph 39 of his witness statement to the element of agreed profit to Lakatamia of 1 WS point but said that TMT Liberia did not guarantee a price to Lakatamia at which the RBS broker would buy from Lakatamia as TMT Liberia was not in any position to do that. Mr Su stated that both parties wanted the transaction to be structured through RBS without having to go out into the market. At paragraph 46 of his witness statement, Mr Su stated that he did not recall discussing with Mr Karakoulakis exactly which company would be the party to the contract with Lakatamia. "It was obvious to me that the party I was representing at the meeting with Mr Haji-Ioannou and Mr Karakoulakis in June 2008 and the party that Mr Haji-Ioannou would be assisting was the TMT company which held the TD3 position. I don't see how Mr Haji-Ioannou's company could have agreed to buy positions from a company which was not actually a party to the contract". As that meeting did not take

place and there was no discussion of TMT Liberia and its margin difficulties, this point does not assist. Nor is it sufficient to say, as Mr Su does, that TMT Liberia is the company that had the trading account and is therefore the only defendant that is party to the contract. On his evidence, however, at no time did he envisage or contemplate that he was to be the contractual counterparty to the FFA contract with Lakatamia. He stated that he never communicated that the contract was with him personally and that such personal liability would have been extraordinary in the shipping trade, whether in relation to actual ships or paper transactions.

46. The Iron Monger guarantee, to which Mr Su referred in his witness statement as the "Purported Guarantee" because its validity was not accepted until trial or shortly before, did not, on Mr Su's evidence, include all of the terms which he understood had been agreed or which were so obvious that they did not need to be discussed. Mr Su's intention was that the terms of the agreement be recorded on TMT Asia's letter heading. As that was not a ship owning company, he agreed with Mr Karakoulakis that Iron Monger be put forward as the owner of the Grand Lady which was worth approximately $60 million at the time.

47. In cross-examination Mr Su rarely answered a question directly. When emails were put to him, he was generally evasive about their content or effect. I am satisfied that this was not because he did not understand the questions. It is clear that he has some command of English from the email correspondence and he did give evidence in English in Texas proceedings. At this trial he gave evidence before me through a Japanese interpreter. When asked about emails which undoubtedly came from his Blackberry, he questioned whether he had sent them. When asked about the evidence in his witness statement of a meeting in June 2008 with Mr Haji-Ioannou where TMT Liberia and its margin problems had been discussed (see paragraph 16 above), he had no explanation for giving such evidence save that he had been to Greece at the relevant time to speak to somebody else. When asked about the second of two meetings with Mr Haji-Ioannou in 2009, to which his witness statement referred, at which he stated that he had requested that Mr Haji-Ioannou close all his positions, he again accepted that there was only one meeting in March 2009, that no such second meeting took place and he had not made such a request. He had no adequate explanation for inventing this meeting either.

48. His explanation for the lack of disclosure of emails passing between him and Mr Karakoulakis was that he often lost or broke his Blackberry though enquiry could have been made of the server. At times he appeared to accept he had an urgent need for cash in early July 2008 and was seeking funding whilst at other times he did not seem prepared to accept this. The contents of his emails showed him to be a man who expected others to fit in with his objectives and dismissed them with contempt when they did not. His contempt of court in failing to produce affidavits of assets pursuant to the freezing order granted in 2011 and the inaccuracies in the first affidavits which were produced revealed a man with little regard for his obligations or for truth.

49. He was not a man whose evidence was easy to accept without some contemporaneous document which corroborated it. More often than not, when he did give a direct response, his evidence under cross-examination was directly contradictory to the contemporary emails from his Blackberry or from TMT to Mr Karakoulakis and/or from Mr Karakoulakis to the claimants. Whilst Mr Haji-Ioannou's evidence was not free from error or gloss, his deficiencies were nothing as compared with Mr Su's

failures which made him an altogether unsatisfactory witness, who was not, in my view, honest or credible. On every conflict of evidence as to what took place between him and Mr Haji-Ioannou, or between him and Mr Karakoulakis, I rejected his evidence in favour of what was shown by the contemporary documents and the evidence of the claimants' witnesses which was consistent with them.

50. Under cross-examination he said that Mr Karakoulakis represented his interests and his own interests in the deal which was concluded on 5th/6th July 2008. He did not accept that he was initially after a loan from Mr Haji-Giannis or Mr Haji-Ioannou which on 4th July 2008 transmuted into a desire that he be temporarily relieved of some of his FFA forward positions in order to release cash to meet imminent obligations, but the email traffic shows that to be the case.

Analysis of the FFA contract and surrounding evidence

51. Whilst Mr Haji-Ioannou had in his statement referred to a small number of prior FFA trades in which he had been involved, he had more experience of the FFA market than he was initially prepared to accept in cross-examination. He had in 2007 and early 2008 entered into various FFA transactions with quantities of 10,000 MT-50,000 MT including in particular a purchase on 11 June 2008 of 50,000 MT per month TD3 cal09 at WS 95.47, so that he was not the ingénue that he made himself out to be. The nature of the transaction concluded through Mr Karakoulakis in the first week of July 2008 was however of an altogether different character.

52. It is clear from the 31 page list of TMT Liberia's FFA trades through RBS as at 30th June 2008, that it had considerable exposure at that time, particularly on options. Mr Su accepted in cross-examination that he met Mr Karakoulakis on 29th June 2008 and discussed TMT's urgent need for cash. They apparently met Mr Haji-Giannis in Athens that weekend to seek a loan, but were unable to meet with Mr Haji-Ioannou who was on holiday in Cyprus. On 1st July 2008 Mr Su expressed his view to Mr Karakoulakis that the market could crash and asked what was to be done. The latter expressed his frustration at being unable to obtain assistance from Andreas Haji-Giannis and said he was thinking about calling Mr Haji-Ioannou but said that there was "a big risk" with him, as he had explained when he had met with Mr Su. Mr Su, in evidence, said that he did not know to what this reference to a "big risk" referred. Mr Su denied that he was looking for cash and said he wanted people who had accounts with RBS to take over his positions with RBS. Nonetheless, one of his suggestions to Mr Karakoulakis was to approach "Theodore" and to allow him to cancel a vlcc charter on payment of $60 million. The later discussions about Mr Haji-Ioannou lending to Mr Haji-Giannis so that he could fund Mr Su reveal that he was seeking cash. In short Mr Su was at that stage looking for a personal loan from a wealthy Greek shipowner.

53. Mr Su's evidence was that he had sold a vlcc for $140 million and although the tanker market and dry market were in good shape, he foresaw the crash. Anticipating that, it was an obvious thing to do to increase the cash ratio at that stage. His evidence was that, on 2nd or 3rd July Mr Petros Pappas obtained a Rule B attachment in the USA.

54. He was cross-examined about an email of 2nd July 2008 from Mr Karakoulakis in which he refers to Mr Haji-Giannis being unable to release any cash at that point and suggesting that Mr Karakoulakis call up Mr Haji-Ioannou to discuss matters with him.

The problem, as seen by Mr Karakoulakis, was the urgency of the situation because of the need for money to be received by "yr target deadline". He said that Mr Su had left it very late and should have spoken to him much earlier, rather than raising the point when they had seen each other the previous weekend. Mr Karakoulakis expressed the need to see how to "manage this obligation of yrs next week", which Mr Su told the court referred to the settlement obligations on the FFA market due within 5 days of the end of the month. Mr Su accepted that he had an urgent need for money within 3 days of 2nd July 2008 and was suggesting that Mr Haji-Giannis borrowed money from Mr Haji-Ioannou and lend it to him. Mr Karakoulakis' response was that it was better for him (Mr Karakoulakis) to ask Mr Haji-Ioannou directly as if it was his idea, rather than a request from Mr Su, in order to see what his reaction might be. There was discussion about pressing RBS to pay back margin but Mr Karakoulakis considered this unacceptable. Mr Su accepted that what was being proposed was that he should be lent money by Mr Haji-Ioannou against the security of a tanker but said it would be a deal with the company that owned the tanker.

55. On 3rd July 2008, Mr Karakoulakis, in an email asked Mr Su whether he wanted him to call Mr Haji-Ioannou and mention that it was his idea to do so despite the "grt risk here … as explained". At one point that day Mr Su suggested to Mr Karakoulakis that he should go to Greece to meet Mr Haji-Ioannou and Mr Haji-Giannis and that a deal should be done over the weekend. There then followed a spat between Mr Su and Mr Karakoulakis following Mr Su saying "I need to sell book to Polys and buy back". The exact reason for the spat is unclear from the emails and Mr Su was unilluminating under cross-examination. This appears to be the moment when he first envisaged off-loading FFA positions to Mr Haji-Ioannou. The fact that this idea emerged for the first time at this stage also gives the lie to any suggestion that Mr Haji-Ioannou had been told earlier of TMT Liberia's margin problems and a request made in June that its positions be transferred for short period of time.

56. Mr Su appears to have considered that Mr Karakoulakis was simply out to take advantage of him and dismissed him as his broker – or at least affected to do so. It may be that Mr Karakoulakis was initially unwilling to approach Mr Haji-Ioannou to suggest the deal which was ultimately done. Mr Karakoulakis then adopted a placatory tone and asked whether he still wanted him to make attempts to transfer the TD3 cal09 positions to either "Andreas" or Polys. Mr Su's response on 5th July was: "If u can do it, appreciate it!!", followed up by "25 mil is ok" which, despite Mr Su being unprepared to admit it, must have meant that he needed to generate that amount of cash. He did accept that, following the rule B attachment by Mr Pappas and the big margin call from RBS, he was in urgent need of cash.

57. Following the call made by Mr Karakoulakis to Mr Haji-Ioannou on the Saturday, he sent Mr Su the email dated 5th July which is set out in paragraph 17 of this judgment. Later that day appears another email from him to Mr Su explaining a further call in which Mr Haji-Ioannou expressed concern as to the need to provide margin over the next month. Mr Karakoulakis said he had assured him that "we will with u support the cal09 to close the WS 100 by buying into small lots so he does not have to worry about extra margin apart from his initial margin on Monday … U agree? U like? I had to give him a quick answer in order for him to be happy u understand what I mean." The response from Mr Su was to say "Let's do 300k with others – Andreas".

