Neutral Citation Number: [2019] EWHC 231 (Comm)

Case No: CL-2016-000682

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2019

Before:

SIR ROSS CRANSTON
(Sitting as a High Court Judge)

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Between:

HSBC BANK PLC	**Claimants**
- and -	
(1) PEARL CORPORATION S.A.	**Defendants**
(2) ONYX CORPORATION S.A.	
(3) KRITSAS SHIPPING S.A.	
(4) LESTER HOLDINGS S.A.	
(5) DIMITRIOS KRITSAS	

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Adam Turner (instructed by **Watson Farley & Williams**) for the **Claimants**
Lawrence McDonald (instructed by **S&S Legis**) for the **Fifth Defendant**

Hearing dates: 21-24, 28-29, 31 January 2019

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Approved Judgment

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

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Sir Ross Cranston

Sir Ross Cranston:

INTRODUCTION

1. This is a claim under personal guarantees by HSBC Bank PLC (the "Bank") for approximately $9 million against Mr Dimitrios Kritsas. Mr Kritsas had guaranteed two ship-finance loan agreements, which the Bank had accelerated when there was default under them in April 2016. The loans were made to the first and second defendants, Pearl Corporation SA ("Pearl") and Onyx Corporation SA ("Onyx"). These are single ship-owning companies of the *Aurora Pearl* and *Aurora Onyx* respectively.

2. Both of the loan agreements were governed by English law. Pearl and Onyx gave security, including cross guarantees. The loans were also guaranteed by the third defendant, Kritsas Shipping SA ("Kritsas Shipping"), the management company for Pearl and Onyx. Later another single ship-owning company, the fourth defendant, Lester Holdings ("Lester") gave security over its vessel, the *Aurora Amethyst*, and a guarantee of the loans. Mr Kritsas was the 100 percent beneficial owner of Pearl, Onyx, Kritsas Shipping and Lester. He was also president of Kritsas Shipping.

3. Throughout the period of the loans there was a dramatic deterioration of the dry bulk shipping market to a point not seen for decades. Illustrative is that over the two year period 1 January 2014 to 31 December 2015 the Baltic Exchange Dry Index fell from over 2,000 to under 500. Both Ms Karageorgi and Mr. Marinakis gave evidence that the market hit a 48-year low in February 2016. It was the collapse in the market which affected the value of Mr Kritsas's vessels and led to the failure to repay the loans.

4. The Bank sued for the amounts outstanding on the loans. Andrew Baker J entered default judgment against the first to fourth defendants on liability on their failure to acknowledge service. The Bank now claims that the liability of Mr Kritsas follows on the same facts and for the same amounts as the liability of Pearl and Onyx.

5. Mr Kritsas's personal guarantees were governed by Greek law and he contends that they cannot be enforced in accordance with Articles 862 and 281 respectively of the Greek Civil Code due to fault and an abuse of rights by the Bank. In summary Mr Kritsas's case is that the fault and abuse of rights occurred because the Bank did not accept or respond appropriately to proposals he made for restructuring the loans or for sale of the vessels when the loans became distressed.

6. During the trial I heard evidence for the Bank from Ms Katerina Karageorgi, who is a senior relationship manager in shipping at the Bank's Greek branch and dealt with the borrowers until July 2015, and Ms Eleni Kallantzi, the head of the Bank's loan management unit in Greece ("LMU"). She assumed responsibility for the borrowers after that date. Ms Karageorgi's evidence covered the period 2010-2015, Ms Kallantzi's, the period 2015-2016. Both Ms Karageorgi and Ms Kallantzi are experienced bankers and gave straightforward accounts of their dealings with the defendants.

7. Mr Kritsas gave evidence. It did not always square with the contemporaneous documents and memoranda made by Bank officials of meetings with him. Where

there is an inconsistency I have preferred the latter. Mr Evangelois Marinakis, who was president of both Pearl and Onyx, and managing director and chief operating officer of Kritsas Shipping, also gave evidence. Mr Marinakis is experienced in the shipping business as a shipping agent, broker and manager. On the whole I accept his evidence. Mr Marinakis was more closely involved in the rescheduling negotiations with the Bank than Mr Kritsas, but Mr Kritsas accepted that the details of the negotiations were considered by him.

