Neutral Citation Number: [2018] EWHC 894 (Comm)

Case No: CL-2015-000082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2018

Before :

MR JUSTICE MALES

- -

Between :

(1) IMS S.A. **(2) ROFOS NAVIGATION LIMITED** **(3) XIFIAS NAVIGATION LIMITED** **(4) HELI NAVIGATION LIMITED** **(5) TUTBURY MARITIME LIMITED**	**Claimants**
- and -	
CAPITAL OIL & GAS INDUSTRIES LTD	**Defendant**

- -
- -

David Allen QC and **John Bignall** (instructed by **Waterson Hicks**) for the **Claimants**
The Defendant was represented by its director, **Nsikan Usoro**, assisted by his solicitor, **Deji Holloway**

Hearing dates: 16 to 18 April 2018

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Approved Judgment

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MR JUSTICE MALES

Mr Justice Males :

Introduction

1. This is a claim for US $5.8 million alleged to be due under a "Confidential Deed of Settlement" ("the Agreement") dated 23 January 2013. The Agreement provided that the defendant ("Capital") would pay to the first claimant ("IMS") US $6 million "by no later than 30 days from the execution of this Agreement (January 24, 2013) as full and final settlement" for losses incurred by IMS and the other claimants, and that "upon the signing of this agreement and payment in full of all sums due and payable by Capital", IMS would be deemed to have accepted such payment in full and final compromise settlement of all claims against Capital. Capital did pay US $200,000 to IMS, but the balance of US $5.8 million remains unpaid.

2. Capital denies liability, contending in summary that (1) it was under no liability to IMS in the first place, (2) IMS had not in any event asserted claims against it so that there was nothing to compromise, (3) the Agreement was never executed by IMS and therefore remained only a draft, (4) the Agreement was only ever intended to be an agreement in principle, not a legally binding contract, (5) as Capital was under the administration of the Asset Management Corporation of Nigeria ("AMCON") and undergoing financial restructuring, any agreement by it to make a payment was conditional upon first obtaining finance from AMCON, which never happened, and (6) the payment of US $200,000 was made expressly without making any admissions as to either party's rights.

3. It is apparent from this brief summary that the critical issues are (1) whether the Agreement was executed by IMS and (2) whether it was intended to be valid and binding upon such execution.

Procedure and evidence

4. IMS is a ship management company managing a fleet of tankers which in the period from 2011 to 2013 included the "ROFOS", "XIFIAS", "HELI" and "PANTHER", vessels owned by the second to fifth claimants. The principal of IMS is Captain George Gialozoglou.

5. Capital is a Nigerian company concerned in the trading, importing, storage and distribution in Nigeria of petroleum products. It is the owner of the biggest private oil jetty in Nigeria. Its Chief Executive Officer is Dr Patrick Ubah, who is also a director of the company. He is described by Capital as "an active player in the Nigerian political scene".

6. Until one week before the trial was due to begin, it was expected that Capital would be represented by leading counsel. On 9 April 2018, however, Capital advised that it no longer had funds to pay counsel, that Dr Ubah who had until then been lending his personal funds to Capital to enable it to pay its legal fees was unable to make funds available at the time he had anticipated doing so, and that Capital's case would therefore be presented by its directors. There was no request for an adjournment. Accordingly Capital's case was presented by Mr Nsikan Usoro, a director of Capital, assisted by Mr Deji Holloway, an English qualified solicitor and solicitor advocate as well as a Nigerian barrister and solicitor who acts as Capital's in-house lawyer.

7. Witness statements from Captain Gialozoglou and Mr John Hicks of Waterson Hicks the claimants' solicitors were served on behalf of the claimants. Both gave oral evidence and were cross examined by Mr Usoro. They were in general straightforward and reliable witnesses, although their exasperation with Capital was apparent.

8. Witness statements from Dr Ubah, Mr Usoro and Mr Holloway were served on behalf of Capital. On the first morning of the trial the court was informed that Dr Ubah's health did not allow him to travel to this country so arrangements were made for his evidence to be given by video link. Even allowing for the difficulties of giving evidence in this way without access to the trial documents, he was not a satisfactory witness. He made lengthy and argumentative speeches which bore little resemblance to the contemporary evidence.