58. It is noteworthy that these email exchanges (like the exchanges referred to in paragraphs 19, 21, 23 and 24 of this judgment) proceed on a personal basis. In an email of 6th July 2008 Mr Karakoulakis told Mr Su that following his two conversations with Mr Haji-Ioannou the previous day and "Upon my suggestion even, he refused to have any legal document drawn up on this agreement simply telling me he fully trusts me and my friend. Only this alone has on huge goodwill value alone Nobu and I hope u appreciate it. Now Polys deals via RBS on LCH but not on the same way as u but like Andreas, Georgina, Nicholas because of the long relationship and loans together. In other words they have a credit line at RBS but every time they trade RBS charges them sleeve differential … u will have to buy it back from him at 101.5 (depending on what RBS will charge him …)."

59. I have already referred to the transcripts of telephone conversations and emails exchanged on 7th and 8th July 2008, following the weekend and the fax cover sheet and Iron Monger guarantee (at paragraphs 25 and 26 of this judgment) which employed unusual terminology in describing the parties to the deal. Mr Su did not accept that he had agreed a deal between himself and the TMT companies on the one hand and Mr Haji-Ioannou and whatever company that the latter deputed to effect the cleared trades, which turned out to be Lakatamia; nor did he accept that these documents reflected that. He said he believed that Mr Karakoulakis had told Mr Haji-Ioannou that it was TMT Liberia which had the account with RBS and he had not needed to tell Mr Karakoulakis that TMT Liberia was the contracting party. He said that there was no discussion at any time between them that any particular company would be the contracting party. Whilst he had said in his witness statement, that, as a result of the June meeting it was obvious that the party he represented and the party whom Mr Haji-Ioannou would be assisting was TMT Liberia, that reasoning fell when he accepted that the meeting had not taken place and that there never was any meeting with Mr Haji-Ioannou when TMT Liberia was mentioned. Oddly, twice in cross-examination Mr Su said that he was doing a trade with Troodos. Elsewhere, he appeared to accept that the deal was between him and Mr Haji-Ioannou to be executed through companies holding accounts with RBS, whilst in a yet further passage he accepted that the deal done through Mr Karakoulakis was a deal for Mr Haji-Ioannou to buy some of the positions which he had held and for him to buy them back later. In affirming that, he said that this was to be done through RBS but that there was no individual with an account at RBS. It is unlikely that he was truly admitting liability on a personal obligation, but this did reflect the reality of what was agreed, according to the hearsay evidence of Mr Karakoulakis.

60. It is unfortunate that Mr Karakoulakis did not give direct evidence to the Court, but no doubt he and Clarksons did not wish to be embroiled in the dispute between two clients. The evidence of Mr Gardner and Mr Panayiodou is however compelling and the note drafted by Mr Gardner on the day of their meeting is, I consider, the best evidence of what was said. This reflects a personal agreement between Mr Su and Mr Haji-Ioannou, as intentionally recorded in the fax cover sheet and an agreement between Lakatamia and all the TMT companies as represented by the terms "Messrs TMT" and "TMT" in the Iron Monger guarantee document.

61. In my judgment, having heard the evidence of all those involved other than Mr Karakoulakis (including the evidence of Mr Gardner and Mr Panayiodou) and having considered the documents emanating from Mr Karakoulakis, Mr Haji-Ioannou's

evidence has to be accepted when he said that he entered into this deal as a personal favour to Mr Su on the basis of Mr Su's assurance, communicated through Mr Karakoulakis, that the buy-back part of the transaction would be effected at latest one month after the takeover of 600,000 MT of Mr Su's FFA positions. Whilst both Mr Su and Mr Haji-Ioannou would have contemplated that the mechanics of the purchase and buy-back would be effected by companies in their control which had the necessary ability to effect cleared trades through RBS and/or LCH, there was an overarching agreement between the two individuals that the deal be done.

62. The personal terms used in the 5th July 2008 email from Mr Karakoulakis to Mr Su tally with the evidence of Mr Haji-Ioannou, the statements made by Mr Karakoulakis to Mr Gardner and Mr Panayiodou and the unusual forms of expression which appear in the fax coversheet and the Iron Monger guarantee. The "principals of Messrs Troodos and TMT" can only be taken to mean Mr Haji-Ioannou and Mr Su. Troodos Maritime International SA was the treasury company for the Cyclops Group. "TMT" does not identify any particular company but is apt to describe the group of companies of which Mr Su was the principal. Given Mr Karakoulakis' statements to Mr Gardner as recorded in his note that "Messrs TMT" was intended to refer to the companies of the TMT group and his acknowledgement of Mr Su's personal liability on the deal, however unusual it might be, I have come to the clear conclusion that both Mr Su and Mr Haji-Ioannou did conclude a binding contract between them whereby they agreed to the transaction which would be effected by the utilisation of corporate vehicles within their ultimate ownership or control. This was effectively a short term "FFA bridging loan" (Mr Su's words) granted as a personal favour on the basis of a personal request made through Mr Karakoulakis. Had Mr Haji-Ioannou been asked simply to bail out a Liberian company, the matter would have taken an entirely different complexion and I am confident that he would not have agreed to do what he agreed to do. It was the fact that Mr Su gave his word about repurchase which made all the difference.

63. This is confirmed by the reaction of Mr Karakoulakis before, at and after 8th August 2008 when the buy-back leg of the transaction should have been completed. On 6th August 2008, in an email, Mr Su asked Mr Karakoulakis to "ask Polys to postpone Sept 11". Mr Karakoulakis' response was to plead with Mr Su not to ask him to go to Polys with such a request because it would backfire. "He has provided assistance which nobody else would have ever done and that due to my relationship with him over one simple phone call cos he trusted what I told him. Who else would pay US$10 million margin within 24 hours plus another 1 million last week to facilitate your request".

64. The sequence of emails which follow reveal that Mr Karakoulakis had desperately sought to get hold of Mr Su between 6th and 8th August 2008 to confirm that the buy-back was going ahead. On Friday 8th Mr Karakoulakis had told "Polys' office" that he could not reach Mr Su because he was travelling but that if the buy-back did not close on the Friday it would certainly be done on the Monday.

65. There then followed a sequence of email exchanges between Mr Karakoulakis and Mr Su on the Tuesday in which Mr Su indicated that he wanted to meet Mr Haji-Ioannou and whilst resisting the suggestion of immediate repurchase, told Mr Karakoulakis to say that 100,000 MT would be closed first with further parcels of the same size every few days. Mr Karakoulakis was pressing him to repurchase 100,000 MT that day.

Matters continued with Mr Karakoulakis complaining on the following days that he was being pressed by Mr Haji-Ioannou to complete the re-purchase and needed Mr Su to fulfil his commitment. On 13th August 2008, in an email, he stated this:

> "Polys is VEEEERYYY upset nobu … I told u … why u dont listen 2 me and think u can always push me ?????
>
> im trying to call u and u have both yrs nbrs switched ogff
>
> he wants the 100kt at 101.65 as per the agreement NOW
>
> this is our last chance to keep it smooth … plse listen 2 me this time im speaking to u as yr friend … forget the market and everuything else
>
> this is personal between u and polys with my help
>
> plse give me ok to confirm 100kt at ws 101.65
>
> only this way u have a chancve to get him to ustand if u want to escalate the rest and let the market know
>
> plse plse plse confirm now
>
> V."

66. The response to this from Mr Su did not contradict the characterisation of the personal element between himself and Mr Haji-Ioannou, however equivocal the written words may be.

67. What took place thereafter is entirely consistent with the claimants' case inasmuch as constant assurances were given by Mr Su through Mr Karakoulakis that the buy-back would be performed and cash payments were made by other companies in the TMT group to make good the cash difference between such purchases as were made by TMT Liberia or others at the market price which was well below the 101.65 ws agreed. Further details of this appear in the next section of the judgment dealing with the question of loss and damage.

68. I find that there was an overarching agreement between Mr Haji-Ioannou and Mr Su in which each bound himself to the other in the telephone calls with Mr Karakoulakis. They contemplated that companies would be used to effect the FFA ISDA transactions and the Iron Monger guarantee, drafted by Mr Karakoulakis and executed by Iron Monger and Lakatamia, evidences the agreement between Lakatamia, the company subsequently designated by Mr Haji-Ioannou for that purpose and the group of TMT companies, of which one or more would be designated by Mr Su to actually effect the sale and repurchase. These sale and buy back obligations existed over and above the later FFA ISDA transactions which actually took place with TMT Liberia selling to RBS and RBS selling the positions to Lakatamia. That there were such later contracts is unarguably the case because of the existence of ISDA documentation showing the sale of the 600,000 MT FFA positions by TMT Liberia and the purchase by Lakatamia. That there were also resales by Lakatamia to RBS and repurchases also by TMT Liberia is also plain though the documents are unclear as to the identity

of the purchasers of some of the later and smaller blocks repurchased in 2009. They were however the mechanics by which the overarching personal agreement was put into effect albeit belatedly and partially where the buy back is concerned.

69. Whilst Mr Su maintained in cross-examination that the contract was between TMT and Troodos, with a guarantee from Iron Monger, the position adopted by the defendants throughout the action was that the FFA contract was made solely between Lakatamia and the company which held the 600,000 MT of FFA positions, namely TMT Liberia. Whilst the evidence gives the lie to this as the only contract, for the reasons I have already given, the mechanism which Mr Haji-Ioannou and Mr Su utilised to achieve the "FFA bridging loan" as Mr Su described it in his witness statement, was the sequence of sales and repurchases between corporate entities, as referred to in the previous paragraph.