8. I also heard evidence from two experts in Greek law, Professor George Georgiades instructed by the Bank, and Professor Anastasia Grammaticaki-Alexiou instructed by Mr Kritsas. Professor Georgiades is Assistant Professor in civil law at the University of Athens, teaching civil and commercial law. He is also a partner since 2004 in a Greek law firm handling commercial litigation and arbitration. Professor Grammaticaki-Alexiou is Professor Emerita in the Faculty of Law at Aristotle University of Thessaloniki and has held a number of visiting positions in the US, Australia, and Cyprus. Both were impressive witnesses.

9. There was broad agreement between the experts as to the interpretation of Greek law. After their individual reports were served, they prepared a Joint Memorandum in the form of the experts' agreed answers to the questions and issues on an agreed list.

10. The evidence of Mr Marinakis and Professor Georgiades had to be taken out of order because they were unavailable at the time they would normally have been called. In my view this did not disadvantage the parties in advancing their respective cases. An interpreter was sworn for both Mr Kritsas and Mr Marinakis but in the event was not needed by either.

BACKGROUND

The loan agreements and Mr Kritsas's personal guarantees

11. The Bank advanced loans to Pearl and Onyx in 2010 to assist in the purchase of two vessels, the first, a Handymax-size bulk carrier vessel, *Aurora Pearl*, about 10 years old, the second, a Handymax-size bulk carrier vessel, *Aurora Onyx*, about 8 years old. Mr Kritsas was introduced to the Bank by Mr Simon Ward, at the time working for HSBC Shipping Services Ltd. After a management buyout in 2012 the company was renamed Hartland Shipping Services Ltd ("Hartland Shipping"). Ms Karageorgi had already met Mr Kritsas some years previously when working for Barclays. Mr Kritsas explained in evidence that he borrowed from the Bank because of its size, reputation and experience in shipping finance.

12. In her August 2010 memorandum to the Credit Committee of the Bank, Ms Karageorgi had recommended the loans for Kritsas Shipping. She stated that the customer was from a conservative, financially strong group, with long experience in shipping. The client had only minimal exposure in the Greek market and an estimated total net worth of US$ 67 million. The group had been established in 1972, Mr Kritsas having run it since his father's death. He had experienced personnel, including Mr Marinakis.

13. The credit memorandum recorded that Mr Kritsas himself was regarded as a reputable, trustworthy and sophisticated client, having entered swap transactions for

hedging purposes. He was the driving force behind the group. He would not take on commitments he could not fulfil. Mr Kritsas's personal and corporate liquidity was US$38 million, split between Pictet and HSBC Geneva (US$20 million), with some US$1-2 million in the financing bank, RBS. Ms Karageorgi commented that there had been the slide in dry bulk shipping rates. The assets of the company could readily be sold in case of need, the vessels being capable of sale to another of the Bank's customers.

14. On 10 August Ms Karageorgi sought general advice from one of the law firms in Greece, Vgenopoulos & Partners ("V&P Law"). Without naming the client or vessel – in fact it was the vessel to be renamed the *Aurora Pearl* - she inquired about the Bank's position in having a Liberian registered mortgage turning on different nationalities of owner, flag, and bareboat charterer.

15. The Bank sent its term sheet to Kritsas Shipping on 25 August 2010. Among the terms on which it offered credit facilities was that Mr Kritsas give a personal guarantee to cover the Bank's exposure under the term loan facility. Mr Marinakis signed and returned the term sheet on 14 September, with some minor amendments.

16. For documenting the two loans and for taking the related security for the loans, the Bank retained the Piraeus office of the law firm, Stephenson Harwood.

17. Mr Kritsas was represented Mr Miltos Papangelis of the law firm V&P, which had been recommended by the Bank. Mr Kritsas said in his evidence that V&P were well known in the Greek shipping market. It is evident that V&P was one among a number of legal firms the Bank used in Greece.

