Neutral Citation Number: [2014] EWHC 3068 (Comm)
Case Nos: 2006 FOLIO 815, 2011 FOLIOS 702, 894, 897 AND 1043

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

The Rolls Building
Fetter Lane
London EC4A 1NL

Date: 26/09/2014

Before:

THE HONOURABLE MR JUSTICE FLAUX

2006 Folio 815

Between:

STARLIGHT SHIPPING COMPANY	**Claimant/ First Respondent**

- and -

(1) ALLIANZ MARINE AND AVIATION VERSICHERUNGS AG

(2) ROYAL AND SUN ALLIANCE INSURANCE PLC

(3) ASSICURAZIONI GENERALI SpA

(4) REMBRANDT INSURANCE COMPANY LIMITED

(5) BRIT UW LIMITED
(sued on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2987 and for the 2006 Year of Account)

(6) NICHOLAS BURKINSHAW
(sued on his own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2003 for the 2006 Year of Account)

(7) HISCOX DEDICATED CORPORATE MEMBER LTD
(sued on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account)

(8) HILL DICKINSON LLP

(9) HILL DICKINSON INTERNATIONAL

(10) MICHAEL FRANCIS MALLIN

(11) ALEXANDRA JULIA TYTHERIDGE

(12) MARIA MOISIDOU

(13) DANIEL MCCARTHY

(14) DAVE VALE

(15) MARK WATTERS

(16) SIMON LANGRIDGE

(17) WILLIAM GRAHAM HENSMAN

(18) KEITH RICHARD POTTER

(19) STEPHEN BISHOP

(20) RICHARD CHOWN

(21) SIMON VINCENT STONEHOUSE

(22) MARION SUSAN FRAZER

(23) DANIEL TONY DOBISZ

(24) IAIN JAMES HENSTRIDGE

(25) BRENDAN ALLAN FLOOD

(26) CHARLES TAYLOR ADJUSTING LIMITED

(27) GORDON ELLIOT

Defendants/Applicants

-and-

OVERSEAS MARINE ENTERPRISES INC
Third Party/Respondent

2011 Folio 894

Between:

(1) ALLIANZ MARINE AND AVIATION VERSICHERUNGS AG

(2) ROYAL AND SUN ALLIANCE INSURANCE PLC

(3) ASSICURAZIONI GENERALI SpA

(4) REMBRANDT INSURANCE COMPANY LIMITED

Claimants / Applicants

(5) DANIEL MCCARTHY

(6) DAVE VALE

(7) MARK WATTERS

(8) SIMON LANGRIDGE

(9) WILLIAM GRAHAM HENSMAN

(10) KEITH RICHARD POTTER

(11) STEPHEN BISHOP

(12) RICHARD CHOWN

Intended Claimants/Applicants

-and-

(1) IMPERIAL MARINE CO

(2) SEAGARDEN SHIPPING INC

(3) WAVE NAVIGATION LTD

(4) CYCLONE MARITIME CO

(5) BRISTOL MARINE CO

(6) OVERSEAS MARINE ENTERPRISES INC

Defendants / Respondents

2011 Folio 897

Between:

(1) HELLENIC HULL MUTUAL ASSOCIATION PLC

Claimant / Applicant

(2) ILIAS TSAKIRIS

(3) HILL DICKINSON LLP

(4) HILL DICKINSON INTERNATIONAL

(5) MICHAEL FRANCIS MALLIN

(6) ALEXANDRA JULIA TYTHERIDGE

(7) MARIA MOISIDOU

(8) CHARLES TAYLOR ADJUSTING LIMITED

(9) GORDON ELLIOT

Intended Claimants

-and-

(1) STARLIGHT SHIPPING COMPANY

(2) OVERSEAS MARINE ENTERPRISES INC

Defendants / Respondents

2011 Folio 702

Between:

(1) BRIT UW LIMITED
(on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2987 for the 2006 Year of Account)

(2) NICHOLAS BURKINSHAW
(on his own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2003 for the 2006 Year of Account)

(3) HISCOX DEDICATED CORPORATE MEMBER LTD
(on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account)

Claimants / Applicants

-and-

(1) STARLIGHT SHIPPING COMPANY

(2) OVERSEAS MARINE ENTERPRISES INC

Defendants / Respondents

2011 Folio 1043

Between:

(1) BRIT UW LIMITED
(on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2987 for the 2006 Year of

Account)

(2) NICHOLAS BURKINSHAW
(on his own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2003 for the 2006 Year of Account)

(3) HISCOX DEDICATED CORPORATE MEMBER LTD
(on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account)

Claimants / Applicants

-and-

(1) IMPERIAL MARINE CO

(2) SEAGARDEN SHIPPING INC

(3) WAVE NAVIGATION LTD

(4) CYCLONE MARITIME CO

(5) BRISTOL MARINE CO

Defendants/Respondents

- - - - - - - - - - - - - - - - - - - -
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Mark Howard QC and Tony Singla (instructed by **Clyde & Co LLP**) for the **1st to 4th and 13th to 20th Defendants in 2006 Folio 815, the Claimants and Intended Claimants in 2011 Folio 894 and the Claimant and 2nd Intended Claimant in 2011 Folio 897**
Steven Gee QC and Tom Whitehead (instructed by **Norton Rose Fulbright LLP**) for the **5th to 7th and 21st to 25th Defendants in 2006 Folio 815 and the Claimants in 2011 Folios 702 and 1043**
David Bailey QC and Jocelin Gale (instructed by **Mayer Brown International LLP**) for the **8th to 12th Claimants in 2006 Folio 815 and the 3rd to 7th Intended Claimants in 2011 Folio 897**
Stephen Cogley QC and Christopher Jay (instructed by **Bentleys, Stokes & Lowless LLP**) for the **26th and 27th Defendants in 2006 Folio 815 and the 8th and 9th Intended Claimants in 2011 Folio 897**
The Claimant and Third Party in 2006 Folio 815 and Defendants in 2011 Folios 702, 894, 897 and 1043 were not represented

Hearing date: 10 September 2014
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Judgment

The Honourable Mr Justice Flaux:

Introduction and background

1. The vessel ALEXANDROS T ("the vessel") was owned by Starlight Shipping Company ("Starlight"). The vessel's managers were Overseas Marine Enterprises ("OME"). On 3 May 2006 she sank and was a total loss. 26 of the 33 crew died. Amongst the survivors was the bosun, Mr Aljess Miranda.

2. At the time of her loss, the vessel was insured under two policies of marine insurance, a vessel policy and a fleet policy. The vessels insured under the fleet policy included vessels owned by the five companies who are defendants in the actions 2011 Folio 894 and 1043 ("the co-assureds"). Those vessels were also managed by OME. Both policies expressly provided that they were subject to English law and the exclusive jurisdiction of the English courts. The insurers under the policies were both the companies market (the first to fourth defendants in 2006 Folio 815 or "the CMI") and the Lloyd's market (the fifth to seventh defendants in that action or "the LMI"). The vessel was also insured under a policy with Hellenic Hull Mutual Association PLC (the claimant in 2011 Folio 897 or "Hellenic"). That policy was also governed by English law but contained a London arbitration clause. Where it is not necessary to distinguish between the CMI, the LMI and the Hellenic, I will refer to them compendiously as "the insurers".

3. Following the loss, Starlight commenced proceedings in the Commercial Court (2006 Folio 815) against the CMI and the LMI claiming an indemnity under the vessel and fleet policies. An arbitration was also commenced by the Hellenic, seeking a declaration of non-liability under their policy. In both the proceedings and the arbitration, Starlight were represented by Ince & Co and all the insurers by Hill Taylor Dickinson (subsequently Hill Dickinson LLP). In the defence in the action, the CMI and the LMI made allegations that the vessel was unseaworthy, that Starlight and OME were privy to that unseaworthiness, which was causative of the loss and that Starlight and OME had in place an illegal practice, whereby they refused to notify Class and the vessel's flag state authority of defects in the vessel. The CMI and the LMI also sought to avoid the policies for material non-disclosure. Evidence in support of those allegations was obtained from a number of factual witnesses including Mr Miranda.

4. In inter-solicitor correspondence in July 2006, Ince & Co alleged that the insurers had been spreading "malicious scuttlebutt" about the assured and that there had been serious misconduct by one of the underwriters and, in correspondence in October 2006, Ince & Co alleged that the insurers were "behaving in a reckless and irresponsible fashion in making an allegation when they have no evidence to substantiate what they allege". It was alleged that a Mr Bernardo had offered bribes to survivors, including Mr Miranda, to give false evidence.

5. At a pre-trial review before Tomlinson J (as he then was) on 14 December 2007, Starlight sought permission to amend the Particulars of Claim to claim damages for late payment of the indemnity quantified by reference to alleged loss of profits which it was said would have been earned had the indemnity been paid and an alternative vessel purchased. Further information and specific disclosure were also sought by Starlight relating, *inter alia*, to payments made by the insurers to witnesses including Mr Miranda.

6. The application for permission to amend was refused by Tomlinson J, principally on the ground that the proposed amendment was bound to fail as a matter of English law because of the decision of the Court of Appeal in *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep I.R. 111. The applications for specific disclosure and further information were adjourned to the trial, which was listed to be heard in January 2008.

