QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

6; 27 July 2017

ASPEN UNDERWRITING LTD
v
KAIROS SHIPPING LTD AND OTHERS
(THE "ATLANTIK CONFIDENCE")

[2017] EWHC 1904 (Comm)

Before Mr Justice TEARE

Insurance (marine) — Vessel lost at sea — Settlement Agreement between owners and underwriters — Subsequent discovery that vessel was deliberately sunk — Claim by underwriters to recover settlement sum from mortgagee bank — Whether bank bound by exclusive jurisdiction clause in agreement — Agency — Jurisdiction over claims in tort and restitution — Whether special jurisdiction rules for insurance applied — Brussels Regulation Recast, Council Regulation 1215/2012/EU, articles 7 and 14.

The vessel *Atlantik Confidence* was owned by Kairos Shipping Ltd. By a loan agreement dated 9 March 2010 Credit Europe Bank NV, domiciled in the Netherlands, lent US$38.2 million to the owners to re-finance the purchase of the vessel. The loan was secured by a first mortgage and a deed of assignment that included an assignment of the insurance on the vessels. The vessel was insured under a hull and machinery policy made through Willis as broker between the hull underwriters and the owners. The policy was renewed for a period of 12 months from 15 October 2012 at a value of US$22 million. The policy was governed by English law and contained an exclusive jurisdiction clause in favour of the English courts. It identified the bank as mortgagee. By endorsement no 6 dated 8 February 2013 there were attached notices of the assignments and loss payable clauses in favour of the bank.

On 3 April 2013 the vessel was lost. There were meetings between the owners and the bank that month, and it was agreed that about US$4 million of the proceeds would be used to settle operational debts of other vessels. By an email dated 4 April 2013 the owners asked the bank to provide a letter formally authorising the hull underwriters to pay the proceeds of the insurance claim to the brokers, Willis. The letter was executed on behalf of the bank on 5 April 2013. It was addressed to the "Underwriters concerned" and provided:

> "We hereby authorise you to pay to Willis Ltd all claims of whatsoever nature arising from the above mentioned casualty provided that (i) there are no amounts due under the policy and (ii) Credit Europe Bank NV is the sole loss payee of the policy.
>
> We agree that settlement of such amounts in account or otherwise with Willis Ltd., shall be your absolute discharge in respect of such amounts paid."

Settlement discussions took place between the owners and the hull underwriters. On 6 August 2013 an agreement was signed by Clyde & Co LLP as agents only on behalf of "the Assureds" (defined as being the owners and the managers) and by Norton Rose Fulbright LLP as agents only on behalf of the underwriters. The agreement provided for the payment of US$22 million. The agreement was governed by English law, and the parties irrevocably submitted to the exclusive jurisdiction of the High Court of Justice in England in respect of any disputes or claims. On or around 16 August 2013 the bank received US$21,970,272.74 in Malta from Willis.

The owners commenced limitation proceedings in England. In *The Atlantik Confidence* [2016] 2 Lloyd's Rep 525 Teare J held that the vessel was deliberately sunk by the master and chief engineer at the request of Mr Agaoglu, the alter ego of the owners.

In the present action the hull underwriters of the vessel sought recovery of the insurance proceeds paid to owners. The hull underwriters claimed damages for fraudulent misrepresentation and also restitution of the sum paid. The proceedings were served on the bank in the Netherlands. The bank argued that under the Brussels Regulation Recast, Council Regulation 1215/2012/EU, it could be sued only in the place of its domicile, the Netherlands. The hull underwriters maintained that the English court had jurisdiction for three reasons: the bank was bound by the exclusive jurisdiction clause in the Settlement Agreement; the bank was bound by the exclusive jurisdiction clause in the policy; and the claims brought against the bank were matters which related to tort, delict or quasi-delict and the harmful event occurred in England so as to confer jurisdiction under article 7(2) of the Brussels Regulation Recast.

———*Held*, by QBD (Comm Ct) (TEARE J) that the hull underwriters did not have the better of the argument that the bank was bound by the exclusive jurisdiction clause in the

Settlement Agreement or in the policy. The hull underwriters did however have the better of the argument that their claim for damages caused by misrepresentation was a matter relating to tort and that the harmful event occurred within the jurisdiction, but the court did not have jurisdiction over the claim in restitution.

(1) As these were questions of jurisdiction, the question was whether the hull underwriters had a good arguable case in the sense of having the better of the argument (*see* para 21);

———*Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky* [2013] 2 Lloyd's Rep 242, applied; *Antonio Gramsci Shipping Corporation v Recoletos Ltd* [2012] 2 Lloyd's Rep 365, referred to.

(2) The hull underwriters were unable to establish a good arguable case in the sense of having the better of the argument that this court had jurisdiction by reference to the exclusive jurisdiction clause in the Settlement Agreement (*see* para 45).

(a) The terms of the agreement unequivocally and exhaustively defined the parties to it. The agreement was described as being between the hull underwriters and the owners and managers of the vessel. The recitals recorded that the bank was the mortgagee of the vessel and loss payee under the insurance and that the bank had consented to the hull underwriters making payment to Willis in accordance with the letter dated 5 April 2013, but there was no suggestion that the bank was a party to the agreement (*see* paras 35, 36 and 43);

———*Shogun Finance Ltd v Hudson* [2004] 1 Lloyd's Rep 532; [2004] 1 AC 919, *Foster v Action Aviation Ltd* [2013] EWHC 2439 (Comm), applied.

(b) Applying ordinary principles of English law, the bank had the better of the argument that the owners had not entered into the agreement as agents of the bank. Neither the terms of the letter of 5 April 2013 nor the context in which the letter was written required the court to infer that the bank must have given the owners authority to settle the claim under the policy on its behalf. The bank could have done so because it was the assignee of the policy and the loss payee, but the terms of the letter were consistent with the bank's understanding that the owners would deal with the hull underwriters on their own behalf but being concerned to ensure that the sums received by the owners from the policy would be used to discharge the owners' debts to the bank (*see* paras 20, 34 and 44);

———*Standard Steamship Owners' P&I Association (Bermuda) Ltd v GIE Vision Bail* [2005] 1 All ER (Comm) 618, *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] 1 Lloyd's Rep 647, *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm), referred to

(3) The exclusive jurisdiction clause in the policy was not binding on the bank.

(a) It was not suggested in the present case that there was complete succession of the bank to the rights and owners under the policy (*see* para 47);

———*The Mount I* [2001] Lloyd's Rep IR 460; [2001] 1 QB 825, referred to.

(b) The hull underwriters did not have the better of the argument that the bank's right to payment under the policy was subject to the exclusive jurisdiction clause. The bank had not asserted its right to payment under the policy in the sense of demanding that the proceeds of the policy be paid to it or to its order. Rather, the bank recognised that it was entitled to the proceeds of the policy and informed the hull underwriters that they could pay the proceeds to Willis and that such payment would be regarded as a good discharge of the hull underwriters' obligation to pay the proceeds to the bank under the loss payable clause. The bank had the right to assert a claim but it did not do so. In any event, the bank would only have been bound by the jurisdiction clause in the event that it had chosen to sue the hull underwriters on the policy and it never did so (*see* para 51).

(c) The bank had not expressly subscribed to the jurisdiction clause. None of the assignment agreement requiring a loss payable clause in the policy, the requirement in the mortgage that the bank be provided with a copy of the policy or the letter of 5 April 2013, contained an express recognition by the bank of the exclusive jurisdiction clause in the policy, and it was accepted that the bank had never said that "we agree to the jurisdiction clause" (*see* para 54);

———*Société financière et industrielle du Peloux v AXA Belgium* Case C-112/03 [2006] Lloyd's Rep IR 676, *Gerling Konzern Speziale Kreditversicherung AG v Amministrazione del Tesoro dello Stato* Case C-201/82 [1983] ECR 2503, distinguished.

(4) The hull underwriters' allegation that misrepresentations made by the bank induced the hull underwriters to enter into the Settlement Agreement with the owners, and the claim for damages as a result of the bank's misrepresentations,

were matters relating to tort within article 7(2) of the Brussels Regulation Recast.