18. Stevenson Harwood sent V&P various draft documents, including a draft of Mr Kritsas' personal guarantee. On 28 September 2010 Mr Papangelis returned some of the documents marked up with suggested changes, adding that Mr Kritsas might have comments on the personal guarantee when he returned the following day. In a further email of 4 October Mr Papangelis returned further drafts marked "with some minor amendments I have made vis-à-vis your last drafts." He stated in the email that he would call the Stephenson Harwood lawyer about a particular clause of the corporate guarantee. As well as formal changes in the personal guarantee, Mr Papangelis suggested deletion of a clause stating that it was given in order to promote Mr Kritsas's own activities.

19. The formal loan agreements and guarantees were dated 30 November 2010. The Pearl Loan was for US$ 15 million to part-fund Pearl's acquisition of the vessel for $24.85 million. It was advanced about 14 October 2010 and was secured by a mortgage over the vessel, guarantees from Kritsas Shipping and Mr. Kritsas, and security assignments of the vessel's earnings and marine insurances. Repayment of the principal sum was over a 10-year period, in quarterly instalments of $312,500, with an additional US$ 2,500,000 balloon added to the final instalment. Repayments in the first instance were to be taken from the earnings account associated with the vessel. Interest was payable quarterly.

20. The Onyx loan was for the same amount and was advanced approximately 6 weeks later, on about 30 November 2010, to part-fund Onyx's acquisition of the vessel for US$ 27.35 million. It was secured in a similar manner to the Pearl loan. Repayment

and interest terms were similar to the Pearl loan (prepayment of the principal by quarterly instalments of US$ 300,000 over 10 years, with an additional US$ 3,000,000 balloon added to the final instalment).

21. Other terms of the two loan agreements were also similar. Both had asset cover ratio ("ACR") covenants, which required the total security provided for the loan to be maintained at a minimum 135 percent of the outstanding loan debt. Where the value of the security fell below this ratio, the Bank could demand additional security or prepayment. Minimum liquidity covenants required Pearl and Onyx to maintain deposits with the Bank of not less than US$1,250,000 (Pearl) or $1,200,000 (Onyx).

22. "Control of the borrower" covenants required Pearl and Onyx to procure that they remained within the beneficial ownership or control of Mr Kritsas. Clauses in both loans required Pearl and Onyx to maintain control accounts, which would be conclusive and binding in the absence of manifest error as to debit/credit balance. "Events of default" clauses included missed payments, breaches of other obligations, and any change in the ownership or control of Pearl or Onyx. There were acceleration clauses in both agreements should there be a continuing event of default.

23. Mr Kritsas gave personal guarantees for both loans. The Guarantee and Indemnity for the Pearl loan is dated 8 October 2010; that for the Onyx loan dated 23 November 2010. Each is governed by Greek law. Each contains a "Warning to Guarantor" on the cover page in bold type. This reads that it is an important document, that a signatory should take independent legal advice before signing, and it should only be signed if the signatory wanted to be legally bound. If it is signed and the lender is not paid, the guarantor might have to pay instead of the borrower without any limit on liability.

24. The signature page of the personal guarantees contains a "Declaration", again in bold type: "I hereby declare and confirm that I understand English, I have read this Guarantee and Indemnity and I have taken independent legal advice before signing this guarantee and Indemnity." Mr Kritsas's evidence was that he trusted his lawyers when he signed the personal guarantees, but he accepted that he knew that under them he might be liable in the event that his companies did not pay.

25. Clause 3 of each guarantee makes the liability of a guarantor and a principal debtor by way of indemnity in respect of all "indebtedness" under the corresponding loan and its associated finance documents. "Indebtedness" in the loan agreements is defined as

> "the aggregate from time to time of: the amount of the Loan outstanding; all accrued and unpaid interest on the Loan; and all other sums of any nature (together with all accrued and unpaid interest on any of those sums) payable by the Borrower to the Lender under all or any of the Finance Documents."