70. In the telephone conversations with Mr Karakoulakis over the weekend, Mr Haji-Ioannou and Mr Su committed themselves to one another personally. In the exchanges which followed by email and fax, through the mediation of Mr Karakoulakis and in particular by reference to the fax cover sheet and the Iron Monger guarantee, the corporate entities which were bound by the "principals" to perform this same transaction were entities described as "Messrs TMT" and "TMT" on the one hand and Lakatamia on the other, with a guarantee of "Messrs TMT's" performance given by "Iron Monger 1 Co, Ltd c/o TMT". As is accepted by the defendants, there is no issue that TMT Liberia is encompassed by the phrase "Messrs TMT" and "TMT" but the defendants submit that no other TMT company was also bound.

71. There are to my mind only four possibilities in law when seeking to understand the document and determine the identity of "Messrs TMT" and "TMT" as the seller/re-purchaser in the Iron Monger guarantee, where Lakatamia was named as the buyer. The words can only mean one of the following:

    i) The TMT company which held the 600,000 MT FFA positions or

    ii) Any company in the TMT group which Mr Su should designate to be party to the transaction or

    iii) Each and every one of the companies in the TMT Group or

    iv) Mr Su and each and every one of the companies in his TMT group.

72. In the evidential setting, and on the wording employed, in the light of the evidence emanating from Mr Karakoulakis who sought to encapsulate the parties' agreement in the Guarantee, I am driven to the conclusion that the designation "Messrs TMT" and "TMT" in context are not apt to describe any specific individual company and were intended to be all-embracing. The "principals of Messrs Troodos and TMT", referred to in the fax cover sheet on TMT Taiwan letter-heading, meant Mr Haji-Ioannou as the principal behind Troodos (the treasury arm of the Cyclops group) and Mr Su as the principal behind the TMT group, not the principal behind a specific company. "Messrs TMT" and "TMT" were used by Mr Karakoulakis in the Iron Monger document as a generic term without any precision to refer to the group as a whole (as appears from Mr Gardner's note). As Mr Su was bound himself, adding the

companies in his group was of little consequence. The short term FFA bridging loan was to be a liability of the group as a whole as well as his own. Although Mr Karakoulakis appears to use "Messrs" in a number of different senses and contexts (see by way of example the reference to "Messrs Clarkson Securities" in the fax cover sheet), the evidence as to what he told Mr Gardner and Mr Panayiodou concludes the issue, in my judgment, as to the meaning of the phrasing of the Iron Monger guarantee because he said that it reflected the agreement that all the TMT companies in the group would be bound.

73. By the time of the guarantee, Mr Haji-Ioannou had already designated Lakatamia as the company that he would utilise and it was the entity to which the guarantee was addressed, but Mr Su and Mr Karakoulakis had not made known the identity of the holder of the FFA positions. Whilst each of the individuals effectively had to utilise a company with the ability to trade cleared FFA positions, TMT Asia and TMT Maritime could apparently have traded such positions as well as TMT Liberia, even if the latter (unknown to Lakatamia or Mr Haji-Ioannou) did actually hold them and was the obvious candidate to sell them and to be designated as the re-purchaser. From the fact that he authorised execution of the Iron Monger guarantee in the form it took, it can be seen that Mr Su was not unduly concerned about questions of corporate personality nor the identity of the TMT entity or entities to be bound. He was content to utilise a term that was apt to describe the group and I therefore conclude that not only is TMT Liberia bound by the terms of the repurchase agreement with Lakatamia, but so also are other companies which can properly be described as being in the TMT group for whom Mr Su was authorised to act. Mr Su bound himself to Mr Haji-Ioannou in an overarching personal agreement and in so doing to any company the latter might designate to fulfil his obligations whilst the companies in his group bound themselves to Lakatamia, which had been designated by the time the document was drawn up.

74. The logic of the structure of the Iron Monger guarantee, drafted by Mr Karakoulakis with the fax cover sheet with the intention of recording the trading agreement, as well as giving some form of guarantee is perhaps not hard to see once it is recognised that what appeared in writing in the guarantee itself was a reference to an undertaking on the part of all TMT companies (because no single company had been identified as the seller) guaranteed by a specific company known to own a ship of value. The fact that it added little or nothing to the liability of each TMT company or the liability of Mr Su, which was referred to in the fax cover sheet, is nothing to the point since lawyers were not involved and all Mr Karakoulakis was seeking to do was to provide a document which gave some assurance to Mr Haji-Ioannou that the buy-back would take place. No asset collateral for any obligation was requested or given. Mr Parker had simply wanted a "guarantee" that the 600,000 MT FFA positions would be repurchased. He was not looking for a guarantee of the obligations of a primary contracting party by another company but the form of words that was adopted was accepted by himself following acceptance by Mr Haji-Ioannou. "Messrs TMT's" performance was, on the face of the document, guaranteed by Iron Monger which was the only TMT company individually identified by name.

75. There is, to my mind a potential distinction not, I think, drawn by the parties. The agreement between Mr Haji-Ioannou and Mr Su was a personal one made via Mr Karakoulakis on the telephone and reflected in the fax cover sheet. The agreement

recorded in the Iron Monger guarantee concerns, on its face, the corporations utilised by the individuals but covers the same ground as the personal agreement. On Mr Gardner's note, "Messrs TMT" was apt to include companies in that group but not Mr Su personally and Mr Haji-Ioannou was not included because Lakatamia was the named buyer and beneficiary of the guarantee. It could be said that there were effectively two agreements covering the same ground, one between Mr Su and Mr Haji-Ioannou and one between the corporate enteritis.

76. The fax cover sheet, as Mr Karakoulakis told Mr Gardner, reflected the fact that the principals had bound themselves to the deal whilst the Iron Monger guarantee reflected their agreement that their companies be bound. Although the deal developed after the telephone conversation as a result of the designation of Lakatamia by Mr Haji-Ioannou, as far as Mr Karakoulakis and the parties were concerned, it was nevertheless all one agreement made by telephone and subsequently recorded in this unusual manner with the result that Mr Su and his TMT companies were in fact bound to Mr Haji-Ioannou and his designated corporate vehicle, which was Lakatamia and vice versa. Both Mr Haji-Ioannou and Lakatamia therefore had contractual claims against each of the defendants. It is perhaps this unusual feature of the documentation which explains the claimants initially pursing the claim solely in the name of Lakatamia, rather than joining Mr Haji-Ioannou as a party by reason of his personal agreement with Mr Su.

What is the measure of loss suffered by Lakatamia and Mr Haji-Ioannou

77. As already mentioned, it is the defendants' case that recovery is limited to the difference between the contract and market value of the 600,000 MT FFA positions at the date when the repurchase should have taken place, namely 8th August 2008, whilst recognising that the value to be ascribed at that date was that which would have been achieved by effecting an orderly disposal of this large quantity of forward positions in smaller quantities over an appropriate period following that date. By contrast, the claimants seek recovery of the total loss incurred in closing the positions in 2009 less the credit to be given to the defendants in respect of cash sums paid and discounts on freight and hire, as set out in paragraph 6.ii) of this judgment.

The course of events after 8th August 2008

78. The defendants' contentions are, in my judgment, unsustainable by virtue of the position that Mr Su adopted following the failure to buy back the FFA positions on 8th August 2008 and the conduct of the parties. Any objective reading of the exchanges between the parties thereafter reveals Mr Haji-Ioannou and Lakatamia pressing Mr Su through Mr Karakoulakis (and Mr Karakoulakis pressing Mr Su) to fulfil the buy back obligations but allowing time for him to do so. At the same time, Mr Su and Mr Karakoulakis on his behalf were constantly telling Lakatamia and Mr Haji-Ioannou that the buy back would take place as and when Mr Su and/or TMT Liberia were in a position to do so. As Mr Parker put it in his evidence, Lakatamia was constantly being told that the buy back would happen. Mr Karakoulakis was adamant that Mr Su and TMT would complete the purchase and make good any cash losses. Assurances were given of payment but not kept and new assurances were given. Rarely a day would pass in the early months without Lakatamia asking for the repurchase to take place and receiving promises that this would happen. I reject the submission that Mr Parker's evidence does not accord with the documentary record.

79. The reason why TMT Liberia did not repurchase the FFAs in full, on its own case in its action against RBS, was that RBS would not sanction such transactions in the absence of adequate margin. RBS was apparently saying that the effect of the repurchases would increase rather than reduce TMT Liberia's exposure to it in circumstances where the market price had fallen. On 31st July 2008 RBS had written to the defendants' London office with two requirements for TMT Liberia to continue trading, namely, first, the provision of $14 million cash and, secondly, written confirmation from Goldman Sachs that it would take over 50% of TMT Liberia's positions in the ensuing week, with an instruction from TMT Liberia confirming the date of transfer. Neither of those requirements were met and on 1st August, Mr Lee of the defendants' London office told Mr Su that RBS would not allow TMT Liberia to trade on the TD3 route.

80. On 6th August 2008, Mr Su was looking to request a postponement of repurchase obligations. On Monday 11th August 2008, Mr Su told Mr Karakoulakis that he did not want to buy back the FFA positions at 101.5 WS (not in fact the contract price in any event) because it would be too obvious when the market was trading at about 90 WS. On being pressed by Mr Karakoulakis, Mr Su on 12th August 2008 then said that he could sort the matter out next week but not this. He wanted to meet Mr Haji-Ioannou, personally to negotiate a postponement of his obligations. Mr Karakoulakis was however assuring Mr Haji-Ioannou that the repurchase would be effected. Later that day Mr Su instructed Karakoulakis to tell Mr Haji-Ioannou that 100,000 MT would be cleared first and that he would close another 100,000 MT every few days so that people would not suspect that there had been a warehousing of 600,000 MT in all. Mr Karakoulakis asked whether the 100,000 MT would be done that day with the same volume on Thursday 14th and Friday 15th and the balance in the following week. Mr Su's response was to say that the first 100,000 MT would be bought back on Friday 15th. Mr Karakoulakis' email to Mr Su on 12th August stated that he had spoken to Mr Haji-Ioannou and told him that the buy back would take place in 100,000 MT lots starting immediately.