(a) The claim did not constitute a matter relating to insurance falling within the special jurisdiction rules.

(i) The nature of the claim made by the hull underwriters against the bank was so closely connected with the question of the hull underwriters' liability to indemnify in respect of the loss of the vessel pursuant to the policy that it could fairly and sensibly be said that the subject matter of the claim related to insurance and so was governed by article 14 (*see* para 70);

———*Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] Lloyd's Rep IR 93; [1999] 2 AC 127, *The Ikarian Reefer (No 2)* [2000] 1 Lloyd's Rep 129, *Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe* [2016] Lloyd's Rep IR 94, considered; *Brogsitter v Fabrication de Montres Normandes EURL* Case C-548/12 [2014] QB 753, *Profit Investment Sim SpA v Ossi* Case C-366/13 [2016] 1 WLR 3832, distinguished.

(ii) However, under recital 18 to the Regulation, in relation to insurance, only the weaker party was protected by rules of jurisdiction more favourable to his interest than the general rules. In the present case, it was not possible to describe either party to the policy or the bank as "the weaker party". That being so, the special rules for matters relating to insurance did not apply (*see* paras 72 and 73);

———*Vorarlberger Gebietskrankenkasse v WGV-Schwäbishe Allgemeine Versicherungs AG* Case C-347/08 [2010] Lloyd's Rep IR 77, applied.

(b) The English court had jurisdiction over the tort claim.

(i) Whilst there was a factual connection between the claim and the Settlement Agreement, that was not enough to make the claim a matter relating to a contract and so within article 7(1). It therefore followed that the claim related to tort within the autonomous meaning of article 7(2), for actions which sought to establish the liability of the defendant and which were not related to a contract were matters relating to tort (*see* paras 76 and 77);

———*Kalfelis v Bankhaus Schröeder Münchmeyer, Hengst & Co* Case C-189/87 [1988] ECR I-5565, applied; *Brogsitter v Fabrication de Montres Normandes EURL* Case C-548/12 [2014] QB 753, distinguished.

(ii) The claim for damages based upon misrepresentation could be brought in England so long as the "harmful event" occurred in England. The submission by the underwriters that it did because either the damage occurred in England (where the Settlement Agreement was signed and where the US$22million was paid to Willis' bank account in London) or the event giving rise to the damage occurred in London (being the place where the misrepresentations were made and/or the place where the hull underwriters were induced), was not contradicted (*see* para 79);

———*Handelskwekerij Bier BV v Mines de Potasse d'Alsace* Case C-21/76 [1976] ECR I-1735; [1978] QB 798, applied.

(5) The claim in restitution based upon mistake was not within article 7(2). The English court had no jurisdiction, and if it was to be pursued it had to be pursued in the Netherlands where the bank was domiciled (*see* para 78);

———*Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, applied.

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The following cases were referred to in the judgment:

AMT Futures Ltd v Grundmann (QBD) [2016] EWHC 3606 (QB);

Antonio Gramsci Shipping Corporation v Recoletos Ltd (QBD (Comm Ct)) [2012] EWHC 1887 (Comm); [2012] 2 Lloyd's Rep 365;

Antonio Gramsci Shipping Corporation v Stepanovs (QBD (Comm Ct)) [2011] EWHC 333 (Comm); [2011] 1 Lloyd's Rep 647;

BNP Paribas SA v Anchorage Capital Europe LLP (QBD (Comm Ct)) [2013] EWHC 3073 (Comm);

Brogsitter v Fabrication de Montres Normandes EURL Case C-548/12 (CJEU) [2014] QB 753;

Foster v Action Aviation Ltd (QBD (Comm Ct)) [2013] EWHC 2439 (Comm);

Gerling Konzern Speziale Kreditversicherung AG v Amministrazione del Tesoro dello Stato Case C-201/82 (ECJ) [1983] ECR 2503;

Handelskwekerij Bier BV v Mines de Potasse d'Alsace Case C-21/76 (ECJ) [1976] ECR I-1735; [1978] QB 798;

Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky (CA) [2013] EWCA Civ 784; [2013] 2 Lloyd's Rep 242;

Jordan Grand Prix Ltd v Baltic Insurance Group (CA) [1998] Lloyd's Rep IR 180; (HL) [1999] Lloyd's Rep IR 93; [1999] 2 AC 127;

Kalfelis v Bankhaus Schröeder Münchmeyer, Hengst & Co Case C-189/87 (ECJ) [1988] ECR I-5565;

Kleinwort Benson Ltd v Glasgow City Council (HL) [1999] 1 AC 153;

Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe (CA) [2015] EWCA Civ 598; [2016] Lloyd's Rep IR 94;

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2) (CA) [2000] 1 Lloyd's Rep 129;

Profit Investment Sim SpA v Ossi Case C-366/13 (CJEU) [2016] 1 WLR 3832;

Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC (The Mount I) (CA) [2001] EWCA Civ 68; [2001] Lloyd's Rep IR 460; [2001] 1 QB 825;

Shogun Finance Ltd v Hudson (HL) [2003] UKHL 62; [2004] 1 Lloyd's Rep 532; [2004] 1 AC 919;

Société financière et industrielle du Peloux v AXA Belgium Case C-112/03 (ECJ) [2006] Lloyd's Rep IR 676;

Standard Steamship Owners' P&I Association (Bermuda) Ltd v GIE Vision Bail (QBD (Comm Ct)) [2004] EWHC 2919 (Comm); [2005] 1 All ER (Comm) 618;

Vorarlberger Gebietskrankenkasse v WGV-Schwäbishe Allgemeine Versicherungs AG Case C-347/08 (ECJ) [2010] Lloyd's Rep IR 77.

This was an application by the third defendant, Credit Europe Bank NV, to set aside service of proceedings on it by the claimant hull underwriters.

Peter MacDonald Eggers QC and Sandra Healy, instructed by Norton Rose Fulbright LLP, for the hull underwriters; Steven Berry QC, instructed by Campbell Johnston Clark Ltd, for the bank.

The further facts are stated in the judgment of Teare J.

Thursday, 27 July 2017

JUDGMENT

Mr Justice TEARE:

1. On 3 April 2013 the vessel *Atlantik Confidence* ("the vessel") sank in the Gulf of Aden. It has been held by this court in a limitation action commenced by her owners, the first defendant, that the vessel was deliberately sunk by the master and chief engineer at the request of Mr Agaoglu, the alter ego of the owners: see *The Atlantik Confidence* [2016] 2 Lloyd's Rep 525. In this action the hull underwriters of the vessel, who paid out on the hull and machinery policy ("the policy") in August 2013 but who now consider, on further investigation, that the vessel was deliberately cast away by her owners, claim recovery of the insurance proceeds which were paid to owners and the vessel's mortgagees, Credit Europe Bank NV, the third defendant ("the Bank").

2. The Bank is domiciled in the Netherlands. These proceedings were served on the Bank there. The Bank maintains that under the Brussels Regulation this court has no jurisdiction to hear and determine the claim against the Bank. It must be sued in the courts of the Netherlands where it is domiciled. The hull underwriters maintain that this court has such jurisdiction for three reasons. First, it is said that Bank is bound by a Settlement Agreement which confers exclusive jurisdiction on this court. Secondly, it is said that the Bank is bound by the exclusive jurisdiction clause in the policy. Thirdly, it is said that the claims brought against the Bank are matters which relate to tort, delict or quasi-delict and the harmful event occurred in England. This is the judgment of the court upon the Bank's challenge to the jurisdiction.

The financing of the vessel

3. On this subject there was evidence from Mr Tayfun who is currently, and has been since 2006, Division Director of the Corporate Credits Department of the Bank. He was not the designated relationship or account manager for the owners. They were Mr Urer and Mr Erguler of the Bank's branch in Malta. In addition there was evidence from Mr Nazlicicek who managed the owners' account in coordination with the Malta branch. Mr Tayfun had infrequent contact with Mr Agaoglu. Mr Nazlicicek had frequent contact with him.