9. Mr Usoro and Mr Holloway gave oral evidence. Neither was an impressive or reliable witness. Mr Usoro also adopted an argumentative approach. He was shown to have given misleading evidence in a previous witness statement where he asserted that a Nigerian government investigation into fuel import subsidy fraud had terminated in April 2012, when in fact Capital was under investigation in the period leading up to the negotiation of the Agreement. This reflected poorly on his credibility. So too did his obviously false claim, made for the first time in cross examination and contradicting earlier evidence on behalf of Capital, that each of the fixture recap emails sent by the claimants was followed by a telephone conversation in which it was agreed that the terms set out in the recap would not apply to the transaction in question.

10. Mr Holloway was evasive, taking refuge in the mantra, whenever a difficult question was asked about his involvement in relevant events, that it was matter on which he had had no instructions. I do not accept that.

Background

11. It is unnecessary to record the full history of the parties' dealings or to attempt to determine the merits of any claims which the claimants may have had against Capital. What matters, so far as the background to the Agreement is concerned, is whether such claims had been asserted. The summary which follows is directed to that issue.

12. The parties began doing business together in 2010. Because Capital's terminal at Apapa had a draft limitation of about 7-8 metres, it would charter the claimants' vessels to load oil products by ship-to-ship transfer offshore for delivery to the Capital terminal. These were short voyages which meant that original bills of lading would not normally be available at the discharge berth. Accordingly the charterparties included terms providing for delivery without bills of lading and the provision of letters of indemnity by Capital. It appears, however, that although the charterparties (which took the form of fixture recap emails rather than signed charterparties) required letters of indemnity to be provided, this did not happen. Nevertheless cargoes were delivered in accordance with Capital's instructions.

13. Financing for petroleum products imported into Nigeria by Capital was provided by Access Bank, which issued numerous letters of credit in favour of foreign sellers. Bills of lading were consigned to the order of Access Bank, which would authorise

release of the products stored by Capital once payment from the Nigerian buyers had been received.

14. These arrangements worked successfully for some time, but in the summer and autumn of 2011 six bills of lading were issued relating to cargoes carried on the four vessels named above which in April 2012 gave rise to claims by Access Bank for misdelivery by the claimants. This led IMS to seek appropriate letters of indemnity from Capital, which Dr Ubah signed at a meeting between the parties at IMS's office in Greece on 14 May 2012.

15. Proceedings in this court were brought by Access Bank against the claimants, Capital and Dr Ubah personally, which were served on the claimants on 19 October 2012. The claims amounted to US $133 million in total, that being the alleged value of the cargoes misdelivered. Arrests of the claimants' vessels followed in South Africa ("PANTHER") and Nigeria ("HELI" and "XIFIAS"). An attempt to arrest "ROFOS" in South Africa was unsuccessful. Access Bank also obtained a freezing order in Greece against a company associated with IMS.

16. Through their solicitors Waterson Hicks, the claimants sought assistance from Capital to obtain the release of their vessels, referring to the terms of the letters of indemnity signed by Dr Ubah and reserving their rights. I accept the evidence of Mr Hicks that at no stage during the exchanges which followed, both in writing and at meetings, did the representatives of Capital deny that it was their responsibility to procure the vessels' release. Nevertheless the vessels remained under arrest for some time – "HELI" and "XIFIAS" until 7 January 2013 and "PANTHER" until 12 February 2013.

17. On 21 December 2012 IMS set out in an email to Mr Holloway a summary of the losses which it had so far sustained as a result of the arrests and the further losses which it expected to incur going forward. It identified a number of potential solutions, the first of which was that Capital should arrange to lift the arrest by making a payment to Access Bank, although other possibilities included the purchase by Capital of one of the claimants' vessels. The email emphasised the seriousness of the situation which the claimants were facing. It referred also to a conversation that morning in which Dr Ubah was said to have promised a payment of US $2 million by 24 December 2012 to cover part of the expenses incurred by the claimants so far. I see no reason to doubt that such a promise had been made.

18. There followed a meeting between Mr Hicks and Mr Holloway on 24 December 2012. Mr Holloway explained that the promised US $2 million was being sent (although in the event it never was). Another Capital lawyer present, Mr Ajibola Oloyede, expressed confidence that the two vessels arrested in Nigeria would be released by 7 January 2013 (as in the event they were on the basis that the Nigerian court did not have jurisdiction). Mr Hicks summarised the outcome of the meeting in an email sent to Capital later on the same day which concluded by noting "that the financial position of Owners is seriously prejudiced by the ship arrests and the positive response of Capital to this is urgently awaited". His email did not refer to what had been said about the promised payment of US $2 million, but his contemporary attendance note records what Mr Holloway said about this.