81. It appears that there was an attempt to repurchase 100,000 MT on 13th August 2008 but RBS would not allow the trades to be cleared. According to Mr Su he put up $85 million in collateral by way of shares on 14th August 2008 and expected the repurchase to be fulfilled. However on 18th August 2008 100,000 MT was actually repurchased, whilst assurances that a further 100,000 MT would go through on the same day were not fulfilled. The price paid on the repurchase which did take place was 101.45 WS, not the contractual rate, because it seems RBS charged a 2% commission to Lakatamia.

82. On 20th August Mr Haji-Ioannou called Mr Karakoulakis seeking further repurchases, having had to put an extra $6 million of margin to RBS because of the falling market, in addition to the $10 million provided in July 2008. Mr Karakoulakis pressed Mr Su to repurchase a further 200,000 MT that day and only afterwards meet with Mr Haji-Ioannou to renegotiate the repurchase of the balance. It seems that Mr Su agreed to effect that repurchase in an email of that date as Lakatamia continued to press. The 200,000 metric tonne trade did not however go through and, on Monday 25th August 2008, Mr Su, who had again drawn Mr Karakoulakis' attention to his desire to postpone payment, told him that he would have room to fulfil his obligations when the tanker market went up. Mr Karakoulakis was telling Lakatamia that there

were procedural issues in getting the repurchases done. An assurance that another 100,000 MT would go through on 28th August 2008was unfulfilled with RBS rejecting any such trade.

83. On Sunday 29th August 2008, Mr Karakoulakis suggested to Mr Su that he propose to Mr Haji-Ioannou that repurchases take place at prices closer to the market rate and that Mr Su pay the differential between that and WS 101.65 in cash. This was put to Mr Haji-Ioannou as a way of processing the repurchases through RBS/LCH which had imposed a "technicality limitation". Mr Karakoulakis' emails to Mr Su reveal that Mr Haji-Ioannou was expressing anxiety and upset at the continual failure to make the promised repurchases, particularly as RBS were demanding increasing levels of margin as the market dropped further (apparently a further $5.5 million). By 11th September 2008 Mr Karakoulakis was assuring Mr Haji-Ioannou that 100,000 MT would go through on 12th September 2008 at a rate acceptable to RBS with a cash balancing payment to Lakatamia, with Mr Haji-Ioannou content to accept repurchases on that basis.

84. On 16th September 2008 RBS did allow a repurchase of 50,000 MT at a price of WS 84.8, as against the contractual price of WS 101.65. Despite being pressed for the balancing cash payment and for the repurchases promised, it was not until 7th October 2008 that Mr Lee of the defendants' London office wrote to Mr Karakoulakis proposing to pay $1.8 million in cash in respect of the balancing figure owing, with an offer in addition of government bonds to replace the margin that Lakatamia had provided to RBS. The latter never came to anything but on 8th October 2008 $1,803,195 was paid to Lakatamia.

85. On 9th October 2008, Troodos sent an email to Mr Karakoulakis complaining that the deal of 8th July 2008 had not been performed and stating that, having started with $10 million collateral, $41 million was now blocked with daily requests from the bank to add more. The email concluded:

> "We therefore ask you to comply with the terms of the deal and pay."

86. At no time following this email did Mr Su or TMT Liberia or the defendants' London office ever indicate that the repurchases would not take place. To the contrary, Mr Su continued to exhibit willingness to perform but to do so on an extremely partial basis. Mr Su's evidence in cross-examination was that he was intending to resolve the issues in good faith and instructed Mr Karakoulakis that the buy back should be done to the extent that it was possible to do so. "We were unable to clear with LCH through RBS but I was trying to find a solution in good faith."

87. On 16th October 2008 a further 50,000 MT was repurchased at WS 55.8, reflecting the significant drop in the market which had taken place after the financial crisis following the insolvency of Lehman Brothers took hold.

88. On 17th October 2008 Mr Karakoulakis quoted a message from "Messrs TMT" concerning the discussions that he had been having with Mr Haji-Ioannou that day and the previous day. It read as follows, so far as relevant:

> "We are currently sorting our situation. We can only be in a position to suggest the restructuring of the positions held with Polys by Wednesday next week. Please allow us this time to find a solution that suits all and allows you to reclaim your funds as soon as possible. We will do our best to resolve the situation. In the meantime we shall attempt to take in further amounts of the position from Polys."

Mr Karakoulakis' email went on to explain his understanding that TMT was working out its cash flows over the next two weeks, including its over the counter FFA settlements payable in early November, "in order to revert with an specific pay-by date of outstanding balance of cash difference. In the meantime they are endeavouring to continue closing more volume during next week whilst coming into an agreement with yourself on respective ultimate cash payment date."

89. This was followed on 23rd October 2008 by a proposal of a repayment schedule consisting of payment of $8 million on 10th November 2008 and payments of $5 million each and every month thereafter until final accounting and closure of the remaining open positions took place. "Above repayment schedule to run in parallel to buyers buying back outstanding 400 kt position in sizes/timings/levels mutually acceptable by both sides". The response from Mr Parker was to state that Lakatamia was looking forward to the agreement of 8th July 2008 being fulfilled.

90. $8 million was paid on 12th November 2008 by TMT Panama which was acknowledged by reference to Mr Karakoulakis' email of 23rd October 2008. Three further instalments of $5 million were made on 9th December 2008, 7th January 2009 and 6th February 2009.

91. On January 26th 2009, Mr Karakoulakis sent an email with an "amended repayment schedule offer" which was said, following discussion with the pic (person in charge) of TMT, to represent the best possible strategy for reducing the cash margin positions of Lakatamia as well as the open volume of FFA positions which stood at 400,000 MT. Mr Su accepted that he had approved the message. The email explained the difficulty faced by TMT as a result of default in payment by their own counterparties on OTC dry FFA contracts which had prevented TMT "performing their always intended obligation of closing out the current exposure with your goodselves". The email continued:

> "having explored the realistic alternatives available to tmt to both facilitate the quickest possible cash and volume exposure reduction of yrselves, the herebelow buy back/repayment schedule can be confirmed to yourselves and which to ammend the current so far repaymnt schedule:
>
> a- early and immdiate paymnt of usd5million to lakatamia nominated acct, exact date of executiontb to be confirmed but certainly within this week
>
> b- buy back of 50kt of the o/s position thru various market counterparties taking place over this week, respective balance cash payment to cover yr long position of ws100.65 taking

> place by tmt latest within 10days from execution of such 50kt buy backs. (such would equate to a cash blance paymnt equivlt of abt usd 8.7million bss present cal09 trded at ws42)
>
> above to be the first stage of immediate repayment/buy back of the outstanding position.
>
> thereafter and everymonth an amount of between 50-100kt of yr outstanding position in variable lots (in order [not] to create market distortion) to be sold at with respective cash balance paymnts to be executed by tmt to yr nominated acct.
>
> in this manner tmt is endeavouring to eventually release yrselves frm both volume exposed to rbs as well as paying u cash balance differences of positions that u would sell amnd being bought up by third parties, levels/timing of which to always be under tmt's approval. Everytime a certain lot will be sold by yourselves as sellers to buyers under our best efforts negotiations, respective accounting notification taking place to tmt establishing the respective blance difference cash paymnt obligation of them to yrselves.
>
> hoping that respective proposal is going to be acceptable by yourselves and once
>
> re_lakatamiamt_ammended-repaymnt_schedule_offer
>
> more thanking you on behalf of tmt for your commercial understanding of the adverse conditions that have influences tmts ability to thus far collect substantial amounts receivable thru their dry ffa profitable positions
>
> looking forward to your favourable response"

92. The response sent read:

> "In order to facilitate TMT to comply with their obligations under the FFA agreement, we agree with your proposal."

93. A further $5 million payment was made on 6th February 2009 but no further cash payments were made at all. It can be seen that the agreed proposal provided for 50,000 MT to be repurchased "through various market counterparties" during the ensuing week with a balancing cash payment and for amounts between 50,000 MT and 100,000 MT to be bought back every month thereafter in variable parcels, again with cash balancing payments to be made by TMT. It was a term of the proposal, which was agreed, that sales made to third parties would always be subject to TMT's approval both in terms of level and timing with the negotiations effected by TMT.

94. Between 28th January 2009 and 24th March 2009, 50,000 MT of notional cargoes for the remaining months of cal09 were purchased in lots of 5,000 or 10,000 MT from Lakatamia. Lakatamia did not know the identity of the company that purchased these

quantities but were told by Mr Karakoulakis that it was TMT in one guise or another. The prices paid varied between ws 36.7 and ws 40.7.

95. On 22nd or 23rd March 2009 Mr Su and Mr Haji-Ioannou met in Athens. Mr Haji-Ioannou's evidence was that Mr Su said that he was extremely sorry and would pay then and there if he had the money but could not do so because of debtors who had not paid him. He said that as soon as money was collected, payment would be made. At no stage, on Mr Haji-Ioannou's evidence, was there any dispute as to the amount owing which was set out in various trade summaries which were sent to Mr Karakoulakis. The only issue was when and how it would be paid. No suggestion was ever made that Lakatamia should close out the positions in order to crystallise or mitigate the losses.

96. I have already referred to Mr Su's evidence in his witness statement of two meetings in Greece in 2009 with Mr Haji-Ioannou and his admission in cross-examination that there was only one, in March. In that witness statement he said that he requested that Lakatamia close out the positions so it could mitigate the losses that it was suffering. Mr Haji-Ioannou, he said, refused and, according to paragraph 65 of his witness statement, because Mr Haji-Ioannou was not willing to take any sensible steps to stop Lakatamia's continuing market losses, he decided to stop making any further payments to it. Under cross-examination Mr Su said the only meeting in January lasted 20 minutes and that Mr Haji-Ioannou insisted on immediate and full repurchase. Whereas he, Mr Su, was always thinking of finding a solution, he did not promise to buy back 50,000 MT or 55,000 MT the following week and although initially he reiterated his evidence that he requested Lakatamia to close out positions to mitigate loss, he later stated that he never suggested at that meeting that Mr Haji-Ioannou should close the positions. I reject Mr Su's evidence about this meeting to the extent that it conflicts with that of Mr Haji-Ioannou.