4. By a loan agreement dated 9 March 2010 (but subsequently amended) the Bank lent US$38.2 million to the owners and to Capella Shipping Ltd, the owners of *Atlantik Glory*, to re-finance the purchase of the vessel and *Atlantik Confidence*. The loan was secured by a first mortgage on both vessels and by a deed of assignment which included an assignment of the insurances on the vessels. Additional security included a personal guarantee from Mr Agaoglu and first and second mortgages on real estate in Istanbul owned by Mr Agaoglu.

5. By a further loan agreement (entitled the Framework Credit Agreement) dated 14 March 2011 the Bank lent US$3.5 million to the owners for working capital and enabling overdraft. This loan was secured by a second mortgage and a second deed of assignment.

6. At the beginning of April 2013 the debt against the vessel under the first loan was just under US$10 million, namely US$9,990,158, and under the second loan just under US$3.9 million, namely US$3,899,704.86. The debt against *Atlantik*

Glory under the first loan was just under US$25 million, namely US$24,906,136.39. Those sums included missed repayment of principal in the sum of US$723,280 and missed repayment of interest in the sum of US$685,068.

The policy

7. Evidence of the insurance on the vessel was given Mr Zavos, a solicitor with Norton Rose Fulbright LLP who acts for the hull underwriters. By a hull and machinery policy made through Willis as broker between the hull underwriters and the owners (together with the vessel's managers, the second defendants) the vessel was insured for the period of 12 months from 15 October 2012 at a value of US$22 million. The policy identified the Bank as mortgagee. By endorsement no 6 dated 8 February 2013 there were attached notices of the assignments and loss payable clauses in favour of the Bank.

Events after the loss of the vessel

8. On 3 April 2013 the vessel was lost.

9. On 4 April 2013 a meeting took place in Amsterdam at the Bank's offices. It was attended by Mr Agaoglu, Mr Tayfun, Mr Nazlicicek and (for part of the time) Mr Basbay, the Bank's Chief Executive Officer. Mr Agaoglu disclosed that his vessels were having difficulty paying their operational costs. In particular sums were owed to bunker suppliers, engine manufacturers and other third parties. A list of the most prominent claims amounted to about US$1.6 million. The Bank agreed to pay those debts between 9 and 11 April 2013. This was formalised by a US$1.7 million General Credit Agreement dated 8 April 2013.

10. The loss of the vessel was "touched upon" at the meeting. Mr Agaoglu described the casualty in general terms. Mr Agaoglu told the Bank that the amount which would be paid out was the insured value of US$22 million. This surprised Mr Tayfun greatly. He expected that the amount to be paid would be the vessel's market value. He further understood that the insurance claim would be presented by the owners without any involvement from the Bank.

11. There was discussion as to how the insurance proceeds would be applied. Mr Agaoglu wanted, first, to pay the full debt due against the vessel and, secondly, to settle operational debts and, thirdly, for the remaining balance to be disbursed to his companies to settle other debts. The Bank reluctantly agreed to allow about US$4 million to settle operational debts of other vessels provided that about US$2 million would be paid in respect of the debts against *Atlantik Glory*

12. By an email dated 4 April 2013 the owners asked the Bank to provide a letter formally authorising the hull underwriters to pay the proceeds of the insurance claim to the brokers, Willis. Such a letter was executed on behalf of the Bank on 5 April 2013. The letter was addressed to the "Underwriters concerned" and was headed "Re: Atlantik Confidence/30 March 2013 Fire, explosion and subsequently sank". It provided as follows:

> "We hereby authorise you to pay to Willis Ltd all claims of whatsoever nature arising from the above mentioned casualty provided that (i) there are no amounts due under the policy and (ii) Credit Europe Bank NV is the sole loss payee of the policy.
>
> We agree that settlement of such amounts in account or otherwise with Willis Ltd, shall be your absolute discharge in respect of such amounts paid.
>
> We further agree that settlement by Willis Ltd of such amounts to the USD denominated account with number . . . in our name held with Standard Chartered Bank or otherwise to the account of Kairos Shipping Ltd, with IBAN . . . held with Credit Europe Bank NV, Malta Branch shall be an absolute discharge to Willis Ltd in respect of such amounts paid."

13. On 18 April 2013 the Bank asked the owners for the current status of the claim. The owners replied that day saying that they would ask their lawyer for a weekly report but that correspondence could not be shared because it was "private and confidential".

14. It appears that settlement discussions took place between the owners and the hull underwriters. Willis indicated in an email dated 29 July 2013 that it understood that Clyde would sign the Settlement Agreement on "Owners'/Bank's behalf". This appears to have been a misunderstanding for on 6 August 2013 an agreement was signed by Clyde & Co LLP as agents only on behalf of "the Assureds" (defined as being the owners and the managers) and by Norton Rose Fulbright LLP as agents only on behalf of the underwriters. The agreement provided as follows:

> "AGREEMENT
>
> 'ATLANTIK CONFIDENCE'
>
> This agreement is made the 6th day of August 2013
>
> BETWEEN:
>
> (1) The UNDERWRITERS more particularly described in schedule 1 hereto ('Underwriters') for their respective several proportions;
>
> (2) KAIROS SHIPPING LIMITED of 5/2 Merchants Street, Valletta VLT 1171, Malta, as owners of the Vessel (as defined below), ZIGANA GEMI ISLETMELERI AS of ltri Sokak, No 10/A, Balmucu 34349, Istanbul, the Republic of Turkey as managers of the Vessel

and their associated, affiliated and subsidiary companies for their respective rights and interests (hereinafter together the 'Assureds').

WHEREAS:

(A) The Assureds purchased hull and machinery insurance from the Underwriters for 12 months at 15 October 2012 in respect of the 'ATLANTIK CONFIDENCE' (the 'Vessel') in the sum of US$22,000,000 on the terms and conditions appearing in policy no. B08019389M12 and the endorsements thereto (the 'Insurance').

(B) The Insurance was placed on behalf of the Assureds by Willis Limited ('Willis'). Credit Europe Bank NV of Tower Road 143/2. Sliema SLM1064, Malta (the 'Bank') was mortgagee of the Vessel and loss payee under the Insurance. The Bank have consented to Underwriters making payment to Willis in accordance with a letter dated 5 April 2013, a copy of which is annexed as schedule 2 hereto.

(C) The Vessel suffered a fire and sank off the coast of Oman in March/April 2013 (the 'Casualty'). The Assureds advanced claims under the Insurance, inter alia, in respect of damage to and/or loss of the Vessel (the 'Claims').

(D) The parties wish to resolve all claims of whatsoever nature in relation to the Vessel and the Casualty upon the terms and conditions set out below.

NOW IN CONSIDERATION OF THE MUTUAL OBLIGATIONS AND PROMISES HEREINAFTER CONTAINED, IT IS HEREBY AGREED AS FOLLOWS:

1 Payment

1.1 Underwriters shall pay to the Assureds their due proportions as more particularly set out in schedule 1 hereto of US$22,000,000 (the 'Settlement Sum').

1.2 Each Underwriter shall pay its due proportion of the Settlement Sum to Willis on behalf of the Assureds within seven (7) banking days of this agreement. Such payment whether in account or otherwise, shall completely discharge and release each such paying Underwriter for its respective proportion of the Settlement Sum and as described in clause 2 below. Should such payment not be made within seven (7) banking days, interest shall be payable on such amount as may be outstanding from the date following the due date until the date of payment at the rate of 3 per cent per annum.

1.3 The Assureds accept the Settlement Sum in full and final settlement of all and any claims of whatsoever nature and howsoever arising in connection with the damage to and/or loss of the Vessel and/or the Casualty and/or the Claims (including but not limited to the way in which the Claims were handled) and/or the Insurance against the Underwriters which they had, now have or may have hereafter (whether past, present or future and whether known or unknown), including but not limited to claims for loss of or damage to the Vessel, salvage, general average, sue and labour, third party liabilities, principal, interest, costs and legal costs.