19. Another meeting place took place on 28 December 2012, this time between Captain Gialozoglou and Mr Holloway. I accept the evidence of Captain Gialozoglou that he told Mr Holloway that the shipowning companies' losses were likely to be in the region of US $15 million and that Mr Holloway responded that he would take instructions.

20. Meanwhile the shipowning companies were required to serve their Defence in the Commercial Court proceedings brought by Access Bank by 18 January 2013, for which purpose they would need documents which Capital had promised to provide but had not yet provided. On 22 January 2013 Access Bank (perhaps discouraged by the release of the two vessels in Nigeria and the fact that "PANTHER", the one remaining vessel under arrest, was heavily mortgaged) made a without prejudice offer to the shipowning companies to release them from the proceedings on payment of US $5 million and the provision of documentation showing what had happened to the cargoes.

Negotiation of the Agreement

21. On the same day, 22 January 2013, Captain Gialozoglou flew to Lagos to meet Dr Ubah.

The claimants' evidence

22. Captain Gialozoglou's evidence is that the meeting began in the lobby of Dr Ubah's hotel in Lagos on the morning of 23 January. It was attended by Dr Ubah, Mr Usoro, Mr Holloway and other Nigerian personnel. Captain Gialozoglou set out again the claimants' claims arising out of the arrests of their vessels. Dr Ubah did not dispute Capital's liability to pay compensation. He spoke about Capital's strong financial position and about his political ambitions in Nigeria which meant that he wanted to settle his outstanding debts. He said that Capital's current value was of the order of US $2 billion, with estimated liabilities of no more than US $1 billion. He said that he was going to stand for election as the Governor of Anambra State, which would require him to leave the management of Capital. He spoke also about plans to create an oil refinery opposite Capital's existing installation.

23. According to Captain Gialozoglou, Dr Ubah's position was that he could pay US $6 million immediately in settlement of the claimants' claims and would compensate them for the balance of their losses through future business. Captain Gialozoglou accepted this proposal and it was agreed that the payment would be made by 24 February 2013. At this point Captain Gialozoglou telephoned Mr Hicks in London, explaining what had been agreed and asking him to prepare a draft settlement agreement. It does not appear that Captain Gialozoglou said anything to Mr Hicks about additional compensation through future business as the draft agreement which Mr Hicks emailed later that day (copied to Mr Holloway) was a simple agreement providing for payment of US $6 million in full and final settlement with a condition precedent that Capital and Dr Ubah would within 10 days of signing procure settlement of Access Bank's claims against the claimants and the release of all security held by Access Bank in support of those claims.

24. However, the draft prepared by Mr Hicks was not signed by either party. Instead, according to Captain Gialozoglou, the parties proceeded to the office of a law firm in

Lagos where a revised document was prepared by Mr Holloway and the Lagos lawyers. That was the document which became the Agreement. Mr Holloway produced two copies of the draft, one of which was signed by Dr Ubah on behalf of Capital and witnessed by Mr Holloway, with the other being signed by Captain Gialozoglou and witnessed by one of the lawyers. The copy signed by Dr Ubah was given to Captain Gialozoglou. The copy signed by Captain Gialozoglou was retained by Capital.

25. Thus Captain Gialozoglou's evidence is that the Agreement was signed on behalf of both parties, with nothing being said to indicate that it was anything other than immediately binding and effective in accordance with its terms. In particular, it was not an agreement merely "in principle". Nor was it in any way dependent on AMCON, let alone being a document which was not intended to be binding but was merely produced for the purpose of enabling IMS to stave off pressure from its banks.

Capital's evidence

26. Dr Ubah, on the other hand, says that the discussion at the meeting at his hotel on 23 January 2013 was concerned with whether there were outstanding freight payments or fees due to IMS and the need for a reconciliation of accounts, as well as discussion of the possible purchase of three IMS vessels by Capital. Dr Ubah said that he would put this question to AMCON and that finance from the restructuring which Capital was undertaking might be able to be used for this purpose. According to Dr Ubah it was understood and agreed that any payment (i.e. to purchase the vessels) made by Capital was conditional on financing from AMCON and information about the vessels would need to be provided in order for the transaction (i.e. the proposed purchase) to be "verified".

27. Dr Ubah says in addition that Captain Gialozoglou told him that "he needed urgently an in-principle document reflecting expected payment of US$6,000,000 for the bankers of the vessels that had been arrested". Accordingly Dr Ubah instructed one of his Nigerian lawyers to produce such a document with Captain Gialozoglou, while he left for another meeting. After that meeting, the parties reassembled at the offices of Wole Olanipekun & Co where Dr Ubah signed one copy of the document which had been prepared and gave it to Captain Gialozoglou. However, Captain Gialozoglou did not sign any version of the document.