7. By a settlement agreement dated 13 December 2007, scheduled to a Tomlin Order dated 20 December 2007, Starlight and OME's claims against the LMI were settled on these terms:

> "SETTLEMENT AGREEMENT
>
> BETWEEN
>
> THE ASSURED
>
> OVERSEAS MARINE ENTERPRISES INC and STARLIGHT SHIPPING COMPANY as Managers and/or Owners and/or Associated and/or Affiliated Companies for their respective right and interest in the ship "Alexandros T"
>
> AND
>
> INTERESTED UNDERWRITERS
>
> AT LLOYDS (the Underwriters)
>
> LLOYDS HULL & MACHINERY UNDERWRITERS subscribing to [the] Policy…
>
> 3. The Assured and Claimant agree to accept the EURO equivalent of US$8m … in full and final settlement of all and any claims it may have under [the] Policy… against the Underwriters signing below in relation to the loss of "Alexandros T", including all claims for interest and costs (including in respect of all cost orders made to date in the proceedings) but without effect to any other insurance policy in which each Underwriter may be involved.
>
> 4. The Assured and Claimant agree to indemnify the Underwriters signing below against any claim that might be brought against them by any of the Assured's or the Claimant's associated companies or organisations or by any mortgagee in relation to the loss of "Alexandros T" or under [the] Policy but without effect to any other insurance policy in which it may be involved.
>
> …
>
> 5. This agreement is subject to English law and to the exclusive jurisdiction of the High Court in London."

8. Similarly, by a settlement agreement dated 7 January 2008, scheduled to a Tomlin Order of the same date, Starlight and OME's claims against the CMI were settled on these terms:

> "SETTLEMENT AGREEMENT
>
> BETWEEN
>
> THE ASSURED
>
> STARLIGHT SHIPPING COMPANY as Owners and OVERSEAS MARINE ENTERPRISES INC as Managers and/or Associated and/or Affiliated Companies for their respective right and interest in the ship "Alexandros T"
>
> ("the Assured")
>
> AND
>
> INTERESTED UNDERWRITERS:
>
> (1) ALLIANZ GLOBAL CORPORATE & SPECIALTY formerly known as ALLIANZ MARINE AND AVIATION VERSICHERUNGS AG
>
> (2) ROYAL AND SUN ALLIANCE INSURANCE PLC
>
> (3) ASSICURAZIONE GENERALI SpA
>
> (4) REMBRANDT INSURANCE COMPANY LIMITED
>
> ("the Underwriters")
>
> …
>
> 2. The Assured and Claimant agree to accept the EURO equivalent of each Underwriter's due proportion of US$16m … in full and final settlement of all and any claims it may have under [the] Policy against the Underwriters in relation to the loss of "Alexandros T", including all claims for interest and costs (including in respect of all cost orders made to date in the proceedings) but without effect to any other insurance policy in which each Underwriter may be involved.
>
> 3. The Assured and Claimant agree to indemnify each Underwriter against any claim that might be brought against it by any of the Assured's or the Claimant's associated companies or organisations or by any mortgagee in relation to the loss of "Alexandros T" or under [the] Policy but without effect to any other insurance policy in which it may be involved.
>
> …

> 6. This agreement is subject to English law and to the exclusive jurisdiction of the High Court in London."

9. In the case of both Tomlin Orders in the usual way they provided that "Save for the purpose of carrying into effect the terms agreed between the claimant and [the defendants] all further proceedings between [them] shall be stayed with immediate effect".

10. In the arbitration, Hellenic had made similar allegations to those made by the LMI and the CMI and Ince & Co on behalf of Starlight and OME raised the same complaints about the conduct of the insurers. By a settlement agreement dated 30 January 2008, Starlight and OME's disputes with the Hellenic were settled on terms that Hellenic would pay U.S. $4.8 million being its 15% share of the U.S. $32 million for which the vessel was insured. The relevant provisions of that settlement agreement were as follows:

> "2. The Owners [i.e. Starlight] and the Assured [i.e. Starlight and OME] agree to accept US$4.8M (United States Dollars Four Million Eight Hundred Thousand) in full and final settlement of all and any claims they may have under the Policy in relation to the loss of the "Alexandros T" against the Underwriters [i.e. the Hellenic] and/or against any of its servants and/or agents, including all claims for interest and costs but without effect to any other insurance policy in which the Underwriters may be involved.
>
> 3. The Assured agree to indemnify the Underwriters against any claim that might be brought against it and/or against any of its servants and/or agents and/or managers by any of the Assured's associated companies and/or organisations and/or its managers and/or its servants and/or its employees and/or their agents and/or by any mortgagee in relation to the loss of "Alexandros T" or under the Policy but without effect to any other insurance policy in which it may be involved.
>
> …
>
> 6. This agreement is subject to English law and to the exclusive jurisdiction of the High Court in London."

11. In April 2011 nine sets of proceedings were commenced in Greece by Starlight, OME, the co-assureds and individual officers of those companies against not only the CMI, the LMI and the Hellenic but the individual underwriters and employees of those insurers (the thirteen to twentieth defendants in 2006 Folio 815 or "the CMI Individuals", underwriters and employees of the CMI, the twenty first to twenty fifth defendants in that action or "the LMI Individuals", underwriters and employees of the LMI and Mr Tsakiris, the director of the Hellenic responsible for defending the claim). The proceedings were also brought against Hill Dickinson and the individual lawyers who had had conduct of the defence (the eighth to twelfth defendants in 2006 Folio 815, collectively "the HD parties") and against Charles Taylor Adjusting Limited and the individual adjuster Mr Elliot (the twenty sixth and twenty seventh

defendants in 2006 Folio 815, collectively "the CTa parties") who had investigated the claim.

12. The essence of the claims in Greece is that it is alleged that all the defendants obtained false evidence from Mr Miranda which they deployed to avoid paying an indemnity under the policies and spread defamatory rumours against the claimants in the insurance market. In particular, it is alleged that the insurers sought to avoid payment by intentionally fabricating false evidence and disseminating false information. The claims are for loss of hire and loss of opportunity totalling about U.S.$150 million. More detail of those claims is set out at [11] to [13] of the judgment of Burton J ([2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162) referred to below. As Burton J said: "the factual allegations are entirely familiar", since they reflect the allegations made by Ince & Co in correspondence in 2006 Folio 815 and in the unsuccessful application for permission to amend in that action. For present purposes it is only necessary to also note that there is no doubt that the allegations in those Greek proceedings are of joint liability on the part of all the defendants.

13. By Application Notices in 2006 Folio 815 issued in July, August and October 2011, the CMI and the LMI sought relief (including declaratory relief, specific performance and damages) to enforce the terms of the settlement agreements, on the basis that the proceedings in Greece were in breach of the terms of the settlement agreements and of the exclusive jurisdiction clauses in both the settlement agreements and the underlying policies. The insurers asked for summary determination of the relief they sought against Starlight. The LMI also sought such relief against OME in 2006 Folio 815. The CMI commenced fresh proceedings against OME and the co-assureds seeking the same relief (2011 Folio 894) as did Hellenic, who were not parties to 2006 Folio 815 (2011 Folio 897). By a Part 7 Claim Form issued on 15 June 2011 (2011 Folio 702) the LMI commenced a fresh action against Starlight and OME solely to enforce the LMI settlement agreement. The LMI then issued another Part 7 Claim Form (2011 Folio 1043) against the co-assureds contending that so far as they are concerned the proceedings in Greece are in breach of the exclusive English jurisdiction clause in the policies.

14. In their defences, Starlight, OME and the co-assureds opposed the insurers' applications and claims on the grounds that the claims in Greece did not fall within the scope of the releases or the indemnities in the settlement agreements and did not fall within the scope of the jurisdiction clauses in the settlement agreements or the policies. They also sought a stay of the English proceedings under Article 28 of the Judgments Regulation 44/2001 ("the Judgments Regulation").

15. Burton J heard the insurers' applications for summary judgment and the stay applications at the same hearing on 28 and 29 November 2011. He handed down his approved judgment on 19 December 2011 ([2011] EWHC 3381 (Comm); [2012] 1 Lloyd's Rep 162). He granted the insurers summary relief on the merits and held:

    (1) Each of the claims by Starlight, OME and the co-assureds against the insurers in Greece was in breach of the exclusive jurisdiction clauses in the policies;

    (2) Each of the claims by Starlight, OME against the insurers in Greece was in breach of the jurisdiction agreements in the settlement agreements which provide for exclusive English jurisdiction;

(3) Each of the claims by Starlight and OME against the insurers in Greece was in breach of the terms of the settlement agreements, by which Starlight and OME had agreed to accept the settlement monies in full and final settlement of, *inter alia*, the claims subsequently brought in Greece. The settlement agreements were intended to release the insurers from any liability they may be under to Starlight and OME in respect of those claims;

(4) Each of Starlight, OME and the co-assureds was liable in damages to the insurers for breach of contract and under section 50 of the Senior Courts Act 1981.

(5) Each of Starlight and OME was bound to indemnify and hold the insurers harmless against certain of the claims in the Greek proceedings pursuant to the indemnities in the settlement agreements.

16. The learned judge also dismissed the stay application under Article 28. At the hearing before him, leading counsel then acting for Starlight, OME and the co-assureds conceded that Article 27 of the Judgments Regulation was of no relevance. On 9 November 2011, the HD parties had issued an Application Notice applying to be joined as defendants to 2006 Folio 815, which the learned judge heard at the same time as the insurers' applications. In his judgment at [59] he held that the provisions of CPR 19.2(2)(b) were made out and the HD parties were joined as defendants. Following that successful application, the CMI Individuals and the LMI Individuals also applied to be joined as defendants to 2006 Folio 815 and were ordered to be joined, as were the CTa parties.