2 Release

Upon payment of each Underwriter's due proportion of the Settlement Sum to Willis, the Assureds completely discharge and release each such Underwriter and its respective directors, officers, servants, employees, adjusters, agents, contractors, solicitors, counsel and experts from all and any claims of whatsoever nature and howsoever arising in connection with the damage to and/or loss of the Vessel and/or the Casualty and/or the Claims (including but not limited to the way in which the Claims were handled) and/or the Insurance against the Underwriters which they had, now have or may have hereafter (whether past, present or future and whether known or unknown), including but not limited to claims for loss of or damage to the Vessel, salvage, general average, sue and labour, third party liabilities, principal, interest, costs and legal costs.

3 Warranties

3.1 The Assureds warrant that, subject to the interests of the Bank:

(a) they are the only parties entitled to the Settlement Sum and no other party has any legal or equitable interest in any claims of whatsoever nature against Underwriters; and

. . .

3.4 The signatories to this agreement warrant that they have proper authority and legal capacity to execute this agreement in all respects and to bind the party on whose behalf they are signing.

. . .

5 Law and Jurisdiction

5.1 This agreement and any dispute or claim arising out of or in connection with it (including any non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of England.

5.2 The parties irrevocably submit to the exclusive jurisdiction of the High Court of Justice in England in respect of any disputes or claims that may arise out of or in connection with this agreement (including any non-contractual disputes or claims).

Signed this 6th day of August 2013."

15. Mr Tayfun and Mr Nazlicicek have both stated that the Bank was not involved

in the negotiations or in the settlement of the insurance claim.

16. On or around 16 August 2013 the Bank received US$21,970,272.74 in Malta from Willis. US$1,676,129.18 was transferred into the Capella account as part repayment of the debt against *Atlantik Glory*. US$20,294.143.56 was transferred into a Kairos account. Of that sum US$11,757,095 was used to discharge the debt against the vessel on the first loan agreement and to repay the overdraft incurred following the meeting on 4 April 2013. A further sum of US$3,973,496.53 was used to discharge the debt against the vessel on the second loan agreement. On 20 and 21 August 2013 US$4,116,428.29 was used to make other payments as agreed with Mr Agaoglu, including a payment of US$1,260,000 to the account of White Funnel, another of Mr Agaoglu's companies, which Mr Tayfun believes was used to discharge other debts including personal debts of around US$750,000. On 23 August 2013 a further US$447,123 was used to part discharge the debt against *Atlantik Glory*.

Was the Bank party to the Settlement Agreement?

17. Mr MacDonald Eggers QC, on behalf of the hull underwriters, submitted that the owners entered into the Settlement Agreement not only on their own behalf but also as agents for the Bank. If that were so then the exclusive jurisdiction agreement within the Settlement Agreement amounted to an agreement within article 25 of the Brussels Regulation with the result that this court has jurisdiction in respect of the hull underwriters' claim against the Bank notwithstanding that the Bank is domiciled in the Netherlands.

18. Mr Berry QC, on behalf of the Bank, submitted that in determining whether there was an agreement within article 25 there had to be, in accordance with "independent EU principles" governing the concept of an agreement in writing "clear and precise written manifestation, demonstration, guarantee or assurance of real and actual consensus or consent in fact by the Bank to jurisdiction": see for example *Dicey, Morris & Collins on the Conflict of Laws*, 15th Edition, at paras 12-128 and 12-136.

19. Mr MacDonald Eggers QC accepted that proposition but submitted that where an agency relationship is relied upon the existence of such relationship is to be determined in accordance with English law whereas the autonomous concept of consensus applied only to the agreement made by the agent. This distinction is apparent from three cases: *Standard Steamship Owners' P&I Association (Bermuda) Ltd v GIE Vision Bail* [2005] 1 All ER (Comm) 618 at paras 51 to 54 per Cooke J, *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] 1 Lloyd's Rep 647 at paras 44 to 46 per Burton J and *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at paras 58 to 61 per Males J.

20. Mr Berry QC submitted that English law is irrelevant but in the light of the consistent approach of this court since 2005 as revealed by the three cases to which I was referred I shall follow that approach and shall therefore determine whether, on the ordinary principles of English law, the owners, in making the Settlement Agreement with the hull underwriters, did so on behalf of the Bank.

21. Since this is a jurisdictional question the question is whether the hull underwriters have a good arguable case that the Bank is party to the Settlement Agreement in the sense of having the better of the argument: see *Joint Stock Company "Aeroflot-Russian Airlines" v Berezovsky* [2013] 2 Lloyd's Rep 242 at paras 48 to 50 per Aikens LJ.

22. Mr MacDonald Eggers QC submitted that the letter of 5 April 2013 signed by the Bank was authority given by the Bank to the owners to settle the claim under the policy on behalf of the Bank. He said that this was the conclusion to be drawn from the following circumstances: (i) the owners were unable to settle the claim without the Bank's consent; (ii) the Bank was the only person entitled to claims proceeds in respect of a total loss; (iii) the Bank was the only person who could give the hull underwriters a good discharge; (iv) the owners requested the Bank to provide the letter dated 5 April 2013; (v) the letter was provided and so the owners must have acted as the agents of the Bank in presenting it to the hull underwriters; and (vi) the Bank must have known that the owners would settle the claim. I shall consider each of these circumstances but before doing so it is necessary to consider the terms of the letter itself.

23. The first matter to be observed is that the letter does not purport to be a grant of authority by the Bank to the owners to settle the claim under the policy. The letter is addressed to the hull underwriters and authorises them to pay claims under the policy to Willis, the broker, and states that settlement of such amounts in account or otherwise with Willis shall be "your absolute discharge". Since the Bank were assignees of the policy and loss payees under the policy the hull underwriters would obviously require such assurance before making any payment to Willis. The owners must have appreciated that and realised that without a letter giving such discharge they would be unable to obtain any payment under the policy. The Bank provided the letter to the owners and must have appreciated that it would, at an appropriate time, be placed before the hull underwriters.

24. Mr MacDonald Eggers QC submitted that the owners were unable to settle the claim without

the Bank's consent. I accept that the owners would not be able to persuade the hull underwriters to make a payment to Willis without the Bank having given authority to the hull underwriters to do so. The latter would wish to ensure that such payment would be accepted by the Bank as good discharge of their payment obligation. I also accept that under the terms of the mortgage, clause 5.14, the owners were contractually obliged not to settle a claim without the prior written consent of the Bank. So if the owners settled without the Bank's consent they would be in breach of the mortgage. But were the owners unable to settle the claim without the Bank's consent?

25. If there had been a legal assignment of the policy pursuant to section 50 of the Marine Insurance Act 1906 or section 136 of the Law of Property Act 1925 then the owners would have lost the right to make a claim on the policy. They could in such circumstances only make a claim on the policy in the name of the Bank. There was discussion before me as to whether the assignment in the present case was a legal or equitable assignment. However, Mr MacDonald Eggers QC accepted that whether or not the assignment was legal in the present case was not critical to his argument and therefore he did not press his submission that the assignment was legal. Since Mr Berry QC did not accept that the assignment was legal I think that I must proceed on the basis that the assignment was equitable, not legal. Since the assignment predated the loss and was an assignment by way of security for payment of the owners' indebtedness to the Bank the assignment may well have been equitable only. Mr MacDonald Eggers QC pointed to the terms of the General Credit Agreement dated 8 April 2013 (after the loss) and suggested that they indicated that the assignment was absolute and therefore legal (for example clause 10.7 provided that the "insurance claims paid by the insurer in case of damages shall belong to the Bank"). He also pointed to what counsel for the owners had said to the court in June 2013 when seeking the discharge of freezing orders obtained by the cargo interests ("the proceeds of the Hull and machinery policy were not assets of the owners . . . the owners have nothing but a worthless equity of redemption"). However, as I have indicated, the argument that the assignment was legal was not pressed. On the basis that the assignment was equitable the owners retained a right to pursue a claim under the policy in their own name. I consider that they could settle the claim without the Bank's consent; though that would be a breach of the mortgage and they would need the Bank to agree that payment by the hull underwriters to Willis would be a good discharge of their payment obligations. That agreement was given by the Bank in the letter dated 5 April 2013 and such letter probably also amounted to consent for the purposes of the mortgage. But it does not follow that the claim must have been made on behalf of the Bank.