28. According to Dr Ubah the document was never intended to create a binding obligation but was "meant to be used by George to provide comfort to his bankers". In other words (mine rather than Dr Ubah's) it was a sham document intended to deceive the claimants' banks.

29. Neither Mr Usoro nor Mr Holloway said anything in their witness statement about the meetings on 23 and 24 January 2014. There is some doubt whether Mr Usoro was present. Captain Gialozoglou said that he was, but Mr Usoro denied this. Mr Holloway agreed that he was present for the first meeting at the hotel and that he was left by Dr Ubah to speak to Captain Gialozoglou, but his evidence of what they spoke about was extremely vague. Accordingly neither Mr Usoro nor Mr Holloway provide support for Dr Ubah's account.

The Agreement

30. The Agreement provided as follows:

> "THIS DEED WITNESSES and it is mutually agreed as follows:
>
> *Settlement*
>
> 1. Capital shall pay to IMS as the Manager of all the above companies, except Capital, by no later than 30 days from the execution of this agreement (January 24, 2013) the sum of $6 Million US Dollars ('the Settlement Sum') as full and final settlement for all losses, dues, payments made by IMS as a result of the arrest and detention of their vessels consequent upon the suit commenced against her in London by ACCESS BANK PLC.
>
> 2. Capital shall pay to IMS the Settlement Sum which includes any interest howsoever calculated or incurred or accrued thereon in full by way of instalments payable no later than February 24, 2013.
>
> 3. Upon signing of this agreement and payment in full of all sums due and payable by Capital pursuant to this Deed, IMS:
>
> > 3.1.1 shall be deemed to have accepted the said sums in full and final compromise settlement of all and any liability of Capital to it under the Charter Parties, Bills of Lading and letters of indemnity;
> >
> > 3.1.2 shall be deemed to have accepted the said sums in full and final compromise settlement of all and any liability of Capital and/or Access Bank to it under the bills of lading and all Indemnities issued by Capital to IMS, all proceedings issued, all orders obtained against the companies, inclusive of all costs;
> >
> > 3.1.3 shall use its best endeavours to take such steps as are reasonably necessary to release Capital and Access from any indemnity and or guarantee whether directly or directly [*sc*. indirectly] given, oral or written, express or implied.
> >
> > 3.1.4 IMS' right in respect of the matter and the subsequent arrest and detention of the vessels shall forever abate.
>
> 4. IMS acknowledges and agrees to the terms of this Deed in full and final compromise settlement of all complaints (including for the avoidance of doubt letters of Indemnity and all sums whatsoever and howsoever incurred as a result of the above claims), claims and causes of action whether in law or equity and howsoever arising in respect of or in connection with the Charter Party, the Bills of Lading and any security (whether past or present) or guarantees (whether past or present and including any express or implied Personal Guarantee) in respect thereof and any enforcement or other action or steps taken in relation thereto by Access Bank or any other party in respect to the subject matters stated in the above recital.

> 5. Capital undertakes and guarantees that Access Bank will within 10 working days from 25 January 2013, withdraw all the claims against the owners and or managers of all the above named vessels, in particular will withdraw the claim in the Commercial Court of the High Court of England under case number 2012-1300, will release panther from arrested in the Kwazulu Natal High Court, Durban, South Africa claim under A131/12. And withdraw from brought in the Greek court against Seamus Holdings under which its bank account was frozen and will ensure all the bills of lading issued are returned [*sic*.].
>
> 6. In the event that Capital fails to make any payment in accordance with the terms of this Deed or otherwise breaches or fails to comply with any term of this Deed (particularly payment of outstanding monies or para 5 above) then the IMS may serve on Capital a notice requiring that the said breach or failure to comply be remedied and in the event that Capital for no good reason fails to remedy the said breach or failure to comply within 5 working days of such notice being served on Capital then the payment terms set out above in this Deed shall immediately determine and IMS have the right to claim all their losses and not the compromise of $6 million.
>
> 7. There shall be no interest applicable to the settlement sum howsoever incurred, calculated or accrued.
>
> 8. This Deed and any dispute or claim arising out of or in connection with it shall be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the English Courts.
>
> 9. The parties to this Deed warrant and represent that their representatives signing this Deed are fully and duly authorised to do so.
>
> IN WITNESS of which the parties have executed this deed on the date written above."