17. In January 2012, Starlight and OME commenced a second set of proceedings in Greece against the insurers, certain of the individuals who were defendants in the first set of proceedings and the HD parties repeating the allegations in the first proceedings and claiming additional losses consisting of the costs of putting up a bank guarantee when their P & I Club was unwilling to do so because of the allegations being spread about them and of a management audit required by insurers. On 1 February 2012, the insurers applied for the same relief against Starlight and OME in relation to that second set of Greek proceedings as they had in relation to the first.

18. On 2 February 2012, a hearing of consequential applications took place before Burton J. One such application was by Starlight, OME and the co-assureds for permission to appeal. Draft grounds of appeal had been served, which relied for the first time on Article 27 of the Judgments Regulation. The learned judge granted permission to appeal, on terms that included an undertaking that no further steps would be taken in the Greek proceedings pending the final determination of the appeal. The proceedings in relation to the individuals added as defendants in 2006 Folio 815 were stayed pending the appeals.

19. The insurers' application for the same relief in relation to the second Greek proceedings was not before Burton J on 2 February 2012, but he heard that application on 19 March 2012, granted the relief sought and gave Starlight and OME permission to appeal.

20. The relief granted by Burton J in February and March 2012 included an order for specific performance of the obligation of Starlight and OME to indemnify the insurers and hold them harmless against all loss falling within the scope of the indemnity

provisions in the settlement agreements. He held that the scope of the indemnity includes, but is not limited to: (a) costs incurred by the insurers in defending the claims in Greece within the scope of the indemnity; (b) any sums ordered to be paid by the Greek court in respect of those claims; and (c) any sums which the insurers had to pay employees or agents by way of indemnity in respect of any liability those employees or agents were held to be under in the Greek proceedings.

21. In respect of the first set of Greek proceedings, Burton J ordered that funds be established in London through payment into court by Starlight and OME from which any loss suffered by the insurers falling within the scope of the indemnity can be paid. He gave express liberty to apply in relation to that decree for specific performance and the amount of the fund. An initial payment into the fund of £50,000 was made by Starlight and OME, but subsequent payments have not been made.

22. In 2011 Folio 897, the Hellenic had obtained judgment in default against Starlight and OME on 26 October 2011. On 15 December 2011 Starlight and OME applied to set aside that judgment and for a stay under Article 27 of the Judgments Regulation. However, it was agreed that that application and the proceedings in 2011 Folio 897 should be stayed pending the outcome of the appeal. A similar stay was agreed in 2011 Folio 894.

23. On 20 December 2012, the Court of Appeal allowed the appeal in relation to Article 27 of the Judgments Regulation, holding that it was not too late for Article 27 to be invoked and that the claims brought by the CMI and the LMI in 2006 Folio 815 should be stayed under Article 27 because they involved the same cause of action as the claims in the two sets of Greek proceedings and the English court was second seised. The Court of Appeal did not deal with the remainder of the appeal on the merits. The insurers obtained permission to appeal to the Supreme Court. In the meantime the Hellenic, recognising that Starlight and OME would be able to demonstrate a real prospect of success, agreed to judgment in default in 2011 Folio 897 being set aside. The CMI and the Hellenic also agreed that the proceedings in 2011 Folios 894 and 897 should be stayed pending the outcome in the Supreme Court.

24. The Supreme Court handed down judgment on 6 November 2013 ([2013] UKSC 70). It allowed the insurers' (and the HD parties') appeal, holding that Article 27 did not apply to the insurers' claims in 2006 Folio 815, since, with one exception, the claims did not involve the same cause of action as the claims brought against the insurers in Greece. The exception was the claim for a declaration that the Greek proceedings had been compromised by the settlement agreements. Lord Mance held that part of the claim did involve the same cause of action as the claims in the Greek proceedings. Rather than necessitate a reference to the ECJ, the CMI indicated they would not pursue that part of their claim. Accordingly the appeal was allowed in full, the stay in 2006 Folio 815 was lifted, the Orders of Burton J were reinstated and the remainder of the appeal against his judgment on the merits was remitted to the Court of Appeal.

25. On 14 February 2014, Application Notices in respect of the following applications currently before the Court were issued:

    (1) In 2006 Folio 815, an application by the CMI Individuals to lift the stay of the proceedings and by the CMI and the CMI Individuals to extend the Orders made

by Burton J on 2 February 2012 and 19 March 2012 to obtain the same substantive relief on behalf of the CMI Individuals;

(2) In 2011 Folio 894, an application by the CMI to lift the stay of the proceedings, amend the pleadings to reflect the Orders of Burton J, by the CMI Individuals for permission to join those proceedings and by both the CMI and the CMI Individuals for summary judgment against OME and the co-assureds;

(3) In 2011 Folio 897, an application by the Hellenic to lift the stay of the proceedings, amend the pleadings to reflect the Orders of Burton J, by Mr Tsakiris to join the proceedings and by the Hellenic and Mr Tsakiris for summary judgment against Starlight and OME.

26. The HD parties issued applications on 11 March 2014:

(1) In 2006 Folio 815, seeking declaratory relief in materially identical terms to that sought by the CMI and the CMI Individuals and judgment for damages to be assessed for breach of the settlement provisions of the CMI and LMI settlement agreements by Starlight and OME in lieu of an injunction or at law;

(2) In 2011 Folio 897, to lift the stay in those proceedings, for joinder to that action, for a declaration that Starlight is in breach of clause 2 of the Hellenic settlement agreement in commencing and continuing the Greek proceedings and for judgment for damages to be assessed for such breach, in lieu of an injunction or at law.

27. On 21 March 2014 the LMI and the LMI Individuals issued an Application Notice seeking relief which mirrored that sought by the CMI and the CMI Individuals. In a letter to Keates Ferris, solicitors for Starlight and OME, dated 25 April 2014, Norton Rose Fulbright solicitors for the LMI and the LMI Individuals indicated that at the hearing their clients would also seek a decree of specific performance of clause 3 of the LMI settlement agreement. Application Notices were issued the same day seeking that relief.

28. By Application Notices dated 21 March 2014 in 2006 Folio 815 and 2011 Folio 897, the CTa parties seek declarations to the same effect as sought by the other applicants. Although this was originally described as contingent relief in the sense that the CTa parties denied that they had been acting on behalf of the insurers of the vessel, their case being they were instructed by and acting for the cargo underwriters, at the hearing before me, Mr Cogley QC on their behalf was inclined to put his case on the basis that, since Starlight, OME and the co-assureds were suing the CTa parties in Greece on the basis of allegations that they were agents for the insurers of the vessel, the proceedings against the CTa parties were precluded by and in breach of the settlement agreements for the same reasons as given by the other applicants.

29. One effect of the reinstatement of the Orders of Burton J was that the undertakings given to the learned judge on 2 February 2012, that Starlight, OME and the co-assureds would not take any steps in the two sets of Greek proceedings pending the final determination of the appeal to the Court of Appeal, came back into force. Notwithstanding that, in late February/early March 2014 Starlight, OME and the co-assureds did take steps to pursue the Greek proceedings, which led to the insurers and

the individuals commencing contempt proceedings. On 12 March 2014, Andrew Smith J held that Starlight, OME and the co-assureds (amongst others) were in contempt of court and subsequently fined them a total of U.S.$250,000, U.S. $150,000 of which has not been paid. He also listed the current applications for hearing on 13 and 14 May 2014, recognising the need for a degree of expedition. At that stage, the hearing of the appeal against the judgment of Burton J on the merits was due to be heard on 1 July 2014.

30. Detailed skeleton arguments were served by all parties for the hearing of the present applications in May 2014, including a skeleton argument filed on behalf of Starlight, OME and the co-assureds by Mr Timothy Young QC. In that skeleton argument, there was no serious challenge to the applications to lift the stays, for the various individuals to be joined and for permission to make amendments to pleadings. Mr Young's primary position was that the balance of the applications should await the determination of the Court of Appeal, failing which he contended that the Orders of Burton J were not binding, so that his clients could argue *de novo* on the hearing of these applications the substance of what Burton J had decided. In the event it is not necessary to examine that point more closely, because the Court could not provide the Court time which it transpired that the applications needed, so they were adjourned to be heard on 10-12 September 2014.

31. In the meantime the Court of Appeal heard Starlight, OME and the co-assureds' appeal against the Orders of Burton J on the merits on 1 July 2014. The appellants themselves did not attend the hearing, alleging impecuniosity, the reason they have also given through their latest solicitors Keates Ferris for not attending the hearing of the present applications before me. As Mr Mark Howard QC points out on behalf of the CMI and the CMI Individuals, that position is flatly contrary to the position they have taken in the Greek proceedings, which is that they have very substantial assets and should not be required to provide security for costs. I suspect their non-attendance at both hearings is in reality tactical.