26. Clause 4.5 of each guarantee contains a waiver of rights provision as follows:

> "The Guarantor hereby irrevocably waives any rights which the Guarantor may have to require the Lender first to proceed against or enforce any guarantee or security of, or claim payment from the Borrower or any other guarantor of the Borrower's obligations to the Lender before claiming from the

> Guarantor under this Guarantee and Indemnity as well as all other rights, remedies, defences or exceptions (if any) which are or may be given to a guarantor by any applicable law including without limitation Articles 853, 855, 856, 859, 860, 861, 862, 863, 864, 866, 867, 868, 869 and 1297 of the Greek Civil Code (or any statutory re-enactment or modification thereof)."

27. Each of the guarantees also imposes, under clause 6.1, liability for the Bank's expenses of enforcing them.

The period from drawdown to February 2015

28. About a year after draw-down both Pearl and Onyx breached their ACR covenants. In Pearl's case it became liable to provide an additional US$ 3.25 million security. The parties agreed that Pearl and Onyx would provide part of the additional security required by the covenants by way of payment into an account over which an account pledge was taken (US$ 1.25 million from Pearl, US$ 1.2 million from Onyx), with the balance payable on demand.

29. This was given effect by the First Supplemental Agreements dated 5 April and 17 May 2012. The guarantors executed deeds of confirmation to confirm their agreement to the changes. The borrowers were represented by V&P Law. From this point, since the security did not reach the level required by the ACR covenants, the loans (to use Ms Karageorgi's description) were "underwater".

30. In mid-2012 the Bank notified Kritsas Shipping that the lending office of record was henceforth to be London. The Bank's staff in Greece, in particular the senior relationship manager, Ms Karageorgi, continued to deal with them. Ms Karageorgi's evidence was that that the move had no effect on the way in which decisions about the loan were made. This is the only direct evidence on the subject; there is nothing to support the argument that the change led to a less sympathetic handling of the account.

31. On 4 February 2013 the Bank wrote to Pearl and Onyx, Kritsas Shipping as corporate guarantor and Mr Kritsas as the personal guarantor, care of Kritsas Shipping, advising that the borrowers remained in breach of their ACR covenants and asking how they proposed to remedy the breaches. The Bank had obtained valuations of the vessels dated 22 January 2013 from Hartland Shipping which showed that the *Aurora Pearl* was valued at US$ 11 million, and the *Aurora Onyx* at US$ 13.5 million.

32. Negotiations between the parties led to an agreement contained in two countersigned letters, dated 15 February 2013, whereby the ACR covenants would be temporarily relaxed to 120 percent until the end of 2014. In return Pearl and Onyx would pre-pay two of the quarterly repayments of principal due later in 2013. Further, Mr Kritsas - identified as the personal guarantor - agreed to maintain a US$ 3 million deposit with HSBC Private Banking Group in Geneva throughout 2013 and 2014, covering both loans.

33. In January 2014 the borrowers requested the Bank's permission to reflag the vessels. This involved the execution of new ship mortgage documentation. The changes were

documented in Second Supplemental Agreements to the loan documents dated 20 February 2014. The guarantors executed a deed of confirmation of their agreement to these changes.

34. Under a new procedure the Bank had introduced since 2010, Ms Alexandra Tatagia of V&P Law completed a certificate of 20 February 2014 that she had attended Mr Kritsas and explained the nature and consequences of the deed, and gave independent advice on it, including the risks of entering it and that there was no obligation to accept the terms or to complete it. She was satisfied that Mr Kritsas understood the nature and consequences of entering it. There was no conflict of interest in advising Mr Kritsas. She was satisfied that he could act in his best interests.

35. In a letter to HSBC securities processing centre in Sheffield, England, the same day, 20 February 2014, Mr Kritsas confirmed that he had instructed Ms Tatagia in relation to his giving of security and the deed, that he understood that the Bank would ask for a certificate from Ms Tatagia of his understanding and willingness to sign them, and that he further understood that the Bank would be able to rely on the certificate and that he would not be able to dispute that he was bound. Mr Kritsas's evidence at the hearing was that the reflagging was a minor matter and he did not pay much attention to it.