31. There was then space for execution of the Agreement by IMS and by Capital, with provision for both signatures to be witnessed. There was also space for signature by the second to fifth claimants (i.e. the shipowning companies) and by Seamus Holdings SA, the associated company of IMS against which a freezing order in Greece had been obtained.

32. The version of the Agreement which is in evidence contains no signature on behalf of IMS. Dr Ubah's signature on behalf of Capital was witnessed by Mr Holloway. Dr Ubah also purported to sign on behalf of the four shipowning companies and Seamus Holdings SA, but there is no evidence that he was authorised to do so and it seems probable that this was simply a mistake.

33. At this stage I draw attention to the following points:

(1) Although there is an issue whether the Agreement should be taken at face value, there can be no doubt that it purports to be a compromise settlement of claims made by the claimants against Capital to be compensated for losses caused by the arrest of their vessels by Access Bank. The Agreement makes no sense unless

such claims had been made and those who prepared the document were aware of them.

(2) It is clear that those who prepared the document expected that it would be executed (i.e. signed) by both parties, and that this would happen on 24 January 2013 (see clause 1).

(3) Capital's payment obligation was to be triggered by execution (i.e. signature) of the Agreement (clauses 1 and 3).

(4) Taking the Agreement at face value, it appears that it was intended upon execution to be legally binding upon both parties (clauses 8 and 9).

(5) I leave for later consideration whether the Agreement would be legally binding if not executed by both parties. That question will only matter if, contrary to Captain Gialozoglou's evidence, he did not sign the Agreement.

(6) In addition to its payment obligation, Capital undertook to ensure the withdrawal of the claims made against the claimants by Access Bank and the release of the remaining security held by Access Bank (clause 5).

(7) There were clear and imminent deadlines for the performance of Capital's obligations which, so far as the terms of the Agreement were concerned, were unqualified.

(8) Failure by Capital to perform its obligations would entitle the claimants to reinstate their claims to recover all their losses by service of a notice (clause 6). However, the claimants have not purported to exercise this right. Their claim is to enforce payment of the "Settlement Sum".

Subsequent events

34. On 24 January 2013 Captain Gialozoglou sent the copy of the Agreement signed by Dr Ubah to Mr Hicks under cover of an email which stated that "the attached document was signed".

35. On 30 January 2013 Mr Hicks wrote to Mr Holloway about the procedure for terminating the litigation. His email included the following:

> "On a separate issue, under the agreement between Capital and IMS the time for Capital to procure the withdrawal of all claims against the Owners, including the English proceedings, the release from arrest of "PANTHER" and the withdrawal of the Greek proceedings against Seamus Holdings expires next week on Friday 8 February. …
>
> Time is therefore extremely tight.
>
> I look forward hearing from you."

36. It is obvious from this message and the further messages referred to below that the claimants and their solicitors were treating the Agreement as valid and binding.

Neither Mr Holloway nor anyone else at Capital ever sought to correct this misapprehension (if such it was).

37. Following the conclusion of a settlement agreement between Capital and Access Bank, IMS wrote on 13 February 2013, including both Mr Holloway and Dr Ubah as addressees:

> "We are willing [*sc*. writing] to report you as follows in connection with our Settlement Agreement:
>
> 1) Panther was released however leaving certificate were not delivered to Master. Vessel can't sail remaining immobilized.
>
> 2) Bank Guarantee was not released yet.
>
> 3) BL/S were not returned.
>
> 4) Access have not withdraw from London Proceedings claiming that will do after they paid [*sic*.].
>
> 5) Meantime by February 24th Ancon [*sic*.] has to pay 6,000,000 usd compromise settlement agreed. Please advise that payment will be effected timely."

38. Once again, it is clear that IMS was treating the Agreement as valid and binding, albeit that the final paragraph indicates an understanding that the payment of US $6 million would come from AMCON.

39. The next day, 14 February 2013, IMS sent an invoice to Dr Ubah for US $6 million under the Agreement. The covering email stated:

> "We attach herein invoice for compromise settlement agreement dd 23/01/13.
>
> Please proceed with payment of compromise settlement agreement usd 6,000,000, as per attached details, latest by 24th february 2013, in full and final settlement.
>
> p.s. we have tremendous pressure from mortgage bank therefore please arrange this settlement to arrive timely."

40. No payment was made and accordingly a further demand was made by IMS for payment of US $6 million "as per the agreement" on 25 February 2013.

41. On the same day Mr Hicks spoke to Mr Holloway to ask what was happening about the payment. His attendance note of the conversations records that Mr Holloway's response was that there was to be an AMCON board meeting in the next week to approve payment to Access Bank and that the payment to IMS would go with this AMCON payment.