32. By its judgment dated 18 July 2014 ([2014] EWCA Civ 1010), the Court of Appeal dismissed the entire appeal and upheld the Orders of Burton J. They held first that the claims in the two sets of Greek proceedings fell within the settlement and indemnity provisions of the CMI and LMI settlement agreements. The reasoning of Longmore LJ (with whom Lord Toulson and Rimer LJ agreed) on this point was as follows at [7]-[10]:

> "7. In one sense it could be said that the indemnity provision is somewhat wider than the settlement provision since in the settlement provision the owners agree to accept the relevant sums in full and final settlement of all and any claims the Assured and the claimant may have under the policy in relation to the loss of "Alexandros T", whereas in the indemnity provision the Assured and the claimant agree to indemnify underwriters against any claim that might be brought against them in relation to the loss of "Alexandros T" or under the policy. The Greek claims (however much the claims may be tortious or delictual rather than contractual) are clearly brought in relation to the loss of the "Alexandros T" and thus, on any

> view, fall within the indemnity provision. Do they also fall within the settlement provision?
>
> 8. In my opinion they do so fall partly because it is the obvious intention of the parties that the settlement provision and the indemnity provision should march together and complement one another, but also because, ever since the decision of the House of Lords in *Fiona Trust v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, fine distinctions between words such as "under" or "in relation to" should no longer be made, at any rate when one is construing arbitration clauses. Jurisdiction clauses are very similar to arbitration clauses (and, of course, appear in the Settlement Agreements with which this court is concerned); settlement clauses are analogous to both arbitration and jurisdiction clauses and should likewise be given a sensible commercial meaning; the words "full and final settlement" point to the intention of the parties that all claims in relation to the loss of the "Alexandros T" should be included in the settlement and the parties be able to continue their existence without being disturbed by further litigation in relation to that loss.
>
> 9. The owners submitted that the *Fiona Trust* principle was not universal and should not apply to settlement agreements. They relied on *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826; in which *Fiona Trust* was distinguished. But that case was about a clause requiring an expert to determine the allocation of partnership profits; any other dispute would have to be determined by the English courts in any event. In these circumstances the rationale of *Fiona Trust* (that sensible businessmen would not want their disputes to be determined partly by arbitration and partly by another tribunal such as the court) did not apply because the parties had expressly agreed that such a division was to occur. As Thomas LJ (as he then was) put it (para 28):-
>
> > 'In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court.'
>
> No such presupposition applies in the present case.
>
> 10. It follows that the Greek proceedings fall within both the settlement provision and the indemnity provision and Burton J was right so to hold.

33. Longmore LJ held that it must follow that the Greek claims fell within the exclusive jurisdiction clauses in the settlement agreements on the basis that the principle in *Fiona Trust* must apply to jurisdiction clauses just as much as to arbitration clauses. Accordingly, the Greek claims should have been brought in England.

34. Longmore LJ then decided that the Greek claims fell within the exclusive jurisdiction clauses in the original policies. His reasoning was as follows at [12] to [14]:

> "12. Again the answer is that they do, however much the Greek claims may be tortious or delictual. As Lord Clarke explained in para 4 of his judgment each party to the policy agreed to submit to the exclusive jurisdiction of the courts of England and Wales. Indeed the owners proposed to amend their claim to allege that they had sustained losses beyond the measure of indemnity in the relevant policy relying on the very facts on which reliance is now placed in the Greek proceedings. The fact that these claims are not permissible in English law and that Tomlinson J refused permission to the owners to make that amendment for the reasons given in para 6 of Lord Clarke's judgment is nothing to the point because the owners had promised to submit to the exclusive jurisdiction of the English courts and thus promised not to bring claims in other courts where such claims might (or might not) succeed.
>
> 13. To the extent that persons other than the parties to the policies of insurance (or indeed, the settlement agreements) have brought claims in Greece those claims will not be caught by the jurisdiction clause in the policies (or the settlements). That, of course, is why the Settlement Agreements had to contain the indemnity clause, by which the parties to the Settlement Agreements agreed to indemnify underwriters in the event that parties other than the parties to the policies (and the Settlement Agreements) initiated proceedings against underwriters in relation to the loss of the "Alexandros T".
>
> 14. In these circumstances the underwriters have (as they were entitled to do) issued proceedings in England claiming (1) declarations that the bringing of the Greek proceedings was a breach of the release in the Settlement Agreements and (2) damages for breach of the release in the Settlement Agreements and for breach of the jurisdiction clause in both the policies and the settlement agreements (as more fully described in para 18 of Lord Clarke's judgment)."

35. He went on to decide that neither the claims for damages nor the claims for declaratory relief constituted an interference with the jurisdiction of the Greek court or infringed EU law. He upheld the decisions of Burton J that the insurers were entitled to summary judgment now for damages to be assessed and that the claims for an indemnity were not premature, so that it was appropriate for a fund to be established as Burton J had held, to indemnify the insurers for the considerable expenses they were incurring defending the Greek proceedings which had been wrongly brought.

36. As Mr Howard QC on behalf of the CMI and the CMI Individuals correctly submitted, the effect of the decision of the Court of Appeal is that there is no answer to that part of his clients' applications which seeks relief in the various proceedings

which is equivalent to the relief which the CMI and the LMI have obtained before Burton J and the Court of Appeal, so as to bring the various sets of proceedings commenced by those applicants into line with one another. No submissions have been put before the Court to the contrary from Starlight, OME and the co-assureds (who have served no further submissions since those of Mr Young QC served before the Court of Appeal hearing and judgment and who, as I have said, did not attend the hearing before me). In any event, even if I had not thought that the reasoning of the Court of Appeal was entirely correct (as I do), it would be binding upon me and I do not see any basis for Starlight, OME and the co-assureds distinguishing that decision.

37. It follows that, so far as the CMI, LMI and Hellenic applications are concerned, the only live issues are (i) the claims for relief in each of 2006 Folio 815 and 2011 Folios 894 and 897 in respect of the Greek proceedings in so far as they have been brought against the CMI Individuals, the LMI Individuals and Mr Tsakiris and (ii) the claim by the LMI and the LMI Individuals for specific performance of the LMI settlement agreement.

38. In relation to the former, Mr Howard QC made the running in making submissions as to why, on the true construction of the CMI and LMI settlement agreements, the claims which Starlight and OME bring against the CMI Individuals, the LMI Individuals and Mr Tsakiris (and for that matter the HD parties and the CTa parties) were also settled. Further or in the alternative, he submitted that, as a matter of English law, by reason of the application of the joint tortfeasor principle or rule, the effect of Starlight and OME having settled with the insurers was that they had settled against the CMI Individuals and the LMI Individuals, who were joint tortfeasors with the insurers. Those submissions on the construction of the CMI and LMI settlement agreements were adopted by Mr Gee QC for the LMI and the LMI Individuals, Mr Bailey QC for the HD parties and Mr Cogley QC for the CTa parties.

39. So far as the Hellenic settlement agreement is concerned, clause 2 expressly provides that the payment of U.S.$4.8 million is "in full and final settlement of all and any claims they may have under the Policy in relation to the loss of [the vessel] against the Underwriters and/or against any of its servants and/or agents.." As with the CMI and LMI settlement agreements, that wording settles claims under the policy in relation to the loss of the vessel. Accordingly, by application of the reasoning of Longmore LJ in the Court of Appeal, as set out at [32] to [35] above, the claims against Hellenic in Greece are within the settlement and indemnity provisions in the Hellenic settlement agreement and in breach of the exclusive jurisdiction clause in the Hellenic settlement agreement and the arbitration clause in the underlying Policy. Furthermore, since clause 2 expressly settles claims against the servants or agents of the Hellenic, the claims in Greece against any of Mr Tsakiris or the HD parties or the CTa parties who are sued in their role as servants or agents of the Hellenic has been settled and the continued pursuit of such claims is a breach of the Hellenic settlement agreement.

40. In so far as the claim for specific performance of the LMI settlement agreement is concerned, it was Mr Gee QC who developed the primary submissions on that issue. Those submissions were adopted by the other applicants, although, as set out below, their Application Notices did not cover that particular relief.

The true construction of the CMI and LMI settlement agreements

41. I turn first to the issue of the construction of the CMI and LMI settlement agreements. Mr Howard QC's primary submission was that the settlement agreements had settled any claims including claims against servants or agents such as the individual underwriters and employees sued in Greece because, on the true construction of the word "Underwriters" in clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement, that word encompassed the servants or agents of the Underwriters defined in the preamble to the agreements, the CMI and the LMI, respectively.

42. Mr Howard QC advanced a number of submissions as to why this was the correct construction of the settlement agreements. First, that the intention of these settlement agreements, as with any other settlement was that, save where there was an express reservation of the right to pursue a particular claim, there should be a "clean break" between the assured and the insurers. Corporate entities such as these insurers can only act through human agents and it would make no sense for the settlement to have released the insurers themselves but left the assured free to pursue proceedings against those human agents. The effect of the assured being entitled to pursue the claims against the individual underwriters and employees in Greece would be that there would not be a clean break since the insurers would find themselves legally or morally obliged to indemnify their employees in respect of any liability they were held to be under in Greece, it not being suggested those employees had acted outside the scope of their employment.

43. Second, and following on from the first point, Mr Howard QC submitted that the construction for which Mr Young QC urged in his skeleton, that "Underwriters" in the body of the agreements must mean the same as in the preamble, in other words the defined insurance companies and Lloyd's syndicates and not their servants or agents, was commercially unreasonable, since its effect would be to leave the assured free to pursue claims against the servants or agents in Greece which, if successful would entitle those servants or agents (whether individual underwriters or employees or for that matter the HD parties or the Cta parties) to an indemnity from the CMI or the LMI, who in turn would be entitled to be indemnified by the assured under clause 3 of the CMI settlement agreement and clause 4 of the LMI settlement agreement. Mr Howard QC submitted that this tortuous and circuitous route to the assured not being able to make any overall recovery against the servants and agents cannot have been objectively intended and that business common sense pointed towards the construction where "Underwriters" in clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement encompassed in each case the servants or agents.