26. Mr MacDonald Eggers QC's next point was that the Bank was the only person entitled to payment on a total loss. The Loss Payable Clause provided that claims in respect of a total loss shall be "payable to the Mortgagee up to the Mortgagee's mortgage interest". Thus it is correct that claims for a total loss were payable to the Bank (so long as the amount of the claim was at least equal to the owners' indebtedness) but I do not consider that this point, by itself, materially advances the debate. In the absence of a legal assignment the owners could still make a claim on the policy in their own name. But before any admitted or settled claim in respect of a total loss was paid the hull underwriters would need to be assured that such payment was accepted by the Bank as a good discharge of the hull underwriters' payment obligations. The letter dated 5 April 2013 provided that assurance.

27. Mr MacDonald Eggers QC's next point was that only the Bank could give a good discharge. That is true. It reflects the terms of the loss payable clause but for the reasons I have given does not mean that the owners cannot make a claim on the policy in their own name.

28. Mr MacDonald Eggers QC then relied upon the circumstance that the Bank and the owners discussed the policy and the treatment of the proceeds. This is a reference to the discussions on 4 April 2013, the day after the vessel was lost. It is true that the policy and the treatment of the proceeds were discussed by the Bank and the owners. The parties to those discussions both contemplated that a claim would be made on the policy and reached agreement as to how the proceeds would be treated. The Bank, if it had wished to do so, could have instructed the owners to make a claim on the policy on its behalf. It was an equitable assignee of the policy and loss payee. But there is no direct evidence from those present at the meeting that it did so. On the contrary, Mr Tayfun has said that:

> "I do not recall at any point during the 4 April meeting, or at all, any suggestion that the [owners or managers] would present or negotiate . . . the Insurance Claim on behalf of the Third Defendant. It was always my understanding that the [owners and/or managers] were entitled to and would do that directly with the [hull underwriters] on their own behalf. Our only concern was that the sums to be received by them would be used to discharge their debts and those of other group companies."

29. After the meeting (and after the letter dated 5 April 2013 had been provided) the Bank (in the

person of Mr Urer) asked the owners for information regarding the progress of the insurance claim. That request is consistent with the Bank having given authority to the owners to make a claim on its behalf but the existence of such authority is not a necessary inference from the request. Mr Toran replied saying that Mr Tayfun had made a similar request that day. He said that he would ask the owners' lawyer for a weekly report (there is no evidence that such reports were made available) and then said:

> "Unfortunately, it is not possible for me to share all the correspondence we had with the insurance since they are "private and confidential".

30. That remark sits unhappily with the suggestion that the owners were making a claim under the policy on behalf of the Bank.

31. Mr MacDonald Eggers QC's next point was that the owners must have acted as the agent of the Bank in presenting the letter dated 5 April 2013 to the hull underwriters. I agree that they must have done so. But that circumstance does not change the meaning of the letter or indicate by itself, that in making a claim on the policy the owners were doing so on behalf of the Bank.

32. However, Mr MacDonald Eggers QC's points must be considered together, not in isolation. When they are considered together it is arguable that by signing the letter dated 5 April 2013 and by providing it to the owners in circumstances where the Bank was the total loss payee and knew that a claim was to be made on the policy and in due course settled, to which settlement the Bank consented, it is to be inferred that the Bank authorised the owners to make and settle the claim on its behalf. But I do not regard that as an inevitable inference and it is contrary to Mr Tayfun's understanding of the position as expressed in his evidence.

33. My conclusion as to the letter dated 5 April 2013 is that the hull underwriters do not have the better of the argument on their submission that the Bank, by signing the letter dated 5 April 2013, authorised the owners to settle the insurance claim on their behalf. On the contrary, on the evidence before the court, including in particular the evidence of Mr Tayfun, the Bank has the better of the argument that it did not, by its letter dated 5 April 2013, confer authority upon the owners to settle the claim on its behalf.

34. Neither its terms nor the context in which the letter was written require the court to infer (or, as it was put by Mr MacDonald Eggers QC, "compel the conclusion") that the Bank must have given the owners authority to settle the claim under the policy on its behalf. The Bank could have done so because it was the assignee of the policy and the loss payee. But neither the terms of the letter nor its context require the court to infer that that is what must have happened. It seems to me that the terms of the letter and the context are consistent with, as Mr Tayfun puts it, the Bank's understanding that the owners would deal with the hull underwriters on their own behalf but being concerned to ensure that the sums received by the owners from the policy would be used to discharge the owners' debts to the Bank.

35. The terms of the Settlement Agreement itself must now be considered. The first point to note is that the agreement is described as being between the hull underwriters and the owners and managers of the vessel "hereinafter together the Assureds". The recitals recorded that the Bank was the mortgagee of the vessel and loss payee under the insurance. The recitals also recorded that the Bank had consented to the hull underwriters making payment to Willis in accordance with the letter dated 5 April 2013. Further, the recitals recorded that the Assureds, that is, the owners and managers, had advanced claims under the insurance. Finally, the recitals recorded that "the parties hereto", that is, the hull underwriters and the Assureds, wish to resolve all claims of whatsoever nature in relation to the vessel upon the terms and conditions set out.

36. These matters contain no suggestion that the Bank is a party to the agreement. The Bank is mentioned, but as a mortgagee of the vessel and loss payee under the insurance. The definition of the parties as being the hull underwriters, on the one hand, and the owners and managers as Assureds, on the other hand, strongly suggests, at the least, that the Bank is not a party to the agreement. The agreement was signed by Clyde & Co LLP "as agents only for and on behalf of the Assureds".

37. Mr Berry QC submitted that the terms of the agreement were inconsistent with the Bank being party. Mr MacDonald Eggers QC submitted that the Bank is a disclosed principal and so may sue upon the agreement which was entered into by the owners on the Bank's behalf. A party may sign a contract both in its own name and on behalf of its principal.

38. Before considering who has the better of the argument on this question it is necessary to note certain of the substantive terms of the agreement.

39. Clause 1.1 provides that the hull underwriters shall pay "to the Assureds" their due proportions of the Settlement Sum. That strongly suggests that the Bank was not a party to the agreement because payment was to be made to the owners and managers, the Assureds as defined in the agreement. In like manner clause 1.2 provides that each underwriter shall pay its due proportion of the Settlement Sum to Willis "on behalf of the Assureds" and clause 1.3 provided that "the Assureds" shall accept the Settlement Sum in settlement of all claims of whatsoever nature.

40. Clause 3.1 provided that the Assureds warrant "subject to the interests of the Bank, that they are the only parties entitled to the Settlement Sum and that no other party has any legal or equitable interest in any claims of whatsoever nature against Underwriters". Mr MacDonald Eggers QC submitted that this clause recognised the Bank's "primary" or "superior" interest. I agree that this clause, when read with the recital which notes that the Bank is a mortgagee of the vessel and loss payee under the policy, recognises that the Bank has a right to the proceeds of the policy. But it does not necessarily follow, as it was put by Mr MacDonald Eggers QC, that the Settlement Sum is paid to Willis on behalf of the owners on behalf of the Bank. The agreement can work if the Settlement Sum is paid to Willis on behalf of the owners (as clauses 1.1 and 1.2 appear expressly to state), the Bank having agreed on 5 April 2013 that payment by the underwriters to Willis will be a good discharge of the underwriters' obligations under the loss payable clause and being content that the proceeds would be applied in the manner agreed between the Bank and the owners.

41. Clause 5.2 provides that "the parties" irrevocably submit to the exclusive jurisdiction of the High Court. Having regard to the definition of the parties, clause 5.2 does not appear to contain a promise by the Bank to submit disputes to the English court.