42. In the event there was delay in making the payment which was due to Access Bank. It was eventually made almost a year later on 21 February 2014. However, no payment was made to IMS.

43. On 20 March 2014 Mr Hicks wrote to Mr Holloway as follows:

> "… it was agreed in January 2013 that Capital Oil would make payment to IMS of US$6,000,000 by 24 February 2013. Will you please provide a firm date when this will be paid."

44. The response was that "Capital Oil's creditors will be paid once all litigation matters are finalised, after they are finalised an indication will be given to Capital Oil's creditors". There was no suggestion that IMS was not a creditor or that the US $6 million was not due.

45. There was further chasing of payment by Mr Hicks which took matters no further. The Access Bank proceedings were finally discontinued on 26 June 2014. As there was still no payment of the US $6 million, Waterson Hicks obtained an order reviving those proceedings in order to bring a Part 20 claim against Capital.

46. It was not until 29 December 2014 that Capital first denied that it was under an obligation to pay the Settlement Sum. That denial was contained in a witness statement by Mr Holloway in support of an application by Capital challenging the jurisdiction of this court over the Part 20 proceedings. Two points were taken. The first was that any payment obligation under the Agreement was owed to IMS and not the shipowning companies who were the Part 20 claimants. The second was that IMS had not signed the Agreement which was therefore invalid as a matter of English law. There was at that time no suggestion that the Agreement was only ever intended to be a document to be shown to the claimants' bankers or that payment was subject to approval by AMCON.

47. The claim form in this action was issued on 6 March 2015.

48. Subsequently, on 19 March 2015, the shipowning companies and Capital entered into an agreement to discontinue the Part 20 proceedings, with Capital making a payment of US $200,000 "forthwith". This was made expressly without making any admissions as to either parties' rights and was described as a "without prejudice good faith payment". In addition Capital confirmed that Mr Holloway had irrevocable instructions to accept service (without prejudice to any challenge to the jurisdiction) of "any further proceedings issued by the Owners to enforce the Settlement Agreement dated 24 January 2013". In the event the payment of US $200,000 was made in May 2015.

49. Proceedings were duly served and a challenge by Capital to the jurisdiction of this court was unsuccessful ([2016] EWHC 1956 (Comm)).

The claimants' claim

50. The claimants claim payment of the Settlement Sum of US $6 million which they say was due under the Agreement, less a credit of US $200,000 paid pursuant to the 19 March 2015 agreement. As already indicated, Capital denies liability on a number grounds. I consider each of these in turn.

Was Capital under any liability to the claimants?

51. The first point taken by Capital in defence to the claim for the outstanding balance of US $5.8 million under the Agreement is that it was under no liability to IMS in the

first place. However, even if true, this would not provide it with a defence if the Agreement is valid and binding. The point of a compromise settlement is that undecided claims which may succeed or may fail are replaced by defined and certain obligations.

52. It is therefore unnecessary to determine this issue. It is sufficient to say that the shipowning companies had what appear on their face to have been strong claims to be indemnified against the consequences of having delivered the cargoes in accordance with Capital's instruction (as Capital accepts that they did) without insisting on production of original bills of lading.

53. Capital contends that it was under no liability in respect of those claims on the grounds (in summary) that (1) there were no relevant charterparties in place between the parties; (2) the risk of liability for misdelivery without production of bills of lading at Capital's request was to be borne by the shipowning companies; (3) the letters of indemnity signed by Dr Ubah were invalid as any consideration for them was past; and (4) the letters of indemnity were voidable as having been extorted from Capital by economic duress. Without reaching a final conclusion about the strength of the claims, these do not appear to have been promising lines of defence. Indeed, some of Capital's points, for example its denial that charterparty contracts were concluded on the terms of the fixture recaps, are simply absurd. Such a denial, contradicting statements made in previous witness statements, suggests that Capital is prepared to say almost anything to avoid liability. Moreover, and of importance for present purposes, none of these points had ever been indicated by Capital at any time prior to negotiation of the Agreement or indeed until after legal proceedings between the parties were under way.

54. It is true that any claim against Capital would have had to be made by the shipowning companies rather than by IMS. However, that is of no significance. It was clear that IMS was acting on behalf of the shipowning companies in negotiating and concluding the Agreement. It was authorised to do so.

Had the claimants asserted claims against Capital?