44. Third, Mr Howard QC submitted that part of the commercial background to the settlement agreements, by reference to which they were to be construed, was the principle or rule of English law that settlement with one joint tortfeasor constitutes settlement with all other joint tortfeasors (as to which principle see further below). Parties to an English law contract such as these settlement agreements are deemed to know the law and to have contracted by reference to it, including that principle. To the extent that the insurers had any exposure in tort (which they clearly did since the claims of conspiracy and defamation had been foreshadowed in solicitors' correspondence in England and were then advanced in Greece in breach of the settlement agreements) that exposure would necessarily extend to their employees,

servants or agents who were therefore encompassed within the release and settlement in the settlement agreements.

45. The principal argument advanced by Mr Young QC in his skeleton argument against the construction for which the insurers and the CMI Individuals and LMI Individuals contend was that "Underwriters" in each settlement agreement was a defined term which did not include employees, servants or agents of the defined insurers. He submitted that, where a contract contains a defined term which clearly in the preamble means one thing (i.e. the corporate entities or Lloyd's syndicates and not their employees, servants or agents), the court will not conclude that the defined term must mean something else when it is used elsewhere in the contract, unless that construction would be absurd.

46. In support of that proposition, Mr Young QC relied upon the judgment of Jacob LJ in *City Inn (Jersey) Ltd v 10 Trinity Square Ltd* [2008] EWCA Civ 156. That case concerned a transfer of property by the "Transferor" defined in the contract as the Port of London Authority and the question was whether the expression "Transferor" included the successors in title of the Port of London Authority. In rejecting that argument, Jacob LJ (with whom Wilson and Wall LJJ agreed) said at [8]:

> "It is obviously a strong thing to say that where a draftsman has actually defined a term for the purposes of his document that in some places (but not others) where he uses his chosen term he must have intended some other meaning. It is not impossible, however. If, approaching the document through the eyes of the intended sort of reader (here a conveyancer), the court concludes that notwithstanding his chosen definition the draftsman just must have meant something else by the use of the term, it will so construe the document. Such a conclusion will only be reached where, if the term is given its defined meaning the result would be absurd, given the factual background, known to both parties, in which the document was prepared. Nothing less than absurdity will do – it is not enough that one conclusion makes better commercial sense than another."

47. A similar approach to construction was adopted by the majority of the Court of Appeal in *Kookmin Bank v Rainy Sky S.A.* [2010] EWCA Civ 582. Patten LJ (with whom Thorpe LJ agreed) expressed the principle applicable at [42]:

> "In this case (as in most others) the Court is not privy to the negotiations between the parties or to the commercial and other pressures which may have dictated the balance of interests which the contract strikes. Unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect it its terms. To do otherwise would be to risk imposing obligations on one or other party which they were never willing to assume and in circumstances which amount to no more than guesswork on the part of the Court."

48. The reference to "so extreme" a result chimes with the need for absurdity identified by Jacob LJ. A somewhat different approach to construction in that case was advocated by Sir Simon Tuckey in the minority, who stated the principle in these terms at [19]:

> "There is no dispute about the principles of construction to be applied in order to answer this question. The court must first look at the words which the parties have used in the bond itself. The shipbuilding contract is of course the context and cause for the bond but is nevertheless a separate contract between different parties. If the language of the bond leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the Court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense. This follows from the House of Lords decisions in *Wickman Machine Tools Sales Limited v Schuler AG* [1974] AC 235, where at 251 Lord Reid said:
>
> > 'The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.'
>
> and *The Antaios* [1984] AC 191, where at 201 Lord Diplock said:
>
> > 'If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense.'"

49. I agree with Mr Howard QC that it is the latter approach to construction which found favour with the Supreme Court in *Rainy Sky v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900. Having cited the passages from the judgments of Sir Simon Tuckey and Patten LJ to which I have referred, Lord Clarke continued at [20]-[22]:

> "…it seems to me to be clear that the principle stated by Patten LJ in para 42 is different from that stated by the Judge in his para 18(iii) and by Sir Simon Tuckey in para 19. It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.
>
> 21. The language used by the parties will often have more than one potential meaning. I would accept the submission

> made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.
>
> 22. This conclusion appears to me to be supported by Lord Reid's approach in *Wickman* quoted by Sir Simon Tuckey and set out above. I am of course aware that, in considering statements of general principle in a particular case, the court must have regard to the fact that the precise formulation of the proposition may be affected by the facts of the case. Nevertheless, there is a consistent body of opinion, largely collated by the Buyers in an appendix to their case, which supports the approach of the Judge and Sir Simon Tuckey."

50. In my judgment, whilst the *City Inn* case was not specifically referred to by Lord Clarke, the approach to construction which he approves is the antithesis of the more rigid approach which Jacob LJ advocates and I doubt whether *City Inn* can still be regarded as good law after the decision of the Supreme Court in *Rainy Sky*. However, I do not need to decide that question, since the correct approach to construction is clearly that restated by Lord Clarke. The court has to approach construction as "one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant" and if there are two possible constructions, the court is entitled to adopt that construction which is consistent with business common sense and reject the other construction.

51. Adopting that approach to construction, I have no doubt that the reference to "Underwriters" in clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement is to be construed as encompassing servants and agents of the Underwriters. The contrary construction advanced by Mr Young QC on behalf of the assured, that "Underwriters" is a defined term, is a factor to be considered in construing the settlement agreements, but not a decisive factor. That literal approach that "Underwriters" throughout the settlement agreements means only the corporate entities and Lloyd's syndicates and not their servants or agents leaves the assured free to sue those servants or agents, be they the individual underwriters or employees or other agents such as solicitors or adjusters. This leads to a result which defies business common sense: on this construction, the insurers remain exposed to more than the 100% indemnity for which they have settled, since, if the assured's claims in Greece against the servants and agents succeed, those servants or agents will seek an

indemnity from the insurers. The insurers would then be entitled to an indemnity from Starlight and OME pursuant to the indemnity clauses (clause 3 in the CMI settlement agreement and clause 4 in the LMI settlement agreement) but might or might not be able to enforce that indemnity effectively, depending upon the financial position of Starlight and OME. Objectively, that literal construction cannot be what the parties intended and must yield to business common sense.

52. Indeed, if it were necessary to go as far as Jacob LJ suggested in *City Inn*, I would hold that the construction advocated by the assured is an absurd one. The construction for which the CMI and the CMI Individuals and the other applicants contend is one which accords with business common sense and gives effect to the clear objective intention of a general release in a settlement agreement (save where there is an express reservation of the right to bring a particular claim), which is to provide a "clean break" for the parties to end a particular dispute between them. The wording of Clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement: "in full and final settlement of all and any claims" is a classic example of a general release.

53. The principle that general releases are intended to provide a clean break is clear from the speech of Lord Nicholls of Birkenhead in the House of Lords in *BCCI v Ali* [2002] 1 AC 251 at [23]:

> "23. The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean."

54. In his earlier judgment in the present case Burton J recognised the "clean break" principle as the "overriding approach" when construing these settlement agreements. That approach was vindicated by the Court of Appeal, in particular at the end of [8] of Longmore LJ's judgment, where he says: "the words "full and final settlement" point to the intention of the parties that all claims in relation to the loss of the "Alexandros T" should be included in the settlement and the parties be able to continue their existence without being disturbed by further litigation in relation to that loss." However, if the assured's construction of the settlement agreements were correct and "Underwriters" in the settlement provisions did not include servants and agents, that would be a recipe for further litigation, as the Greek proceedings demonstrate.

55. Further support for the construction that "Underwriters" in the settlement provisions encompasses servants and agents is to be found in the joint tortfeasor rule. This rule is stated in *Clerk & Lindsell on Torts* (20th edition) [31-16] in these terms:

> "The general rule at common law is that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all. If accord be made with one joint tortfeasor and satisfaction accepted, or if he be released, all others are discharged."