42. Mr Berry QC submitted that where the terms of an agreement unequivocally and exhaustively identify the parties to it, it is impermissible to seek to contradict it. I accept that submission. Thus in in *Foster v Action Aviation Ltd* [2013] EWHC 2439 (Comm) at paras 131 to 135 Hamblen J (as he then was) said that where a contract identifies the principal upon whose behalf an agent enters a contract, it is not open to a party to suggest that the agent entered the contract on behalf of someone other than the identified principal. If the principal is not identified then, as Lord Hobhouse observed in *Shogun Finance Ltd v Hudson* [2004] 1 Lloyd's Rep 532; [2004] 1 AC 919 at para 49, "where the person signing is also acting as the agent of another, evidence can be adduced of that fact".

43. The first question which therefore arises in the present case is whether the terms of the agreement unequivocally and exhaustively define the parties to it. I consider that they do, or that the Bank has at any rate the better of the argument that they do. The agreement purports to define the parties to it, namely the hull underwriters and the owners and managers. Such clear definition of the parties is a cogent indication that they and no one else were the parties to the Settlement Agreement. Further, the recitals expressly noted the role of the Bank as mortgagee and loss payee and referred to the Bank as having consented to the hull underwriters making payment to Willis by their letter dated 5 April 2013. Had it been intended that the Bank was also party to the Settlement Agreement the parties would surely have made that clear. In those circumstances the natural construction of the terms of the agreement (such as clauses 1, 3 and 5) which referred to "the Assured" is that they did not include the Bank.

44. But if I am wrong in that conclusion and the terms of the agreement do not unequivocally and exhaustively define the parties to it then the second question arises, namely, is there evidence (on which the Bank has the better of the argument) that the owners entered into the agreement as agents on behalf of the Bank? Mr MacDonald Eggers QC submitted that such evidence was to be found in the letter dated 5 April 2013 construed in its factual context. I have already considered this and have been unable to accept that the hull underwriters have the better of the argument on it.

45. It follows, in my judgment, that the hull underwriters are unable to establish a good arguable case in the sense of having the better of the argument that this court has jurisdiction by reference to the exclusive jurisdiction clause in the Settlement Agreement.

46. Mr MacDonald Eggers QC submitted that the "better of the argument" gloss is to be used carefully where the jurisdictional issue is part and parcel of the ultimate merits of the trial. He referred to *Antonio Gramsci Shipping Corporation v Recoletos Ltd* [2012] 2 Lloyds Rep 365 at para 45. That was a case where there was a stark contrast between opposing witnesses. There is no such contrast in the present case but there is a contrast between the inference which the hull underwriters ask the court to draw and the evidence of Mr Tayfun. If that circumstance means that the court must consider whether the hull underwriters' case is of sufficient strength to allow the case to take jurisdiction then I do not consider that it is.

The exclusive jurisdiction clause in the policy

47. The policy contains an agreement by the parties to submit to the exclusive jurisdiction of the English court. Mr MacDonald Eggers QC submitted that there were three ways in which that clause might bind the Bank. The first is where there was a complete succession of the Bank to the rights and obligations of the owners under the policy. That was not suggested in the present case: see *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC (The Mount I)* [2001] Lloyd's Rep IR 460; [2001] 1 QB 825 at paras 58 to 59, 73,75 and 83 per Mance LJ. The second is where an assignee seeks to enforce the terms of the policy for his own benefit and is subject to such conditions

as would apply to the assignor enforcing the policy. It was suggested that that principle applied in the present case. The third is where a person signifies his consent to a policy. It was said that the Bank had signified its consent to the policy.

The conditional benefit analysis

48. This principle is expressed in *Jurisdiction and Arbitration Agreements and their Enforcement*, 3rd Edition, by Joseph at para 7.23 in these terms:

> ". . . in the case of an assignment of a right which as a matter of English law is subjected to the obligation to bring proceedings in a chosen forum, the right can only be enforced or asserted subject to the choice of forum obligation . . ."

49. Mr MacDonald Eggers QC submitted that in the present case the Bank asserted its right to the payment under the policy when it signed the letter dated 5 April 2013. Mr Berry QC accepted that if an assignee chooses to sue on the assigned rights it would be bound to do so only in accordance with any jurisdiction clause in the assigned contract. But, he said, the Bank did not choose to sue as assignee or loss payee under the policy.

50. Mr MacDonald Eggers QC does not say that the Bank has sued on the assigned rights but that the Bank has sought to enforce the terms of the policy by asserting its right to payment under the policy when issuing the letter dated 5 April 2013 to the hull underwriters.

51. By that letter the Bank authorised the hull underwriters to pay claims to Willis (provided that the Bank was the sole loss payee of the policy) and stated that such payment would be a discharge of the hull underwriters' obligation to pay claims to the Bank under the loss payable clause in the policy. The Bank does not, it seems to me, thereby assert its right to payment under the policy in the sense of demanding that the proceeds of the policy be paid to it or to its order. Rather, the Bank recognises that in certain circumstances (where it is the sole loss payee of the policy) the Bank is entitled to the proceeds of the policy and informs the hull underwriters that in those circumstances they may pay the proceeds to Willis and that such payment will be regarded as a good discharge of the hull underwriters' obligation to pay the proceeds to the Bank under the loss payable clause. The Bank had the right to assert a claim in the sense of demanding that the proceeds be paid to it or its order but the terms of the letter do not suggest that it did so. In any event, the Bank would only have been bound by the jurisdiction clause in the event that it chose to sue the hull underwriters on the policy and it never did so. In those circumstances the hull underwriters do not have the better of the argument that the Bank is bound by the jurisdiction clause in the policy.

The signifying of consent to the policy

52. On this part of the case Mr MacDonald Eggers QC relies on two European authorities. The first is *Société financière et industrielle du Peloux v AXA Belgium* Case C-112/03 [2006] Lloyd's Rep IR 676 in which the Court of Justice held that a beneficiary under a contract who has not "expressly subscribed" to a jurisdiction clause in the contract is not bound by that clause (see para 43). The second is *Gerling Konzern Speziale Kreditversicherung AG v Amministrazione del Tesoro dello Stato* Case C-201/82 [1983] ECR 2503 in which the European Court of Justice held that where in a contract of insurance a clause conferring jurisdiction is inserted for the benefit of the insured who is not a party to the contract but a person distinct from the policy holder, it must be regarded as valid within the meaning of article 17 of the Convention provided that, as between the insurer and the policy holder, the condition as to writing laid down therein has been satisfied and provided that the consent of the insurer [which Mr MacDonald Eggers QC says must be a mistake for insured] in that respect has been "clearly and precisely manifested" (see para 20).

53. Thus the question is whether the Bank can be said to have "expressly subscribed to the jurisdiction clause" or that its consent in that respect has been "clearly and precisely manifested".

54. Mr MacDonald Eggers QC submitted that the Bank signified its consent to the policy by reason of: (i) the assignment agreement requiring a loss payable clause in the policy; (ii) the requirement in the mortgage that the Bank be provided with a copy of the policy; and (iii) by the terms of the letter dated 5 April 2013. None of those contain an express recognition by the Bank of the exclusive jurisdiction clause in the policy and Mr MacDonald Eggers QC accepted that he could not suggest that the Bank had ever said that "we agree to the jurisdiction clause". In those circumstances I do not understand how it can be said that the Bank had "expressly subscribed to the jurisdiction clause" or that its consent in that respect has been "clearly and precisely manifested". At any rate the Bank has much the better of the argument on this point.

Tort; article 7(2) of the Brussels Regulation

55. Article 7(2) provides that a person domiciled in a member state may be sued in another member state "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur". Mr MacDonald Eggers QC submitted that the claims in the present case fall "squarely within" the scope of article 7(2). However, he accepted that he had also to establish that the hull underwriters' claim was not a "matter relating to insurance".

If it were then, pursuant to article 14 an insurer may only bring proceedings in the courts of the member state in which the defendant is domiciled, "irrespective of whether he is the policyholder, the insured or the beneficiary". Mr Berry QC said that the Bank was a beneficiary, as assignee and loss payee.