55. Capital's next point is that the claimants had asserted no claims against it, so that there was nothing to compromise. That, however, is plainly wrong in the light of the summary above. Indeed, the Agreement could not have been drafted in the way it was unless such claims had been indicated. Capital suggests that it is significant that IMS's email of 21 December 2012 referred to the losses being suffered by IMS without formally describing these as claims against Capital. In context, however, it was obvious that IMS was looking to Capital to reimburse these losses. I have no doubt that Capital understood this.

56. Accordingly, whether or not the claimants had valid claims against Capital, they were clearly asserting such claims for which they were putting forward an estimated quantum of US $15 million. That may have been an inflated figure, but it was what IMS was saying. Capital had not formally accepted liability, but nor had it put forward any ground on which liability was or might be disputed. It had promised to make a payment of US $2 million, but had not done so.

57. This was the background against which the Agreement was concluded.

Was signature of the Agreement necessary?

58. I consider next whether signature of the Agreement was necessary in order for legal obligations to be created. This is a question of construction of the Agreement in the light of the relevant background material: *Harvey v Dunbar Assets Plc* [2013] EWCA Civ 952 at [22] to [26]. Although the issue in that case was different (whether a guarantor who had signed a guarantee was liable in circumstances where another intended guarantor had not signed), the principle is of more general application.

59. While it is possible for parties to reach a binding oral agreement notwithstanding that they expect to record what has been agreed in an executed document, that was not the position here. It was obvious that the terms of any compromise would require careful drafting in order to ensure that all necessary matters (including the termination of proceedings and the release of security) were dealt with. The clear intention of the parties was that they would conclude a written agreement. Until they had done so, there was in my judgment no binding agreement between them.

60. Moreover it is clear from the terms of the Agreement set out above, not only that any agreement was to be recorded in writing, but that the written agreement was to be executed by both parties. Until this happened, the document would remain a draft without legal effect. Capital's signature was required because it was undertaking obligations as to payment (the time for which was to run from execution) and ensuring the termination of proceedings. IMS's signature was required because it was agreeing to compromise the claims which it had made. Its signature would demonstrate that it accepted the terms of that compromise, which Capital was entitled to know before it was required to perform its own obligations. Any conclusion that execution was not required would immediately require manipulation of the terms to deal with a situation (non-execution of the document) which the Agreement did not contemplate. Execution was therefore required, which cannot sensibly refer to execution by one party only. The assent of both parties was clearly necessary.

61. That does not necessarily preclude some later agreement being made by the parties to treat the Agreement as effective despite the absence of a signature, but that would be a separate matter.

Was the Agreement signed by IMS?

62. Whether the Agreement was signed by Captain Gialozoglou is a factual issue which depends largely but not entirely on the evidence of those who were present when the document was produced on 24 January 2013. I have no hesitation in finding that Captain Gialozoglou did sign the Agreement as he said in his evidence. In addition to preferring the evidence of Captain Gialozoglou over that of Dr Ubah, the following points are significant:

    (1) There was no reason for Captain Gialozoglou not to sign the Agreement. He had gone to Lagos to negotiate a settlement of the shipowning companies' claims. That was a settlement which he needed urgently in view of the losses being incurred and the pressure being brought to bear by IMS's banks. Having gone to the trouble of ensuring that there was a written agreement, first as drafted by Mr Hicks and then as revised by Mr Holloway and Capital's Lagos lawyers (which I find is what happened), he would have wished to remove any possibility of

uncertainty as to the date of Capital's payment obligation which, as was clear from the Agreement, was defined by reference to the date of execution.

(2) Equally there was no reason for Capital, whose lawyers had drafted the final version of the Agreement, to acquiesce in the one-sided situation where Capital had signed the agreement but IMS had not.

(3) Captain Gialozoglou's statement in his email to Mr Hicks on 24 January 2013 that "the attached document was signed" should be taken at face value as referring to signature by both parties.

(4) It is abundantly clear from the exchanges between the parties after conclusion of the Agreement that the claimants understood that the agreement was valid and binding and that payment was due under it on 24 February 2013. This was obvious to and was well understood by Dr Ubah and Mr Holloway. Capital's failure to suggest even the slightest doubt about the valid and binding nature of the Agreement demonstrates that it shared this understanding. Neither Dr Ubah nor Mr Holloway had a satisfactory explanation for their failure to say otherwise. This constitutes powerful evidence that Capital knew very well that the Agreement had been signed by IMS. If it had not been, Capital would have said so. The fact that its denial that the Agreement had been signed by IMS only emerged much later, in response to legal proceedings, is telling.

Was the Agreement only an agreement in principle?