97. On 25th and 26th March 2009 there are exchanges of emails between TMT employees and Mr Karakoulakis under the heading "Polys 55kt buy back". These referred to Mr Su's promise that he would buy back a quantity that week, which is variously referred to as 50,000 MT or 55,000 MT. Reference is also made to the balancing cash payment which would have to be made. Mr Karakoulakis' emails of 4th March 2009 and 28th April 2009 refer to the agreement made between Mr Su and Mr Haji-Ioannou on this occasion for such a purchase and to Mr Su's personal promise in respect of it.

98. From February 2009 onwards, the open positions which TMT Liberia had transferred to Lakatamia fell due for closure on a monthly basis and were duly settled.

99. The continuing failure of TMT Liberia to buy back the open positions or to pay in respect of their closure at a loss resulted in demands being made by Lakatamia for proposals for settlement or litigation. Mr Su sought a meeting with Mr Haji-Ioannou who was not prepared to meet unless monies were forthcoming. Mr Karakoulakis however met with Mr Su in Tokyo and made a further proposal on 1st July 2009 in an email "as requested by Mr Nobu Su of TMT". It was proposed that $4 million be paid by 10th July 2009, $3.5 million be paid by 10th July, $3.5 million by 10th August and $3.5 million by 10th September and that title to an Aframax type tanker vessel be assigned to Lakatamia "as collateral security for the good performance of TMT's obligations". The vessel was to be held by Lakatamia until full and final settlement of

TMT's obligations. The email continued by referring to Mr Haji-Ioannou's request for higher immediate payment on account and to TMT's cash flow strains as a result of outstanding payments due to it from its OTC freight derivative counterparties. The security was said to be offered as a goodwill gesture as well as "a further reassurance/reconfirmation of Mr Nobu S' intention of proceeding with discharging TMT's obligations to Lakatamia in the best achievable manner." Repayment in accordance with the proposed schedule was said to be such as to enable TMT to work "towards the best possible continuity of repayment method in an effort to satisfy the total obligation in the best possible matter." Later that day a slightly improved offer was made of three payments on account of $4 million each by 10th July, 10th August and 10th September with an effort to increase one of those payments to $5 million.

100. Despite Mr Su's evidence in cross-examination that the proposal was an offer which he discussed with Mr Karakoulakis when they were both drunk in a night club and that he had no recollection of authorising him to make it, the terms of the emails make it clear that Mr Karakoulakis had Mr Su's express authority to make the offer, just as he did for the earlier offer in January 2009. The last paragraph of the email with the first offer of 1st July concludes with the hope that "you will extend the so far excellent co-operation and support to Mr Nobu S/TMT in his best efforts and provision of goodwill to satisfy and repay subject obligations to Lakatamia …". The second email of that date expressly refers to "Mr Nobu S cash payment proposal" and a further suggestion made by the latter of swapping part of the third quarter's position into the fourth quarter of the year, a matter which was taken no further. Mr Parker, in an email of 1st July in response, stated that Mr Haji-Ioannou accepted the payment schedule by Mr Nobu Su on a "without prejudice basis" provided that this would continue in the months following September with an equal amount of $4-5 million each month. He also asked for details of the collateral that was being offered.

101. The first instalment of $4 million was not paid on 10th July but $2 million was paid on that date and two further payments of $800,000 were made on 16th and 27th July with $600,000 paid on 3rd August. Only $1 million was paid on 12th August 2009 as against the $4 million promised by 10th August. The repayment schedule was not being followed but further sums of $1 million were paid on 11th September 2009 and 9th October 2009. The total amount repaid in cash, all of which came from TMT Asia or TMT Panama, totalled $32,303,195. Mr Su's evidence was that TMT Liberia's cash was blocked by RBS from January 2009 onwards so that TMT Liberia had to find some other way of paying, with the result that these payments were made by associated companies.

102. Between November 2009 and May 2012 no further payments were made to Lakatamia in respect of the losses suffered on each of the open positions as they settled monthly in 2009. It is however common ground that ship owning companies within the TMT group such as Great Elephant Corporation, Beta Elephant Incorporated and Ocean One Corporation gave discounts to Lakatamia on freight rates to be credited against Iron Monger's liability under the guarantee. In the first recap fixture which records such an arrangement the provision for freight reads "As agreed between the two principals, to be deducted from the amount due to Lakatamia Co. Ltd by the owners' affiliated company Iron Monger 1 Co. Ltd". On 18th December 2009, Lakatamia withheld a sum in excess of $1 million of freight due to Great Elephant Incorporated on another voyage charter, giving notice that money was being withheld

"because your Principals have been in default on their payments to our Principals. Your Principals owe to our Principals huge amounts of money and despite numerous requests payments have not been made and all reminders have been ignored."

103. It is agreed between the parties that the total discount in respect of twenty-six different payments amounted to $11,276,033.01.

S. 50(3) f the Sale of Goods Act

104. The defendants contend that the conventional market measure of loss should be applied in accordance with the principles set out in section 50(3) of the Sale of Goods Act 1979 because there was a relevant market at the date of breach which Lakatamia could have used to dispose of the open positions when the repurchase obligation was breached. It is the defendants' case that the positions could have been sold in the market over a period of weeks at a fair price.

105. Section 50(3) of the 1979 Act provides:

> "Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

106. Reliance is placed by the defendants on the decision of the House of Lords in the *Golden Victory* [2007] 2 AC 353 and Lord Brown's dictum at paragraph 79 where he said that the statutory rule was by no means confined to the sale of goods context and fell to be applied by analogy to a variety of other situations wherever there was an available market for what was lost. The defendants also referred to the *Elena D'Amico* [1980] 1 Lloyds Rep. 79 where Robert Goff J (as he then was) referred to the normal measure of damages as referable to the market rate, saying that where a time charterer decided not to take advantage of the market, he did so as an independent business decision and at his own risk, whether the market went up or down. Relying also on that decision and *Norden v Andre* [2003] 1 Lloyds Rep. 287, the defendants submitted that it was of no consequence whether or not the innocent party's decision was a reasonable one. Staying out of the market was an option presented by the breach but was not caused by it.

107. It was not, I think, disputed that a market would be available for the purposes of the rule even if it was not possible to dispose of the entire product or position at once. Colman J in *Petrotrade v Stinnes* [1995] 1 Lloyd's Rep. 142 at 152-153 considered that there was sufficient flexibility in the wording of section 50(3) to justify calculation of the loss in accordance with the market rule by taking a weighted average of the prices that would have been obtained during the minimum period that it would have taken a reasonable trader acting with reasonable expedition to sell the entire parcel.

108. It was further submitted that, although section 50(3) of the statute provided only a prima facie rule, departing from the principle could only be justified where it was necessary to give effect to the overriding compensatory principle.

109. The defendants' contention, in my judgment, ignores the reality of the situation and the stance being taken by the parties to the FFA contract. The overriding compensatory principle must here oust the prima facie rule. There never was any renunciation of the FFA contract by TMT Liberia or Mr Su. On the contrary, on its own case, by reference to the documents and the evidence before the court, including that of the defendants, TMT Liberia sought to perform the contract, however tardily and was unable to do so because of margin requirements which created problems for TMT Liberia and because of the default of counterparties on TMT Liberia's dry cargo FFA trades where, on Mr Su's evidence, $500 million of debt remained unpaid. From 8th August 2008 onwards, at all material times, TMT and Mr Su were seeking to repurchase positions which were open where finance could be found to do so and to compensate Lakatamia for the failure to repurchase the FFA positions at the agreed purchase price. Mr Haji-Ioannou gave latitude to TMT Liberia and Mr Su in the fulfilment of their obligations at their request. If there was a repudiation of the contract it was not accepted at any time prior to the issue of proceedings. Mr Haji-Ioannou continued to look for performance of the FFA contract in the most practical and convenient way for TMT Liberia. The agreements made in January 2009, March 2009 and July 2009 constituted fresh undertakings by TMT Liberia and Mr Su to make good the prior defaults. In particular, in January 2009 there was specific agreement that sales of the position to third parties were to be "subject to TMT's approval". Mr Su and TMT Liberia insisted on controlling the process of negotiation in respect of the level and timing of such sales in circumstances where, according to Mr Su, TMT Liberia had problems in having any trades cleared through RBS/LCH.

110. In circumstances where Mr Su and TMT Liberia were initially promising to fulfil the contractual obligation to repurchase within a very short period of time and then offering to make good on their default and actually doing so in part over a period running from August 2008 to May 2012 (the last freight refund taking place on 21st May 2012) there is no basis for applying the prima facie rule.

111. The prima facie statutory rule has been justified on a number of different bases on the authorities but it proceeds on the basis that it is open to the seller to go out into the market on the date of breach and sell the goods to others at the market rate, with the resultant loss falling on the defaulting buyer. Where however the buyer constantly and insistently represents that it will complete the purchase and thereby encourages the seller not to go out into the market and dispose of the goods, it cannot lie in the buyer's mouth to say that the measure of damages and the true loss suffered by the seller is to be assessed on the basis of such disposal taking place at the date of breach. The buyer's breach of contract in failing to accept the goods cannot be seen in isolation from the buyer's assurances of fulfilment of the purchase, the latitude allowed to the buyer by the seller in such fulfilment and the express agreement in January 2009 that third party sales would only take place with the buyer's approval.

112. It is accepted that the object of damages is to compensate the innocent party and to put it in the position that it would have been in had the contract been performed. There can be no doubt in the present case that, had the contract been performed, Lakatamia would not have suffered the losses it did in respect of closure of the open positions and would have earned a profit of $1.8 million. The conduct of the parties renders the prima facie rule inapplicable because Mr Su and TMT Liberia sought

indulgence in the fulfilment of the repurchase obligations and received it in the context of what, on Mr Su's evidence, was seen to be a "FFA bridging loan".