56. It is therefore necessary to summarise the nature of the hull underwriters' claims. In the particulars of claim served on 5 May 2017 it is alleged (at para 52) that in presenting the claim, the owners and managers (acting on their own behalf and on behalf of the Bank) made certain representations, in particular, that the vessel was lost by a peril insured against under the policy. It is further alleged (at para 54) that by the letter dated 5 April 2013 from the Bank to the underwriters, the Bank made or adopted the same representations. It is then alleged (at para 55) that in reliance upon the representations the underwriters entered into the Settlement Agreement of 6 August 2013. The underwriters then say (at para 59) that the vessel was not lost by reason of a peril insured against but by the wilful misconduct of the owners and managers and full particulars of such misconduct are given (at para 60). The alleged misrepresentations are said to have been made deliberately and knowingly (para 65(1)) or in breach of a duty of care (para 65(2)) or without reasonable grounds to believe they were true (para 65(3)). The Bank is said to have adopted the representations and to be vicariously liable for the misrepresentations (para 66(4)). Further or alternatively, there was a unilateral mistake, namely, that the underwriters mistakenly believed that the vessel was lost by a peril insured against (see para 66).

57. With regard to remedies the underwriters seek rescission of the Settlement Agreement, restitution of the Settlement Sum and/or damages, including the expenses of handling and investigating the claim under the policy.

58. Mr MacDonald Eggers QC relied upon the European decision of *Brogsitter v Fabrication de Montres Normandes EURL* Case C-548/12 [2014] QB 753 (a case which concerned the meaning of "matters relating to contract") to submit that the "matters relating to insurance" encompasses claims where the purpose of the claim is the enforcement of a right under an insurance contract or the determination of a dispute as to the rights and liabilities under that contract such that consideration of the insurance contract is indispensable to the determination of the claim against the relevant defendant. It was said that a loose connection with an insurance contract will not suffice for principled boundaries must have been intended so that there can be no overlap with "claims relating to contract" or "claims relating to tort".

59. Mr Berry QC submitted that the phrase "matters relating to insurance" should be given a broad and inclusive interpretation. He said, relying upon the European decision of *Profit Investment Sim SpA v Ossi* Case C-366/13 [2016] 1 WLR 3832 (another case dealing with "matters relating to contract") at para 55, that a "but for" test was appropriate. Where, if there had been no insurance, there would be no claim, the matter relates to insurance.

60. I am hesitant to base my decision on those cases which do not concern the meaning of the phrase "matters relating to insurance".

61. There are three English cases which consider the phrase "matters relating to insurance". Although the meaning of "matters relating to insurance" will no doubt have an autonomous meaning and will not be dependent upon national laws I consider it helpful to look at those English cases for the guidance they give in circumstances where I was not referred to any European case which discussed the autonomous meaning of the phrase "matters relating to insurance".

62. The first English case is *Jordan Grand Prix Ltd v Baltic Insurance Group* [1999] 2 AC 127. In that case a claim was made on a policy by Jordan in respect of its liability for bonus payments promised to its staff in the event that it finished in the first six of the Formula One championship of 1994. The insurer denied liability alleging that the bonus agreement was fraudulent. The insurer also counterclaimed for damages caused by an alleged fraudulent conspiracy. The issue before the court was whether it had jurisdiction. The initial question was whether the counterclaim was a matter relating to insurance within the meaning of article 11 (now article 14) of the Brussels Regulation. At first instance Langley J had said it was: "the whole issue between the parties arises from the alleged insurance and whether it is binding and effective". The Court of Appeal agreed; see [1998] Lloyd's Rep IR 180 at page 182. Lord Steyn in the House of Lords said that the Court of Appeal was plainly right: see [1999] 2 AC 127 at page 132. Lord Steyn said that the insurer "alleges an insurance fraud; it seeks to avoid a contract of insurance and to recover damages". I infer from that decision that if the claim in question concerns the avoidance of an insurance contract on the grounds of fraud the matter "relates to insurance". That does not surprise me.

63. The second English case is *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No 2)* [2000] 1 Lloyd's Rep 129. That case concerned an application for a third-party costs order in respect of the insurers' costs of defending a claim under a policy. The Court of Appeal held (at page 138) that the third-party costs order was not a matter relating to insurance

notwithstanding that the claim under the policy was. I infer from this decision that if the claim in question only has a factual connection with an insurance policy that is not sufficient to make the claim a matter relating to insurance. Again, that does not surprise me.

64. The third English case is *Mapfre Mutualidad Compania de Seguros y Reaseguros SA v Keefe* [2016] Lloyd's Rep IR 94. In that case the claimant had suffered an injury at a hotel in Spain. He sued the hotel's liability insurer and then wished to join the hotel as a second defendant to recover the uninsured excess. There was a jurisdictional challenge by the hotel. One question which arose (the sixth issue, see page 106) was whether the claimant's claim against the hotel was a matter relating to insurance. It was submitted that it was not. It was said that it was a tort claim. Gloster LJ said that it was a matter relating to insurance. She said that, given the aim of the Regulation to guarantee more favourable protection to the weaker party than the general rules of jurisdiction provide for, there was no justification for construing "in matters relating to insurance" as subject to some sort of implied restriction that there must be a policy dispute (see para 44). That perhaps suggests that "matters relating to insurance" should be given a broad interpretation. But in understanding this decision it must be borne in mind that the dispute arose in connection with article 11(3) (now article 13(3)) which provides that where there is a direct action against a liability insurer and the law allows for the insured to be joined, the same court shall have jurisdiction over them. In that case the liability insurer had been sued in England and it was held that the claim against the insured, the hotel owner, could also be pursued in England. I am therefore hesitant about relying on that decision when determining the instant case which concerns rather different issues. Further, the case went on appeal to the Supreme Court and I was told that judgment on appeal is awaited.

65. The claim in the present case does not seek the rescission or avoidance of the policy of insurance. The claim can, to that extent, be distinguished from the counterclaim in *Jordan v Baltic*. Mr MacDonald Eggers QC submitted that the claim does not concern the enforcement of a right under the policy nor a dispute about rights and liabilities under the policy. Rather, it concerns a payment made under or pursuant to the Settlement Agreement. It is that agreement of which rescission is sought. That is strictly true but the principal allegation made by the hull underwriters is that there was a misrepresentation that the loss of the vessel was caused by a peril insured against under the policy. Moreover, the sum agreed to be paid pursuant to the Settlement Agreement was the agreed sum under the policy. Further, damages are sought because had the misrepresentations not been made the hull underwriters would not have been liable under the policy because they were not liable for loss attributable to the wilful misconduct of the owners pursuant to section 55(2)(a) of the Marine Insurance Act 1906.

66. The present case is therefore not merely one where there is a factual connection between the claim and the policy but is one where the outcome of the claim very much depends upon whether the hull underwriters were in fact liable under the policy. Mr MacDonald Eggers QC said that this was not enough. The case is not about the policy but about the Settlement Agreement which has "intervened" or been "interposed". The claim concerns rights and obligations created by the Settlement Agreement which are not rights and obligations created under the policy. The mere fact that the policy forms part of the "pathology" of the claim is not enough.

67. I accept that the Settlement Agreement has been interposed. Indeed, its aim is to resolve all claims under the policy (see recital (D)) and the Settlement Sum is accepted in full and final settlement of such claims (see clause 1.3). It is for that reason that the hull underwriters need to be able to rescind or avoid the Settlement Agreement. The question for the court is whether that strict, legal analysis of the position is sufficient to show that the claim is not within the phrase "matters relating to insurance".

68. I consider that there is a risk that if the court concentrates on the strict legal analysis of the position in English law the court will adopt an understanding of the phrase "matters relating to insurance" which depends too much on the English law analysis of the claim. The phrase is no doubt intended to have an autonomous meaning which is applicable in all member states. The articles relating to insurance are an example of "the few well-defined situations in which the subject matter of the dispute" determines which courts have jurisdiction (see recital 15 to the Regulation). That suggests, in my judgment, that in determining whether a matter "relates to insurance" the court must in a broad and common sense manner consider whether the subject matter of the dispute relates to insurance.