63. I reject also Capital's defence that the Agreement was only an agreement in principle. There are two strands to this argument. The first is that it was subject to verification by Capital of the underlying transactions to which it referred. This is inconsistent with its terms, which include an unqualified and unequivocal payment obligation. Indeed the "verification" to which Dr Ubah refers in his evidence was to consist of the provision of information about the IMS vessels which (he says) it was proposed that Capital would purchase. But even if the topic was discussed, there is no hint of any such proposed purchase in the Agreement.

64. The second strand is that the Agreement was produced in order to give Captain Gialozoglou a document which he could use to stave off pressure from IMS's banks. This argument was not pleaded in Capital's defence. It first appeared in clear terms only a few weeks before trial, in Dr Ubah's witness statement dated 28 March 2018 (although there was, perhaps, some hint of it in a previous witness statement of Mr Usoro). It is inherently implausible. Any "comfort" provided to IMS's banks would inevitably have been short lived as the date for payment came and went. That would have been of no use to anybody.

65. Accordingly I reject both strands of this defence, accepting the evidence of Captain Gialozoglou and rejecting that of Dr Ubah. It is obvious that Captain Gialozoglou believed that he was negotiating and had concluded a binding agreement. That is what he told Mr Hicks on 23 January when he asked him to draft an agreement. That is what he meant when he emailed Mr Hicks on 24 January that "the attached document was signed". These messages, which undoubtedly occurred, make no sense at all on either of Capital's versions of events. Moreover, if the parties had intended that the Agreement was anything other than valid and binding in accordance with its terms, it

is inconceivable that Capital would not have said so in response to the many requests for payment in accordance with the terms of the Agreement made by or on behalf of IMS.

66. Indeed, it is hard to see how this defence could be put forward in good faith.

Was payment conditional upon obtaining finance from AMCON?

67. Capital's pleaded case is that it was made clear to Captain Gialozoglou by Dr Ubah that because Capital was under the administration of AMCON and undergoing financial restructuring, any agreement by Capital to make a payment was conditional upon first obtaining finance from AMCON. This is said to have been made clear in November or December 2012. In further information Capital explained that Dr Ubah informed Captain Gialozoglou that the transactions between the parties would be subjected to extra scrutiny due to the involvement of AMCON.

68. However, there is no pleaded case that Capital lacked capacity or authority to make a binding agreement and no evidence of Nigerian law that might support such a case. In fact it appears that although an order had been made by the Abuja Federal High Court on 13 November 2012 for AMCON to take over the property and assets of Capital, that order was set aside on 12 December 2012 and was not in force at the time when the Agreement was negotiated. At that time Capital remained in control of its business and assets.

69. Accordingly Capital's case is that it was understood and agreed that any agreement by Capital to make a payment would be conditional in this way. That is a question of fact. It differs from the previous point, which is that no binding agreement was concluded. The point here is that there was a binding agreement, but its performance was agreed to be subject to provision of funds by AMCON.

70. I do not accept that anything was said by or on behalf of Capital to suggest that any payment obligation which it undertook was conditional on approval or provision of funds by AMCON. Dr Ubah's evidence is that although he had told Captain Gialozoglou in November 2012 that AMCON had taken over Capital, he also said that Capital was in talks with AMCON and would resolve the position. By January 2013 it appeared to have done so. It is striking that there is no reference to AMCON in the Agreement, let alone anything to make clear that payment was conditional on provision of funds by AMCON. A document prepared by Capital's lawyers would inevitably have spelled this out very clearly if that was what was intended. Moreover, it was never suggested at the time that Capital's obligation was conditional in the way now contended.

71. It appears from its email of 13 February 2013 that IMS understood that in practice the payment of US $6 million would come from AMCON, but that does not mean that Capital's liability was dependent on the provision of such funds.

The payment of US $200,000

72. I accept (as do the claimants) that Capital's payment of US $200,000 does not advance the claimants' case in circumstances where that payment was made expressly

without making any admissions as to either party's rights. However, the claimants do not need to rely on this payment in order to prove their case.

The claimants' alternative estoppel case

73. In view of my findings so far, it is unnecessary to consider the claimants' alternative case that Capital is estopped from denying that the Agreement was enforceable. The fact is that the Agreement was and is enforceable in accordance with its terms.

Conclusion

74. The claimants are entitled to judgment for US $5.8 million together with interest since 24 February 2013 at appropriate US dollar LIBOR rates plus an uplift of 1%. The parties agreed that costs should follow the event. Accordingly the claimants are entitled also to their costs of the action.