113. There is no need for the claimants to establish any form of waiver, estoppel, acquiescence or contract variation. The issue is solely what measure of damages truly reflects the loss suffered in the circumstances which occurred. It is plain that the prima facie rule cannot apply when this overriding principle is taken into account.

114. Whether or not Mr Su and TMT Liberia hoped that the market would improve in 2009 so that Lakatamia's loss would be diminished as positions settled on a monthly basis, the representations they made intentionally encouraged Lakatamia not to close the open positions by going into the market but to leave them for TMT Liberia to repurchase as and when it was in a position to do so. Mr Su and TMT Liberia thereby achieved the very result of which they now complain. Whether the defendants' point is put as a matter of application of the statutory prima facie rule or as a matter of failure to mitigate (concepts which are linked), the true position is that Mr Su and TMT sought and obtained indulgence from Mr Haji-Ioannou and Lakatamia in the performance of their obligations so that Lakatamia held on to the FFA positions until those positions settled. Even after that, the liability to Lakatamia was recognised in allowing the freight discounts until 2012. This unmeritorious argument was first taken in February 2013 when there was a change in legal representation.

115. The defendants argued that Mr Haji-Ioannou speculated by not closing the 500,000 MT positions which remained open after 18th August. They relied on his failure to close the 50,000 MT FFA position that he had purchased on 11th June 2008. The two are not comparable. Mr Haji-Ioannou must have decided to hold on to the 50,000 MT positions in the hope of the market going up, notwithstanding his evidence to the contrary. That may well have been Mr Su's hope also when not completing the repurchases whilst stringing Mr Haji-Ioannou along with assurances that he would do so, but Mr Haji-Ioannou was not speculating with the open positions bought from TMT Liberia because he had a purchaser which was expressing its intention to complete.

Mitigation

116. The defendants' arguments on mitigation founder on the same basis without any examination of whether or not 600,000 MT per calendar month of 2009 – 7.2 million MT in all – could have been disposed of at all on the market in the period following August 8th 2008 or examining the price at which this could have been done. Although Mr Haji-Ioannou is an experienced businessman, well versed in the world of shipping, the evidence shows that he had conducted only a limited number of FFA trades in 2007-2008 and, with the exception of the June 11th 2008 trade of 50,000 MT TD3 Cal09, appears to have sought to sell within a month or so of purchase of positions. His overall profit on eighteen trades conducted between March 2007 and March 2008, which essentially consisted of pairs of matching trades and two which were probably intended to match, was $1,167,017. He had limited experience in FFA trading and had been introduced to it by Mr Karakoulakis who had been keen to involve him in business with Mr Su. On his evidence, he was putting his toe in the market to test it before doing so.

117. As the market evidence shows, disposal of a quantity of 7.2 million tonnes would have represented 1.7% of the total volume traded through LCH in 2008. It was a position of the size that neither of the experts had ever seen in the market. Disposal would obviously not be a straightforward matter and anyone faced with the prospect of such disposal would anticipate difficulty in doing so. A substantial market discount and a depressive effect on the market price would be feared, whether the disposal was carried out en bloc or in smaller quantities over a period of time. Where Lakatamia and Mr Haji-Ioannou had a contract with TMT and Mr Su and the latter was confirming his intention to repurchase and make the sellers whole, whilst seeking to control the process of sales into the market, Mr Haji-Ioannou could not be said to be acting unreasonably in relying upon him, giving him time to complete and not going out into the market to sell.

The expert evidence of the market

118. The experts' joint memorandum confirmed the description of the FFA contract as enshrined in the Iron Monger guarantee as a one month warehousing deal with a profit of 1 world scale point to Lakatamia net of any bank fees. Lakatamia was bound to trade with RBS on both legs of the deal (in and out). The defendants' expert was unclear whether he agreed that TMT was free to trade through any clearing account or any clearing member but it is in my judgment plain that it could do so. The experts agreed that the transaction was unusually large. Neither had seen a transaction of that size before.

119. The experts further agreed that the market circumstances were not normal in the period under consideration from August 2008 onwards. There was uncertainty (as per the defendants' expert) or huge uncertainty (as per the claimants' expert) among market participants at the time. August is a holiday season when many senior traders tend to be absent on vacation and the markets in general were in uncharted territory at the time following the Bear Stearns issue earlier in the year and rumours of problems which culminated in the insolvency of Lehman Brothers on September 15th 2008 and the financial crash which followed.

120. The essential difference between the experts was whether a rateable liquidation of Lakatamia's open positions could have taken place without distortion of the market. It was agreed that a sale en bloc would be impossible without a very substantial discount for the market price. Any sale to a third party would, it is agreed, have been speculative. An open position of 600,000 MT or of 500,000 MT which is what remained after 18th August 2008 was, it is agreed, a very large position. The claimants' expert considered that, even if a buyer could be found, the discount from the market price would exceed 20% - perhaps 25%. The defendants' expert agreed that this could well be the position but the point remained untested if sale of the whole quantity was attempted at one time.

121. For the purpose of assessing market price, the data from the Baltic Exchange was treated as the best evidence, although it is an end of day figure based on brokers' assessments. This market data shows that the price for cal09 TD3 did not start to fall alarmingly until October 2008. From around ws 97 on 7th July, the data show figures of around ws 89 on 8th August. The market price continued to slide gradually to ws 87 on 18th August and ws 82 on 16th September. After a small increase in the ensuing ten days, the figure slipped to ws 80 by the end of the month and ws 62.5 by

9th October. On October 16th it was ws 56 and by the end of the month it was ws 49. The data show figures in the 40s until the end of the year. There was no substantial recovery in 2009.

122. It appeared that neither of the two experts in fact was actively trading in FFAs in the period from 8th August-18th September 2008 although each claimed knowledge of what the market was doing in that period. I considered that each of the experts acted more as advocates than experts on the points where they differed. I had regard to this and to the contemporaneous documents emanating from Mr Karakoulakis, Mr Su and TMT in gauging the state of the market at the time.

123. The defendants' expert's view was that Lakatamia could have disposed of 600,000 MT of TD3 cal2009 in smaller parcels averaging 20,000 MT per day. On that basis, 600,000 MT would have taken a minimum of 30 days – more if allowance is made for weekends/non-business days and 500,000 MT, post-August 18th, would have required 25 days or more. He considered that judicious trading on a private and confidential basis would have disguised the fact that a seller had a large quantity to dispose of and drip feeding the market would have resulted in no depression of the market price. He drew on his own expertise in selling very large positions in February 2007 when liquidating ABN Amro's book at less than 10% discount from his marks which were based upon the apparent market price. Whether his transactions were driving that market price he was unable to say. His view was, however, that disposing of the cal209 positions in this way would have led to no distortion of the market at all. The claimants' expert considered that rateable disposal was not a practical possibility and that after one or two sales, the market would recognise that there was a distressed seller so that prices would drop to the same or to similar levels as an en bloc sale. When pressed he said he thought that some individual sales of small parcels might occasionally have been achieved at a discount of about 12½%.

124. The market in February 2007 was different from the market from August 2008 onwards. In my judgment, as the claimants' expert said, the market would soon have worked out what was going on from the published data and market talk, (however much the sellers sought to ensure confidentiality) if parcels of 20,000 MT were drip fed into it. The price would then have dropped more than the 10% figure which the defendants' expert said he had experienced in liquidating Amro's book of both long and short positions. In the market which obtained in August/September 2008, sales of such forward positions in what the defendants' expert considered to be normal sized trades for the time of 20,000 MT (though the claimants' expert considered that 10,000-20,000 was the normal size in an ordinary market which diminished in the fourth quarter of 2008 to 5,000-10,000 MT), the continuing disposal of such parcels would inevitably have led to a significant drop in the market price. From October onwards, if there was any appetite for trading at all, the effect would have been even greater. Basic principles of economics in terms of supply and demand work against the optimism of the defendants' expert's view. I could not accept his evidence that there was no size limit to the amount in practice and that it was "elastic" at that time.

125. Sales in 20,000 MT cal09 blocks in fact represent sales of 240,000 MT at a time because it is 20,000 MT per month over the whole of the 2009 calendar year. The defendants' expert considered the market liquid enough to absorb that on an average daily basis. He was cross-examined on the LCH clear net open interest figures on which he had relied in his report. The movement in those figures from one day to the

next represents the new trading each day net of settlements or closing. Whilst the figure represented the LCH alone and not any OTC trades, NOS trades or SDX trades, 60-65% of FFA trades went through the LCH at the time. The figures show that the amount of LCH daily trades in terms of tonnage between 8th August 2008 and 16th October 2008, by which time the market had dropped significantly, exceeded 500,000 MT on only three days and 240,000 MT in total on sixteen days. Constant feeding of blocks as suggested by the defendants' expert would effectively have flooded the market.

126. If there had been a satisfactory way of disposing of this large quantity of forward positions, I am certain that Mr Karakoulakis and Mr Su would have been instructing Mr Haji-Ioannou as to how to effect such disposal. From August to December 2008, the contemporaneous exchanges between Mr Karakoulakis and Mr Su reveal no possibility of significant sales of this kind and no suggestion is made that any such approach be adopted. Whilst there is reference on 19th August to a bank being willing to sell 100,000 or even 200,000 tonnes perhaps at ws 83 and Sinochem, which could not clear through LCH, being willing to pay ws 84, no deal was concluded as Mr Karakoulakis' later email of 25th August points out. Whilst Mr Karakoulakis recommended Mr Su to buy at that level, all Mr Su wished to do, it seems, was to buy 10,000 MT lots in order to top up the price. Mr Karakoulakis' email of 25th August reveals that none of his Greek contacts had any interest in purchasing and there was no possibility of buying the 100,000 MT which the bank had been seeking earlier to sell. In January/March 2009, the only disposals to third parties which took place on TMT's instructions were disposals of small blocks of 5-10,000 MT on an intermittent basis, which tallied with the claimants' expert's views as to the illiquidity of the market.