56. The rule is of some antiquity and although it was subjected to trenchant criticism as absurd and "a trap for the unwary" by Steyn LJ in *Watts v Aldington* (1993) [1999] L&TR 578 at 595, the Court of Appeal in that case considered itself bound by the

rule. It was most recently recognised and applied by the Court of Appeal in *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466; [2014] P.N.L.R. 11. In that case, at [21]-[24], Briggs LJ enunciated the rule and the two exceptions to it: (a) where the settlement agreement is construed as a covenant not to sue and (b) where there is an express or implied reservation by the claimant of the right to sue another joint tortfeasor by separate action:

> "21. At common law (leaving aside statutory intervention) if A claimed to be the victim of a tort committed by joint tortfeasors, and if A obtained either a judgment against one or more of them, or the benefit of a settlement by which he released one or more of them, then subject to certain exceptions, A thereby released the others: see *Bryanston Finance Limited v de Vries* [1975] QB 703, per Lord Diplock at 730.
>
> 22. Parliament has since intervened to abolish that rule in relation to judgments, in what is now Section 3 of the Civil Liability (Contribution) Act 1978, replacing a similar provision in the Law Reform (Married Women and Tortfeasors) Act 1935. But the common law rule remains in full force and effect in relation to compromises: see Foskett on The Law and Practice of Compromise (7th ed.) at paragraph 6-41, and *Watts v Aldington* [1999] L&TR 578 (but decided in 1993), in which this court considered itself bound by the rule, albeit that the High Court of Australia later reached a different conclusion in *Thompson v Australian Capital Television Pty Ltd* (1996) 141 ALR 1. Mr Chaisty politely declined the opportunity to persuade us not to follow the *Watts* case, reserving his ammunition for a higher court. .
>
> 23. Originally the theory was that, in cases of joint tortfeasors, there was only a single cause of action, so that the release of one (or more) necessarily released all. By contrast, a settlement with one or more under which, for good consideration, the claimant merely covenanted not to sue them, left the cause of action intact, so that all joint tortfeasors outside the benefit of the covenant remained vulnerable to further proceedings: see *Duck v Mayeu* [1892] 2 QB 511.
>
> 24. In the *Watts* case, this court recognised an additional exception, namely where the agreement for the release of one (or more) joint tortfeasors contained a reservation of the claimant's right to sue the others. That reservation may be express or, as in that case, implied. Both Steyn and Simon Brown LJJ were, in that case, critical of the logic behind the common law rule, especially following its statutory curtailment. Steyn LJ called it a "trap for the unwary". Simon Brown LJ called it a "juridical relic". The concept of a reservation of a right to sue might be thought equally illogical, if there really is a single cause of action. Some have suggested

> that such a reservation converts an apparent release into what is in substance only a covenant not to sue the defendant or defendants with whom the settlement is made."

57. In his judgment in *Gladman* at [84], Longmore LJ pointed out that, in a commercial case where parties are represented by sophisticated legal teams, such as they were in the present case, the consideration that the rule is a trap for the unwary is much less powerful. He emphasised at [85] that in such a case the rule is easy to apply and avoids lengthy satellite litigation:

> "The virtue of a rule is that it is comparatively easy of application even if the question of implication of a term in the settlement agreement may lead to some legal argument. In the absence of a rule, the issue of abuse of process will often arise and it may be necessary, as it was in this case, to review the parties' relations over a lengthy period of time… A short appeal has become a heavy appeal, that could have been avoided by a straightforward application of what some regard as an old-fashioned and outdated rule."

58. I agree with Mr Howard QC that neither of the exceptions to the application of the rule is relevant here. The "full and final settlement" wording in the settlement provisions is more than a mere covenant not to sue. As Steyn LJ said in *Watts v Aldington* at 595, "full and final settlement" is the language of release. There is clearly no express reservation in the CMI settlement agreement or the LMI settlement agreement of the rights of Starlight and OME to sue the CMI Individuals or the LMI Individuals. The only question is whether there is an implied reservation. In relation to that question the general law as to the implication of terms is applied.

59. The test for implication of terms is that set out by Lord Hoffmann giving the judgment of the Privy Council in *Attorney General of Belize v Belize Telecom* [2009] UKPC 11; [2009] 1 WLR 1988. That test was endorsed and clarified by Lord Clarke MR in *Mediterranean Salvage & Towage v Seamar Trading and Commerce ("The Reborn")* [2009] EWCA Civ 531; [2009] 2 Lloyd's Rep 639. At [9], having summarised the analysis of Lord Hoffmann as being that the question of implication of a term is one of the construction of the contract as a whole, Lord Clarke said this at [15]:

> "Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable. This point is clear, for example, from the well-known speech of Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, where he rejected at page 253H to 254A the approach of Lord Denning, which was to permit the implication of reasonable terms."

60. I agree with Mr Howard QC that there is no question of an implied reservation of a right to sue the CMI Individuals and the LMI Individuals (let alone the HD parties or

the CTa parties) being necessary. The effect of clause 2 of the CMI settlement and clause 3 of the LMI settlement agreement is undoubtedly to release the CMI and the LMI. Starlight and OME were legally represented and advised during the settlement negotiations and are to be taken to know the law and must reasonably be supposed to have understood the legal consequences of a settlement with some but not all joint tortfeasors: see per Briggs LJ in *Gladman* at [40]. If the assured wanted to reserve their position against the other joint tortfeasors, they could and should have insisted on an express reservation.

61. Of course had they done so, it seems unlikely the insurers would have been prepared to enter into the settlement agreements. As Mr Howard QC submitted, with the benefit of legal representation they would hardly have entered a full and final settlement with the assured for millions of dollars whilst by implied agreement exposing themselves to the likelihood of contribution claims from the Individuals, or the HD parties or the CTa parties, if one or more of those parties were sued by Starlight or OME. This was a point which Briggs LJ put in firm terms in *Gladman* at [41]:

> "The Settlement Agreement was made at the end of lengthy and extremely expensive litigation. The trial, although only part heard, had gone on for some fifteen days, and hundreds of thousands of pounds of costs had been spent on each side. The reasonable addressee may be forgiven for thinking that the parties intended thereby to put an end to their dispute yet, if the reservation of a right to sue the Respondents is to be implied, the Council and the Fire Authority were giving up a specific performance claim worth £6 million less the value of the Properties, paying a further £2.7million and nonetheless by implied agreement exposing themselves to the likelihood of contribution claims from the Respondents, if sued thereafter by the Appellant. That the Council and Fire Authority should be regarded as having agreed by implication to do so while professionally represented seems to me to be an altogether improbable hypothesis. This is not to focus on their presumed intention ahead of that of the Appellant. It simply shows that no such common intention can sensibly be presumed."

62. Since neither of the exceptions to the joint tortfeasor rule applies, Starlight and OME are to be taken to have known that the effect of the settlement agreements would be to settle all claims against all joint tortfeasors. Thus, the applicability of the rule is further support for the applicants' case that the correct construction of the settlement agreements is that "Underwriters" in clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement is to be construed as encompassing the servants and agents of the insurers who include the CMI Individuals, the LMI Individuals and the HD parties, so that Starlight and OME have settled any claim they had against those servants and agents.

63. The servants and agents encompassed by the settlement as a matter of construction also include the CTa parties. As Mr Cogley QC pointed out, although in the context of the original litigation his clients denied that they were acting for hull underwriters as opposed to cargo underwriters, prior to the settlement Ince & Co on behalf of the

assured were asserting that the CTa parties were the agents of the hull underwriters i.e. the CMI, the LMI and the Hellenic and sought further information. Hill Dickinson initially refused to give such information but then did so, setting out, in a long letter, details of what the insurers alleged was the agency between themselves and the CTa parties. It follows that, at the time of the settlement agreements, both protagonists, as Mr Cogley QC put it, were asserting that the CTa parties were agents of the hull underwriters, so that, if as I have held, the word "Underwriters" in the settlement provisions in the CMI and LMI settlement agreements encompasses servants and agents, the parties to those agreements and their legal advisers must be taken to have intended to include the CTa parties in servants and agents.

64. The point can in one sense be put even more simply: given that the case made against the CTa parties in the proceedings in Greece is that they were the agents of the insurers, the hull underwriters, if the definition of "Underwriters" in the settlement agreements includes, as I have held, their servants or agents, Starlight and OME have settled their claims against anyone they allege is an agent of the insurers, specifically the CTa parties.

65. In the circumstances, the point taken against the CTa parties by Mr Young QC in his skeleton argument that the CTa parties are seeking hypothetical declaratory relief, which is "unusual and unacceptable" has something of a hollow ring to it. Given the allegations made by Starlight and OME in the Greek proceedings, the relief sought is not hypothetical. As Mr Cogley QC submits, to the extent that Starlight and OME are contending that the court has no jurisdiction to grant declaratory relief in such circumstances, that is obviously wrong. Most recently, having reviewed the earlier authorities, David Richards J in *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) concluded at [25]:

> "It will be noted that there is nothing in these general statements requiring an actual or an imminent infringement of a legal right before a declaration will be made. The willingness of the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties suggests that the court's jurisdiction is not so tightly constrained."

66. On the basis of my conclusion as to the correct construction of the CMI and LMI settlement agreements and given that the Hellenic settlement agreement expressly refers to servants or agents, and given the decision of Burton J and the Court of Appeal that the pursuit of the proceedings in Greece was in breach of the settlement agreements and the CMI and the LMI were entitled to declaratory relief and damages, it necessarily follows that, as a consequence of the correct construction of the three settlement agreements, the proceedings in Greece against the CMI Individuals, the LMI Individuals, the Hellenic and Mr Tsakiris, the HD parties and the CTa parties are all in breach of the settlement agreements. The CMI Individuals, the LMI Individuals, the Hellenic and Mr Tsakiris, the HD parties and the CTa parties are all entitled to the declaratory relief they seek.

67. In any event, irrespective of the construction of the settlement agreements, as a matter of English law, which is the governing law of the settlement agreements, the effect of the settlements against the CMI, the LMI and the Hellenic, all of whom were the

subject of allegations in English proceedings and arbitration of having participated jointly with their servants or agents in tortious conduct, is that any claim against those servants or agents as joint tortfeasors (which is the basis of the claims against them in Greece) has been settled by the settlement agreements by virtue of the application of the joint tortfeasor rule.