69. I accept that the mere fact that an insurance policy features in the history or pathology of the claim may not be enough to cause the subject-matter of the dispute to relate to insurance. But in my judgment the policy on the vessel is much more than a feature of the history or pathology of the claim brought by the hull underwriters against the Bank. The representations which form the basis of the claim expressly concern the question whether the vessel was lost by reason of a peril insured against under the policy. The hull underwriters expressly allege that the vessel did not become a total loss by

reason of a peril insured against under the policy. That is the reason why the representations were misrepresentations and why the hull underwriters claim to be entitled to avoid or rescind the Settlement Agreement. The hull underwriters, when explaining their claim for damages, expressly allege that they are not liable for loss caused by the wilful misconduct of the owners pursuant to section 55(2)(a) of the Marine Insurance Act 1906. Of course, the claim raises considerations in addition to the question whether the hull underwriters were liable under the policy, for example, whether the Bank made any misrepresentations and if so whether they were made negligently. But such issues concern the manner in which the claim under the policy was presented.

70. It is wise in these matters to stand back from the detail of the claim and its precise legal analysis in terms of English law. In my judgment the nature of the claim made by the hull underwriters against the Bank is so closely connected with the question of the hull underwriters' liability to indemnify in respect of the loss of the vessel pursuant to the policy that it can fairly and sensibly be said that the subject-matter of the claim relates to insurance and so is governed by article 14.

71. Indeed, Mr, MacDonald Eggers QC accepted that where consideration of the insurance contract is indispensable to the determination of the claim the matter is one which relates to insurance. Perusal of the hull underwriters' claim shows that consideration of the hull underwriters' liability under the policy is indispensable to the determination of the claim against the Bank.

72. However, there is a further point to be addressed. Another recital to the Regulation, number 18, provides that in relation to insurance the weaker party should be protected by rules of jurisdiction more favourable to his interest than the general rules. In the present case, it is not possible to describe either party to the policy or the Bank as "the weaker party". That being so the case law of the European Court of Justice appears to establish that the special rules for matters relating to insurance do not apply: see *Vorarlberger Gebietskrankenkasse v WGV-Schwäbishe Allgemeine Versicherungs AG* Case C-347/08 [2010] Lloyd's Rep IR 77 at paras 40 to 45. The ECJ stated at para 41 that the protective role fulfilled by these provisions implies that they should not be extended to persons for whom that protection is not justified. Further, at para 42 it said that no special protection is justified where the parties concerned are professionals in the insurance sector. It followed, on the facts of that case, that a social security institution, acting as assignee of an injured person, could not, when suing an insurer, take the benefit of the special jurisdictional provisions in article 11 (now article 13) of the Brussels Regulation: see para 43.

73. This approach appears to be a particularly robust application of recital 18 but it is one which I cannot ignore. Since the Bank cannot be described as "the weaker party" I consider that, in the light of this decision and taking it into account, I must conclude that the Bank cannot take the benefit of article 14.

74. It follows that it is necessary to consider whether the claims of the hull underwriters are in tort, delict or quasi-delict and, if so, whether the harmful event occurred in England with the result that the Bank can be sued in England.

75. Mr MacDonald Eggers QC submitted that the alleged tortious misrepresentation claims fall "squarely" within the scope of article 7(2). Mr Berry QC submitted that where such misrepresentations induce a contract, in this case the Settlement Agreement, the resulting claims are not matters relating to tort within the autonomous meaning of article 7(2) but are matters relating to a contract within article 7(1). There is support for Mr Berry QC's submission: see *Civil Jurisdiction and Judgments*, 6th Edition, by Briggs at paras 2.173 and 2.191 and *Brogsitter v Fabrication de Montres Normande*. Mr MacDonald Eggers QC's response to that submission is that it is only applicable as between the contracting parties. Since this matter is to be considered on the basis that the Bank is not party to the Settlement Agreement the matter does not arise as between the contracting parties.

76. The court is concerned with a claim between the hull underwriters and the Bank. The hull underwriters allege that misrepresentations made by the Bank induced the hull underwriters to enter into the Settlement Agreement with the owners. They seek to recover damages suffered by the hull underwriters as a result of the Bank's misrepresentations. Whilst there is a factual connection between the claim and the Settlement Agreement I do not consider that that is enough to make the claim a matter relating to a contract and so within article 7(1). Where there is a claim against the contracting party and it is alleged that the contract should be rescinded on the grounds of misrepresentations made by that party because such misrepresentations induced the contract it can sensibly be said that the subject matter of the claim is the contract. But in the case of the claim against the Bank I do not consider that it can be fairly said that the subject matter of the claim is the Settlement Agreement.

77. It therefore follows that the claim relates to tort within the autonomous meaning of article 7(2), for actions which seek to establish the liability of the defendant and which are not related to a contract are matters relating to tort: see *Kalfelis v Bankhaus Schröeder Münchmeyer, Hengst & Co* Case C-189/87 [1988] ECR I-5565.

78. With regard to the claim in restitution Mr MacDonald Eggers QC submitted that it too was a matter relating to tort, delict or quasi-delict because the claim seeks to establish the liability of the Bank and is not related to a contract. Mr Berry QC submitted that claims for unjust enrichment do not depend upon wrongdoing and so are not matters relating to tort: see *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153 at pages 172, 177 and 196. In that case Lord Goff, with whom the other members of the court agreed on this point, said that a claim in restitution based upon unjust enrichment does not, save in exceptional circumstance, presuppose a harmful event and so is impossible to reconcile with the words of article 7(2). He was not deterred from reaching this conclusion by the decision in *Kalfelis*. The claim for restitution in this case is based upon a mistake; it does not require a harmful event, though there might in fact be one as suggested by Mr MacDonald Eggers QC. I consider that I am bound to follow the decision of the House of Lords and to hold that the claim in restitution based upon mistake is not within article 7(2). It must follow that this court has no jurisdiction over that claim and that if it is to be pursued it must be pursued in the Netherlands where the Bank is domiciled.

79. The claim for damages based upon misrepresentation can be brought in this jurisdiction so long as the "harmful event" occurred in England. Mr MacDonald Eggers QC submitted that it did because either the damage occurred in England (where Norton Rose Fulbright signed the Settlement Agreement and/or where the US$22 million was paid to Willis' bank account in London) or the event giving rise to the damage occurred in London (being the place where the misrepresentations were made and/or the place where the hull underwriters were induced): see *Handelskwekerij Bier BV v Mines de Potasse d'Alsace* Case C-21/76 [1976] ECR I-1735; [1978] QB 798. No submissions to the contrary were made by Mr Berry QC. I therefore accept that the harmful event occurred in England and so this court has jurisdiction over the claim for damages for misrepresentation.

80. On case management grounds it is unsatisfactory to reach the conclusion that the tort claim may be brought in England but that the restitution claim may not be brought in England. However, this is the consequence of the Brussels Regulation as was accepted in *Kalfelis*. Of course, the entirety of the hull underwriters' case against the Bank could be brought in the Netherlands but in circumstances where the hull underwriters' case against the owners and managers is being brought in England that also is not satisfactory. The court cannot however base its jurisdictional decisions when applying the Brussels Regulation on considerations of forum conveniens.

No good arguable case

81. Mr Berry QC submitted that the hull underwriters had no good arguable case that the Bank had made any misrepresentations and no good arguable claim in restitution. However, this is not a case where permission to serve out is required and therefore the hull underwriters do not have to show a good arguable case on the merits in order to serve the Bank pursuant to the Brussels Regulation: see *AMT Futures Ltd v Grundmann* [2016] EWHC 3606 (QB) paras 1 to 5 and *Civil Jurisdiction and Judgments* by Briggs at para 5.30.

Conclusion

82. The hull underwriters do not have the better of the argument that the Bank is bound by the exclusive jurisdiction clause in the Settlement Agreement or in the policy. The hull underwriters do however have the better of the argument that their claim for damages caused by misrepresentation is a matter relating to tort and that the harmful event occurred within the jurisdiction with the result that this court has jurisdiction over that claim. But the court does not have jurisdiction over the claim in restitution because that is not a matter relating to tort.