127. On the evidence therefore it is in my judgment clear that the possibilities open to the claimants were very limited and any attempt to dispose of the remaining forward positions at any stage would have resulted in substantial discounts to the market price and an increasingly depressive effect on that price. It was for that reason doubtless that TMT and Mr Su did not suggest other sales at any relevant time.

128. On the facts therefore there is no room for any argument that the claimants failed to act reasonably in mitigation of loss, based on the expert market evidence, even if principles of mitigation fall to be applied.

The actual loss

129. Leaving to one side for the moment the third issue relating to the effect of the Novation Agreements, the differential between the sums which Lakatamia should have received, if the 600,000 MT forward positions had been repurchased on 8th August 2008 and the funds settled on closure of the positions, taking into account credits in respect of cash payments and freight discounts are, to all intents and purpose agreed. The loss suffered on the exposure totalled US$79,633,538.25 in respect of the forward positions not bought back by TMT Liberia against which credit falls to be given for the sums of $32,303,195 paid by TMT Asia and TMT Panama and the freight discounts totalling $11,276,033.01. The resultant loss is $36,054,310.24.

130. That figure cannot however be said to represent Mr Haji-Ioannou's loss, even if it does represent Lakatamia's loss. As is recognised, Mr Haji-Ioannou's loss is in the diminution of the value of his shareholding in Cyclops Shipping and its subsidiaries. The speech of Lord Bingham in *Johnson v Gore Wood* [2002] AC at pages 35-36 makes it plain that, where each has a distinct cause of action, a shareholder and a corporation are entitled to make claims although double recovery is obviously not possible. The claim is made that Mr Haji-Ioannou's loss equates to the figure of $36,054,310.24 but I cannot accept that. The value of shares in a holding company which itself holds shares in a company or companies which suffered loss in the amount to which I have just referred does not correlate with that loss. In the ordinary way, expert evidence is required as to the effect on the value of the shareholding of such a loss by the company or companies in question. There was no application before me to adduce expert evidence of this kind but if it becomes important for damages to be assessed in this way, because Lakatamia's claim is limited by reason of the Novation Agreements, I would feel bound, subject to hearing any argument on the point, to order an assessment of damages on this basis. If Lakatamia is entitled to recover the figure to which I have just referred, then any such exercise would presumably be unnecessary.

The Novation Agreements

131. On 4th November 2008 Lakatamia transferred four fifths of the extant open positions to Kition and Slagen in order to facilitate compliance with RBS' margin demands. By 29th October 2008 there was $54,135,819.69 in blocked deposits at RBS as collateral for the 400,000 MT of outstanding forward positions. Mr Parker's evidence was that the Cyclops Group was encountering cash flow difficulties by reason of these margin requirements and that a payment of US$20 million was due shortly. In consequence it was proposed that alternative security be provided in the shape of equity in vessels owned by two single ship owning companies, Slagen and Kition. On 30th October, RBS sent Mr Parker draft Amendment Agreements for execution by Lakatamia, Slagen and Kition, each of which had existing ISDA Master Agreements with RBS which allowed them to hold FFA positions. The net effect, as described in RBS' email of 30th October would be to obtain $2 million of liquidity relief from the equity in the vessels owned by Lakatamia and Slagen and $6 million of liquidity relief in Kition's vessel.

132. Mr Parker's evidence in relation to these novations was set out at paragraph 55 of his witness statement as follows:

> "The only purpose of these novations was to provide alternative collateral to RBS instead of cash which was running low. Slagen and Kition certainly had no incentive to take over the FFAs, as the FFAs were deep under water and they were likely to result in substantial losses. We always intended to recover any losses when they crystallised from Mr Su and the TMT group. I am not a lawyer, and did not give any direct thought to the legal mechanics of the claim. But if asked how the claim would be pursued, I imagine that I would have said that either Lakatamia would pursue Mr Su and TMT for the entire loss or Slagen and Kition would bring their own claims. I understand that in their formal defence, the defendants say that because of

> the novations they are only liable for the losses by Lakatamia on one fifth of the FFAs. That is an extraordinary claim which ignores the commercial reality and purpose of the novations."

133. On 4th November RBS sent Mr Parker the Novation Agreements for execution and they were duly executed that day. Under paragraph 2(a) of the Novation Agreements, the first of which was between RBS, Lakatamia and Slagen and the second between RBS, Lakatamia and Kition, RBS and Lakatamia were "each released and discharged from further obligations to each other" with respect to the specified transactions "and their respective rights against each other thereunder are cancelled, provided that such release and discharge shall not affect any rights, liabilities or obligations … with respect to payments or other obligations due and payable or due to be performed on or prior to the Novation Date". By paragraph 2(b) RBS and Slagen and Kition, in their respective novation agreements undertook liability to one another in respect of the same transactions as from the Novation Date. The Novation Agreements were, by clause 7, to be governed by the law of New York without reference to its conflict of laws provisions.

134. One fifth of the open positions held by Lakatamia was thus transferred to Slagen and three fifths of those positions to Kition with one fifth remaining with Lakatamia itself. Whilst Lakatamia had concluded a contract with TMT Liberia, neither Slagen nor Kition had entered into any such contract. It is thus submitted on behalf of the defendants that, by reason of the Novation Agreements, Lakatamia suffered no loss on the closure of four fifths of the extant forward positions and Slagen and Kition have no cause of action in relation to the loss they suffered in respect of them. On the face of the Novation Agreements, the point is well made.

135. The claimants have put forward a number of routes around this problem. I see no solution in the decision of the Court of Appeal or the House of Lords in *Linden Gardens Trust Limited v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. At the time of the conclusion of the FFA contract in July 2008, it could not be foreseen that Lakatamia would enter into the novation agreements with the effect of extinguishing any loss which it was entitled to claim from TMT Liberia. I cannot see any basis upon which it could properly be said that the parties to the FFA contract can be taken as having entered into it on the footing that Lakatamia could claim losses suffered by other companies within the same group as a result of the Novation Agreements, following extinguishment of Lakatamia's liability for those sums to RBS.

136. The claimants alternative routes for recovery involve the implication of a contract of indemnity between Lakatamia on the one hand and Slagen and Kition on the other in respect of losses incurred as a result of taking on the FFA positions under the Novation Agreements or alternatively an implied assignment of Lakatamia's right to sue under the FFA contract in respect of that loss.

137. There is an issue between the parties as to the proper law of any putative implied indemnity contract or implied assignment. As the relevant events precede 17th December 2009, the Rome Convention is to be applied and under Article 8 of it, the "existence and validity of the contract or of any term of a contract shall be determined by the law which would govern it under this Convention if the contract or term were valid. Under Article 4.1, where the law applicable to the contract has not been chosen in accordance with Article 3, the "contract shall be governed by the law of the country

with which it is most closely connected". As any relevant contract falls to be implied, there is no express choice and no choice can be "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case" under Article 3.1. Under Article 4, where the "characteristic performance" of the contract cannot be identified, the presumption of Article 4.2 cannot be applied and Article 4.5 effectively redirects attention back to Article 4.1, which is the position here. In my judgment the parties to the putative contract cannot now argue that English law is the governing law because of the potential impact on the issue of validity of the contract and its effect on third party accrued rights.

138. The parties' respective positions can be stated shortly as follows.

i) The defendants say that the putative implied contract is linked to or parasitic on the Novation Agreements which are expressly governed by New York law. The Novation Agreements are between RBS, Lakatamia and Slagen or Kition respectively whilst the alleged implied contract is stated to be between Lakatamia and Slagen or Kition as the case may be, without RBS involvement. Any implied contract however arises in and by virtue of the Novation Agreements, since without them there would be no basis or need for any implication.

ii) The claimants contend that any implied contracts are most closely connected with the law of England, since the FFA positions were governed by English law contracts as was the FFA contract itself. Apart from the fact that the Novation Agreements are governed by the law of New York, there is no other connection with New York at all. The three companies in the Cyclops Group are Liberian and managed from an office in Monaco and the trades took place in LCH.

139. In my judgment, the defendants are right in saying any implied contract would be governed by the law of New York because of the very close connection of the putative contract with the Novation Agreements, without which it would not arise at all. For whatever reason, RBS, Lakatamia, Slagen and Kition chose New York law to govern their rights inter se and the losses arise in relation to the relationship of the Cyclops Group companies with RBS. In such circumstances it would be odd if any other law governed a further incident of the relationship between Lakatamia, Slagen and Kition arising in parallel to the Novation Agreements and the FFA positions transferred under them.

New York law

140. The joint memorandum of experts on New York law and the experts' reports stray beyond the bounds of permissible evidence of foreign law. Mr Molo, the defendants' expert has opined upon the question whether or not terms would be implied into the Novation Agreements in the shape of indemnity or assignment and upon the findings a New York court would make about an implied contract. Professor Thel, the claimants' appointed expert has opined upon the law which the New York court would consider to be the proper law of any implied contract, upon whether a New York court would intervene to strike down an agreement said to arise from paragraph 55 of Mr Parker's witness statement and whether a New York court would find that an implied contract had come into existence in the terms alleged by the claimants.

The matters which the experts should have been directing their attention to, in order to assist this Court, are the principles under New York law which apply to the implication of contracts, however closely they may ally with the principles relating to implication of terms into an existing contract.

141. From the reports of the expert New York lawyers, which I was invited to read for myself without either of them appearing to give evidence, the relevant principles would not appear to be very different from those which apply in English law but Mr Molo's report contains only seven typed paragraphs of relevance to an implied contract, as opposed to the implication of terms into a contract. The principles that appear from his report are as follows:

i) "An implied-in-fact contract can arise from a mutual agreement and an intent to promise, when the agreement and promise have simply not been expressed in words. This type of contract requires consideration, mutual assent, legal capacity and legal subject-matter."

ii) A contract cannot be implied in fact where there is an express contract covering the subject matter involved.