68. The attempt by Starlight, OME and the co-assureds in the evidence they filed and in Mr Young QC's skeleton argument to challenge that conclusion, on the basis of evidence of Greek law that that system of law does not have an equivalent rule to the joint tortfeasor rule, is misconceived. Greek law is irrelevant to the relief sought by the various applicants, including the CMI Individuals, the LMI Individuals, Mr Tsakiris, the HD parties and the CTa parties. Those applicants are seeking declaratory relief as to the proper construction and effect of the three settlement agreements, all of which are expressly governed by English law, and that is a question of English law. What Greek law might be as to the application of a joint tortfeasor rule is wholly irrelevant to the relief sought, which simply raises questions of English law.

Specific performance and injunctive relief

69. The submissions addressed to the court by Mr Gee QC on the question of specific performance of the LMI settlement agreement are essentially complementary to the declaratory relief for which Mr Howard QC contends and to which I have held all the applicants are entitled.

70. Mr Gee QC submits that when the settlement agreements provide that Starlight and OME "agree to accept [the settlement amount] in full and final settlement of all and any claims it may have under the policy", that is not just acceptance at the moment of receipt, but a continuing obligation to accept, the obverse of which is a continuing promise not to sue. In support of that submission, Mr Gee QC relied first upon a passage in the judgment of Lord Mance in the Supreme Court in the present case at [155]:

> "The question therefore arises, what if any outstanding promise could there be left to perform which the second and third heads claim to enforce? I have come to the conclusion that the acceptance of the sums paid "in full and final settlement" involves, certainly very arguably, a continuing outstanding promise not further to pursue claims of the nature identified in clauses 2 and 3 respectively."

71. To like effect is a passage in the judgment of Briggs LJ in *Gladman*, where the settlement agreement also contained a "full and final settlement" provision. One of the points taken by the appellants (who were seeking to sue the respondents who had not been parties to the proceedings which were settled but were joint tortfeasors with the defendants to those proceedings) was that the defendants had not sought to protect themselves from contribution claims by the respondents either by an indemnity or an express covenant not to sue the respondents in the settlement agreement. Briggs LJ was not impressed by that point, saying at [35]:

> "…the absence of any indemnity, or express covenant not to sue the Respondents, is in my view of no significance, because

> the ordinary effect of a settlement by the claimant against one or more joint tortfeasors is, without more, to prohibit any proceedings by the claimant against the others. There is therefore no need for an indemnity, or for an express covenant not to sue the other joint tortfeasors."

72. In my judgment, Mr Gee QC is correct that the agreement to accept a sum in full and final settlement of any and all claims against the "Underwriters", which, as I have held, encompasses their servants and agents as a matter of construction of the settlement agreements, entails a continuing promise to accept that sum and a continuing promise not to sue the insurers, their servants or agents. Even if, contrary to my conclusion on the main point in this case, the servants and agents are not encompassed within "Underwriters" in the settlement provisions, they are being sued as joint tortfeasors and, as *Gladman* demonstrates, by settling with one joint tortfeasor, the claimant settles with all the others and undertakes not to sue them. That promise or undertaking can be enforced by a decree of specific performance.

73. Since the remedy of specific performance is an equitable remedy, the court has a discretion as to whether to grant the remedy and accordingly I have to determine whether this is an appropriate case for such a decree. The first thing to note is that by parity of reasoning with the judgment of Longmore LJ in the Court of Appeal in the present case at [15]-[18] that the claims in damages and for declaratory relief do not infringe EU law, so it seems to me that a decree for specific performance does not infringe EU law.

74. As Mr Gee QC pointed out, the ratio of the decision of the European Court of Justice in *West Tankers Inc v Allianz SpA* (Case C-185/07) [2009] 1 AC 1138 that an anti-suit injunction infringes European law is at [26]-[30] of the judgment, that an anti-suit injunction interferes with the power of the court of a member state under the Judgments Regulation, to rule on its own jurisdiction and is contrary to the mutual trust between the legal systems of member states. As Longmore LJ put it at [15] of his judgment in the present case:

> "The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court."

75. There is no question of the relief sought here, of specific performance of the promise not to sue interfering with the jurisdiction of the Greek court. It is no more than a determination by the English court of the rights and obligations under the settlement agreements, contracts governed by English law (as Mr Gee QC points out, in the same way as would be an order for rectification of a contract governed by English law) and

a determination by the English court of the appropriate remedy in respect of a breach by Starlight and OME of their obligations under English law contracts (in the same way as the declarations and judgments for damages granted by Burton J and by me). Such orders are not intended to usurp the jurisdiction of the Greek court, but rather to assist the Greek court. As Longmore LJ pointed out at [16] it is for the Greek court to decide whether to recognise a judgment of the English court that the Greek claims fall within the terms of the settlement agreements.

76. I agree with Mr Gee QC that one good reason for granting the decree of specific performance which he seeks is that it will provide clarity for the Greek court as to what the position is as a matter of English law, which governs the settlement agreements and exactly what the English court has ordered. This will assist recognition and enforcement in Greece of the judgments of the English courts in this case.

77. Under the jurisprudence of the European Court of Justice, where a court in one member state is called on to accord recognition under the Judgments Regulation to a judgment of the court of another member state, the court must recognise and give effect to not only the decision but the *ratio decidendi* of the judgment, the reasoning underpinning it: see most recently *Gothaer v Samskip* (Case C-456/11) [2013] QB 548 at [40]-[41]:

> "40 Moreover, the concept of *res judicata* under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the *ratio decidendi* of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it (see, inter alia, Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 44, and Case C-221/10 P *Artegodan* v *Commission* [2012] ECR I-0000, paragraph 87). As observed in paragraph 35 above, given that the common rules of jurisdiction applied by the courts of the Member States have their source in European Union law, more specifically in Regulation No 44/2001, and given the requirement of uniform application referred to in paragraph 39 above, the concept of *res judicata* under European Union law is relevant for determining the effects produced by a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause.
>
> 41 Thus, a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause, on the ground that that clause is valid, binds the courts of the other Member States both as regards that court's decision to decline jurisdiction, contained in the operative part of the judgment, and as regards the finding on the validity of that clause, contained in the *ratio decidendi* which provides the necessary underpinning for that operative part."

78. In support of the decree of specific performance, the LMI and LMI Individuals seek an order that each of Starlight and OME execute such documents and do all such things as may be necessary to carry clause 3 of the LMI settlement agreement into effect and they annex to the proposed order a document headed "Receipt and Recognition of the Release Agreement" which they invite the court to make an order that that agreement be signed by or on behalf of Starlight and OME and failing such signature, that it be signed on their behalf by Master Kay QC, the Admiralty Registrar, pursuant to section 39 of the Senior Courts Act 1981.

79. In my judgment, it is appropriate to grant a decree of specific performance and to make the order which Mr Gee QC seeks that Starlight and OME do sign the Receipt and Recognition of the Release Agreement or that it be signed on their behalf. In the exercise of the discretion of the court, it is important that the English court should ensure that the settlement agreements are upheld and enforced according to their terms properly interpreted and applied in accordance with English law. The orders and annexed agreement sought provide clarity as to what the position is as a matter of English law and will assist the Greek court when it comes to consider, in the context of recognition of the judgments of the English courts in this case, precisely what the English courts have decided.

80. Another reason for exercising the discretion of the court to grant the decree of specific performance is the course of conduct on the part of Starlight and OME, since the Supreme Court allowed the insurers' appeal, in failing to comply with court orders, specifically orders for payment of costs and the performance of the indemnity provisions of the settlement agreements, reneging on undertakings to the court and thereby being in contempt of court. In addition, damages would clearly be an inadequate remedy for the breaches of the LMI settlement agreement (and for that matter the other settlement agreements).

81. In the circumstances, the LMI and LMI Individuals are entitled to the decree of specific performance and consequent order they seek. At the hearing before me, Mr Bailey QC on behalf of the HD parties and Mr Cogley QC on behalf of the CTa parties reserved the position of their clients in relation to seeking a similar decree for specific performance as that sought by Mr Gee QC. Indeed, immediately after the hearing, Mayer Brown for the HD parties wrote to the court (copied to solicitors for the other parties including Keates Ferris for Starlight and OME) indicating that they wished to seek a decree of specific performance. They annexed to their letter a draft Receipt and Recognition of the Release Agreement in materially identical terms to that proposed by the LMI and the LMI Individuals. The following day, 11 September 2014, Bentleys Stokes & Lowless on behalf of the CTa parties wrote to the court saying that they were likely to apply for the same relief as Mayer Brown but wanted to consider and review the position after I had made an order. Keates Ferris then wrote to the court the same day saying that, although they were without funds or substantive instructions, they objected on behalf of their clients to the draft Receipt and Recognition of the Release Agreement, which their clients considered an abuse of their rights in the English and Greek courts. It is difficult to see how that assertion can be justified, at least so far as the English court is concerned, but given the objection, I do not propose to make an order now in favour of the HD parties decreeing specific performance, but I will hear submissions from the HD parties on this issue at the hand down of this judgment.

82. Mr Gee QC also sought a top-up of the amount of the fund established pursuant to the Order of Burton J. By Order of 4 April 2014, Andrew Smith J ordered Starlight and OME to pay a further £300,000 into that fund by 2 May 2014. That payment was not made. Since that Order, the costs of the LMI and the LMI Individuals of defending the proceedings in Greece have increased. They stand at £520,000 and are expected to exceed £670,000 to the end of the first instance hearing in Greece. Mr Gee QC seeks another £150,000 in addition to the £50,000 paid in pursuant to the Order of Burton J and the £300,000 ordered to be paid in by Andrew Smith J. In my judgment, the LMI and LMI Individuals are entitled to an Order that Starlight and OME do pay an additional £150,000 into the fund. For the avoidance of doubt, this is additional to the amount of £300,000 Andrew Smith J has ordered them to pay.

HD and CTa parties' claim for damages

83. In addition to the declaratory relief to which I have held all the applicants are entitled, Mr Bailey QC on behalf of the HD parties advanced a discrete claim to enforce the promise by Starlight and OME not to sue his clients, by way of an award of damages pursuant to the Contracts (Rights of Third Parties) Act 1999. The HD parties seek an interim payment on account of such damages, in an amount equal to approximately 60% of the costs incurred to date by them in the Greek proceedings of £364,000 i.e. £225,000. The CTa parties also pursue a claim for damages and Mr Cogley QC adopted Mr Bailey QC's submissions. The costs they have incurred to date are just short of £163,000. The interim payment sought in the fifth witness statement of Mr Paul Griffiths of Bentleys, Stokes and Lowless, their solicitors, is £150,000 or such other sum as the court shall determine, in its discretion.

84. Section 1 of that Act provides, so far as relevant, as follows:

> "**1 Right of third party to enforce contractual term.**
>
> (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> (4)This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

> (5)For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

85. Mr Bailey QC made submissions first in relation to his clients' entitlement to enforce the terms of the Hellenic settlement agreement under the 1999 Act. He submitted first that the requirement of section 1(1)(b) was satisfied: the settlement conferred a benefit on the HD parties as servants or agents of the Hellenic, containing a release from liability and a promise or covenant not to sue such servants or agents. Second, he submitted that for the purposes of section 1(2) there are no indications that the parties intended that promise or covenant not to be actionable by a servant or agent such as the HD parties. Third, Mr Bailey QC submitted that for the purposes of section 1(3) the HD parties are members of a class "servants and/or agents" expressly identified in the settlement agreement.

86. In support of his case that the HD parties should be entitled to enforce clause 2 of the Hellenic settlement agreement, Mr Bailey QC relied upon the decision of the Court of Appeal in *Laemthong International Lines v Artis ("The Laemthong Glory" No. 2)* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep 688. In that case, the receivers of cargo requested delivery of the cargo carried on the owners' vessel without production of the bill of lading, and issued a letter of indemnity to the charterers, pursuant to which the receivers agreed to *"indemnify you [i.e. charterers], your servants or agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature you may sustain by reason of delivering the cargo in accordance with our request"*. The Court of Appeal held that this undertaking purported to confer a benefit on the owners, for the purposes of Section 1(1)(b) of the 1999 Act, as the owners had acted as the charterers' agents in delivering the goods to the receivers: see [30] of the judgment of Clarke LJ (as he then was). Mr Bailey QC also pointed out that the burden of proving that the terms of the Hellenic settlement were not intended to be enforceable by the HD parties would be firmly on Starlight and OME, relying on [22] of the judgment of Clarke LJ, although it is fair to say the point appears to have been common ground in that case.

87. I consider that, in relation to the Hellenic settlement agreement, Mr Bailey QC has established that the HD parties are entitled to enforce the terms of that settlement against Starlight and OME by a claim for damages. So far as the CMI and LMI settlement agreements are concerned, in the light of my decision that "Underwriters" in clause 3 of the LMI settlement agreement and clause 2 of the CMI settlement agreement encompasses the servants and agents of the insurers, including the HD parties, the requirements of section 1(1)(b) and (2) are satisfied.

88. Mr Bailey QC recognises that he faces more of a problem in relation to those settlement agreements in satisfying the requirement in section 1(3) that the HD parties "must be expressly identified in the contract by name [or] as a class". His primary position is that, on the basis of my decision that on the true construction of the CMI and LMI settlement agreements, "Underwriters" in the settlement provisions encompasses the servants or agents of the insurers, then the HD parties are expressly identified by the use of that word in those clauses. Although my initial reaction was

that this was not sufficient for express identification, having considered the matter further I have concluded that because "Underwriters" in clause 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement encompasses servants or agents, that word expressly identifies a class of third party intended to have a benefit conferred on them by the settlement agreements. Accordingly, I consider that the HD parties do have a claim to damages for breach of those settlement agreements under the 1999 Act.

89. Given that conclusion, it is not strictly necessary to consider Mr Bailey QC's fallback points but I will do so briefly. He submits firstly that since for the reasons I have given the settlement provisions in the CMI and LMI settlement agreements contain a promise or covenant not to sue the insurers or their servants or agents, the HD parties would be entitled to enforce that promise by way of the equitable remedy of injunction, were it not for the principles established by the European Court of Justice in *Turner v Grovit* (Case C-159/02) [2005] 1 AC 101 and *West Tankers* that such an injunction would be an illegitimate interference with the powers of the Greek court to determine its own jurisdiction. However, Mr Bailey QC submits that the court has power to award damages in lieu of an injunction and the Court of Appeal in the present case has held that an award of damages does not interfere with the Greek court or otherwise infringe EU law. In my judgment, Mr Bailey QC is right on this point and the court could award the HD parties damages in lieu of an injunction for breach by Starlight and OME of the covenant or promise not to sue which is implicit in clauses 2 of the CMI settlement agreement and clause 3 of the LMI settlement agreement.

90. Mr Bailey QC's further fallback point involves the proposition that, if he is wrong about the 1999 Act and damages in lieu of an injunction, it cannot be correct that his clients' damages claim simply falls into a black hole. In those circumstances, he invites me to conclude that this is one of those cases where, exceptionally, the CMI and LMI could, if necessary, recover the losses suffered by the HD parties as damages from Starlight and OME. He relies upon the so-called "narrow ground" of the decision of the House of Lords in *St Martin's Property Corporation v Sir Robert McAlpine* [1994] 1 AC 85, the decision of the Court of Appeal in *Offer-Hoar v Larkshore* [2006] EWCA Civ 1079; [2006] 1 WLR 2926 and my own decision in *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB).

91. In *Offer-Hoar* having analysed the earlier authorities, Rix LJ said this at [83]-[84] of his judgment:

> "83. Underlying all these cases can be heard the drumbeat of a constant theme, which could possibly be described as *ubi ius ibi remedium*, the maxim that where there is a right there is a remedy; but it could also be said that the courts are anxious to see, if possible, that where a real loss has been caused by a real breach of contract, then there should if at all possible be a real remedy which directs recovery from the defendant towards the party which has suffered the loss. In the case of property development, where it is readily contemplated that a party which prepares the development will transfer the fruits of his work to one or more partners or successors, there is a particular need for some such solution.

> 84. The courts have to work with the analytical tools which are to hand. But the essence of the matter is that the general principles which have been developed to ensure that claims are confined to victims (the rule that a party may only claim in respect of his own loss; the rule in favour of privity of contract) and that a wrongdoer should not be made to pay compensation which goes beyond his breach (the rule that an assignee may not recover more than his assignor could have recovered), rules which as far as they go, are necessary and fundamental to good order and fairness in the litigation of claims, are not, if at all possible, to be allowed to become instruments of maladjustment and injustice. Thus the exception developed long ago in the carriage of goods context to allow a contracting party to recover damages against a carrier on behalf of another party to whom the goods in question are subsequently transferred has been brought into use in a modern situation where there is an equal need to find a solution which matches the commercial situation, and where no other solution had been found to be at hand. Of course, where a solution has been provided by statute, as where a contract of carriage of goods by sea is novated statutorily, as in the case of bills of lading, or where there are other solutions readily to hand (as in *The Albazero* or in *Panatown*), there may be no need, and thus it will be thought to be undesirable, to find an exception to general principle."

92. As I said at [85] of my own judgment in *DRC Distribution*:

> "that passage seems to me to be a clear recognition that, for a party to a contract to be entitled to recover a third party's loss as damages remains an exception to the general rule and, at least implicitly, that the cases where the exception applies are ones where the court imputes an intention to the parties under their contract to benefit that third party."

93. It seems to me that, if the other ways in which the HD parties put their claim to damages failed, since for the reasons I have set out above the CMI and LMI settlement agreements involve a promise or covenant not to sue not only the insurers but their servants or agents, this is a case where there was an intention under the settlement agreements to benefit those servants or agents. Accordingly, if necessary, I would hold that this was an exceptional case where the CMI and the LMI could recover the HD parties' losses as damages, for and on behalf of the HD parties.

94. However, as I have already held, I consider that the HD parties are entitled to recover damages under the 1999 Act to be assessed and are entitled to be paid the sum of £225,000 claimed as an interim payment on account of those damages. It seems to me that by parity of reasoning, the CTa parties must be entitled to recover damages to be assessed upon the same basis or bases as the HD parties. I consider that an appropriate interim payment on account of those damages is £100,000.

Conclusion

95. Accordingly I have concluded that: (i) all the applicants are entitled to the declaratory relief they seek; (ii) the LMI and LMI Individuals are entitled to a decree of specific performance; (iii) the HD parties and CTa parties are entitled to claim damages under the 1999 Act. Given the procedural complication of the various applications, having decided the issues of principle in favour of the applicants as set out above, I will hear submissions at the hand down of the judgment as to the precise form of the orders to be made.