142. Professor Thel, in his report, refers to the following principles:

i) New York law recognises implied-in-fact contracts and does not require an enforceable contract to be expressed. *Miller v Schloss* contains the following dictum:

> "The law defining the nature and obligations of implied contracts is thoroughly established. The courts recognise by the language of their opinions two classes of implied contracts. The one class consists of those contracts which are evidenced by the acts of the parties and not by their verbal or written words – true contracts which rest upon an implied promise in fact."

ii) A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties. Parties to an agreement are presumed to act sensibly in regard to it and an interpretation that produces an absurdly harsh result is to be avoided.

iii) A promise may be lacking and yet a whole writing may be 'instinct with an obligation', imperfectly expressed. If that is so, there is a contract.

143. The essential question that I have to decide therefore is whether or not there is an implied-in-fact contract and an intent to promise where the agreement or promise have not been expressed verbally. Do the actions of Lakatamia, Kition and Slagen evidence the existence of such a contract or not? Secondly I have to determine whether or not there is an express contract covering the subject matter involved.

144. In paragraphs 9-10 of the Re-Amended Particulars of Claim, the claimants refer to the purpose of the Novation Agreements as a means of substituting vessels as collateral in place of the blocked cash deposits put up as margin to RBS. It is specifically pleaded

that the novation of Lakatamia's open positions to Kition and Slagen did not represent a commercial sale of those positions on the open market and that the novations were effected in order to provide alternative security. The requirement for margin had arisen by reason of TMT's Liberia's breach of contract in failing to buy back the FFA positions on 8th August. Those pleas are, in my judgment, established on the facts.

145. It is self-evident that, in effecting the Novation Agreements, Lakatamia, Slagen and Kition did not intend any claim for loss in respect of the FFA contract or the FFA open positions to disappear into a black hole. Neither Kition nor Slagen had any commercial incentive to take on the FFA positions in November 2008 because they were out of the money at the time to a substantial extent and they did so solely for the benefit of the Cyclops Group and the cash flow requirements of the group as a whole. The claimants submit that the conduct of Kition and Slagen only makes sense if it was impliedly understood that Lakatamia would make good any losses they suffered in consequence taking on these positions.

146. I have already referred to paragraph 55 of Mr Parker's witness statement which is candid in saying that he "did not give any direct thought to the legal mechanics of the claim" against Mr Su and the TMT group when the novations were effected. Under cross-examination he said much the same thing: "Not having experience as a lawyer, I wouldn't have even thought to make those documentss" [referring to formal contracts of indemnity.] The conduct of Lakatamia, Kition and Slagen thereafter is consistent with Lakatamia remaining liable in respect of 100% of the open FFA positions, inasmuch as it raised a claim for the entire loss as if it did owe an indemnity to Kition and Slagen in respect of the losses they had incurred.

147. If the point had been raised at the time of the Novation Agreements, it is to my mind inconceivable that there would not have been an express agreement in the shape of a side letter by which Lakatamia agreed to indemnify Kition and Slagen in respect of losses that they would incur as a result of the Novation Agreements. Without such an implied undertaking to this effect, Kition and Slagen's conduct in taking on positions which were out of the money for no benefit on their part makes no commercial sense at all. Lakatamia, Kition and Slagen had no interest in terminating Lakatamia's rights to claim against the defendants and conferring a wholly unjustified windfall upon TMT (and Mr Su), nor in taking on loss making positions where no recovery was possible from the contract breaker. Whereas Lakatamia's liability to RBS was offset by a valid claim against the defendants, neither Kition nor Slagen had any offset in the absence of an indemnity from Lakatamia. Commercial considerations require the implication of the indemnity so that the claim for damages is not divorced from the loss suffered. It is clear that Kition, Slagen and Lakatamia would have assented to this if the point had been raised expressly and they must, by their conduct in effecting the Novation Agreements and leaving Lakatamia to the make the claim against the defendants, be taken to have done so.

148. The implied contract of indemnity does not cover the same subject matter as the Novation Agreements. It is ancillary to them and was necessary in consequence of them. The Novation Agreement did not create rights and obligations between Lakatamia, Kition and Slagen inter se but it extinguished and created rights and obligations between those companies and RBS. The Novation Agreements therefore deal with a different subject matter and there is no inconsistency between them.

149. Furthermore, the FFA contract between TMT Liberia, the other TMT companies, Lakatamia and Mr Haji-Ioannou and Mr Su was separate and distinct from the ISDA contracts concluded between Lakatamia and RBS. The Novation Agreements address only the latter and do not encompass the former. The implied undertaking to indemnify is necessary in order to ensure that the rights under the former are adequate to secure the recovery of losses suffered under the latter.

150. It is for these reasons that the implied contract to indemnify is in my judgment essential and can properly be spelled out from the acts of the parties, resting upon an implied promise in fact. In the absence of any such implied undertaking, four fifths of Lakatamia's claim would disappear as a result of an agreement between companies in the same group that was intended to achieve a group benefit and ameliorate the situation caused by the sellers' breach. This would give rise to a wholly unjust result and would be commercially absurd. I conclude therefore, on the basis of the application of principles of New York law that Lakatamia did impliedly undertake to indemnify Kition and Slagen in respect of losses suffered by them on the open FFA positions which they took on. There is no difficulty about the other elements of an implied contract. The parties must be taken to have assented to it and consideration passed inasmuch as the loss making positions were taken over in respect of which the indemnity was given.

151. In these circumstances I need not consider the question of an implied assignment of the right to claim under the FFA contract, as an alternative route for the claimant.

Damages

152. I have set out the sums which are agreed to flow from closure of the forward positions with credit allowed for payments made by the defendants or on their behalf and freight discounts allowed against the sums due. Lakatamia is entitled to recover damages in that amount from Mr Su, TMT Liberia and the other TMT defendant companies, including Iron Monger which is liable on its guarantee.

153. As already mentioned, subject to issues of double recovery, Mr Haji-Ioannou is also entitled to recover from Mr Su and the TMT companies for his loss, that loss being the diminution in the value of his shareholding in Cyclops Ships which owned Lakatamia which itself suffered the losses referred to in the preceding paragraph.

154. In addition to the loss directly suffered in respect of the closure of the FFA forward positions, as against the profit that should have been made under the FFA contract, the claimants seek to recover for loss suffered in putting up large amounts of margin to RBS in 2008 and 2009. On 8th August 2008, the margin requirement was $15,983,074.43 (an excess of nearly $6 million over the $10 million put up on 7th July as part of the FFA contract) but by 7th January 2009 the requirement had risen to $76,635,819.69 before reducing as open positions settled and the other losses claimed crystallised on closure.

155. The evidence is that the three corporate claimants were one ship companies and their unencumbered equity in their respective ships stood as collateral following the Novation Agreements. Cash collateral was provided from the Cyclops Group's resources and ultimately by Mr Haji-Ioannou himself, as appears from the shareholders' funds entries in the Group accounts (around $100 million in 2008).

156. I am unable to see how losses suffered by the Group can be recovered by Lakatamia, Kition or Slagen, whether the loss is said to be:

i) Inability to take advantage of preferential rates of interest on funding the purchase of two vessels, the Nisos and the Rosi, by two other companies in the Group.

ii) Increased interest payments on RBS' additional facilities granted to purchase another ship (the Arendal) by another company in the Group in September 2008.

iii) Forfeit of instalments paid by Korfi Shipping Co as a result of inability to pay the third instalment of a ship building contract because of the Group's cash flow difficulties.

157. To the extent that loss was suffered by Lakatamia, Kition or Slagen (with the implied indemnity from Lakatamia to these two companies) as a result of the provision of margin beyond 8th August, such loss would in principle be recoverable in respect of the failure to repurchase on that date. There has however been no attempt to quantify any such loss. The losses claimed are not losses suffered by any of the claimant companies and issues of causation arise in relation to each head of claim which, as Mr Panayiodou accepted, are to some extent alternative. Decisions fell to be made by the Cyclops Group as to use of available cash so that, in practice, the most that can be said is that the claimants and/or the Cyclops Group were deprived of cash which would have been available but for RBS' margin requirements.

158. In my judgment however in assessing what interest to award on the sums recoverable by way of damages, I am entitled to take into account the loss of use of the money which should have been available to Lakatamia and the wider impact on it, Slagen and Kition of being deprived of it. There is good reason not to be parsimonious in the award of interest.

Restitution

159. In the circumstances, on my findings, no question of restitution to the defendants arises. No payment was made under any mistake of law or fact.

160. Furthermore, the claimants sent statements of account to the defendants from early on in the history of the deal which showed clearly the split of liability on the open FFA positions as between Lakatamia, Slagen and Kition. The defendants could therefore readily see that Lakatamia was only liable on 20% of the outstanding open positions to RBS. Whilst no notice of the Novation Agreements was given to TMT as such, not only were the statements sent but emails of 19th April 2010 from Mr Parker to Mr Karakoulakis and from the latter to the defendants explained the RBS statements of account which showed that split of liability on the open FFA positions.

161. The reality is that payments were made by the defendants in settlement of a liability that the defendants acknowledged as being due throughout the period from 2008 to 2012. The obligation was always seen by Mr Su as a "FFA bridging loan" and the discounts from freight in the latter years specifically acknowledged that sums were due by way of a debt. The defendants effectively recognised and admitted liability

over an extended period of time until, with new legal representation, the second and third issues which I have decided were raised, in addition to the first which had been a matter of dispute from early days.

Conclusion

162. For all the above reasons, Lakatamia succeeds in its claim against Mr Su, TMT Liberia and the other corporate defendants in the amounts to which I have made reference. The defendants are also liable to Mr Haji-Ioannou with damages to be assessed if necessary.

163. I leave all the questions of interest and costs for determination following delivery of this judgment, having made it plain that the award of interest should fully compensate Lakatamia for being out of its money and for loss of use of the cash required for margin over the relevant period of time. Costs must, in the absence of any special circumstances, follow the event. If the parties are able to agree on the terms of the order to be made and on interests and costs, so much the better. If not I will determine the issues on delivering this judgment.