The "First Proposal" and the 2015 restructuring

36. At the beginning of 2015 the ACR covenants reverted to their original 135 percent level pursuant to the February 2013 agreement. On 10 February 2015 the Bank obtained further valuations of the vessels from Hartland Shipping. These showed that the *Aurora Pearl* was worth some US$ 8 million, when the outstanding loan was US$ 8.44 million after deducting the pledged cash balances, and that the *Aurora Onyx* was worth some US$ 9.5 million, when the outstanding loan was US$ 8.7 million after deducting the pledged cash balances. Thus, the ACR covenants were again being breached.

37. On 26 February 2015 Ms Karageorgi emailed her line manager, Mr Makis Mendoros, that the total ACR shortfall was US$ 5.64 million and that the vessels were on time charters at rates of hire below break-even given the operational expenses. She stated that Mr Kritsas had reported US$ 5.5 million deposited with the Bank's Geneva affiliate and in line with the authority Mr Kritsas had given her, that should be confirmed with Geneva. There was further internal bank discussion. On 2 March 2015 Ms Karageorgi notified Stephenson Harwood of the position.

38. There were various contacts between Mr Mendoros and Ms Karageorgi from the Bank on the one hand and Mr Kritsas and Mr Marinakis on the other. In an email dated 16 March 2015 Mr Mendoros reported internally on a meeting held on 10 March 2015. (Mr Mendoros noted that Mr Kritsas and Mr Marinakis were joined by their sale and purchase ("S&P") broker, Mr Simon Ward.) Mr Mendoros recorded that Mr Kritsas referred at length to the so-called Lagarde list. (This was the spreadsheet with the names of potential tax avoiders from Greece with undeclared accounts at HSBC's Geneva affiliate. Christine Lagarde, the then French finance minister, had passed it to Greek tax officials.) Mr Kritsas might have to pay US$ 3-11 million in tax penalties. Mr Kritsas also explained the poor market conditions.

39. At the meeting, the email recorded, there were discussions of the need for the ACR to be remedied, a shortfall of US$ 6.03 million. Mr Kritsas's liquid resources were about US$ 8 million, of which US$ 5 million was confirmed at HSBC Geneva. (Although Mr Kritsas could not recall details of the meeting, he denied that he would have mentioned the US$ 8 million figure. I cannot see why Mr Mendoros would otherwise have recorded it.) Mr Mendoros' email of 16 March 2015 then set out two options as to how the ACR shortfall could be addressed, the one if Mr Kritsas was willing to dispose of a vessel, the other if he was not prepared to do so.

40. On 2 April 2015 Mr Marinakis emailed restructuring proposals to the Bank on behalf of Kritsas Shipping. For convenience this is called the "First Proposal". At the hearing Mr Kritsas's evidence was that its content was what the Bank said it would accept. That cannot be the case in light of what both he and Mr Marinakis said and did at the time.

41. As background to the First Proposal Mr Marinakis's email recalled that the Kritsas obligations had been honoured over the time of the loans, almost five years, but that the freight markets had severely deteriorated at below break-even point. As well Mr Kritsas was threatened by the tax authorities, which could be traced back to the leak from HSBC Geneva to Christine Lagarde.

42. Mr Marinakis then set out the details of the "First Proposal". It was to the effect that the annual capital and interest payments would be capped at 50 percent of the current amounts until the end of 2017. Payments following a market recovery would be index linked through an earnings recapture clause so the Bank would be repaid more quickly. There would be no future pledge to the Bank. In return for the Bank there would be cross-collateralization between the Pearl and Onyx and a one-off capital repayment, through the release of the funds currently pledged.

43. There was a meeting on 24 April 2015 between Ms Karageorgi, Ms Kallantzi and Mr Mendoros for the Bank and Mr Kritsas and Mr Marinakis. An internal memorandum by Ms Karageorgi later the same day recounted that at this meeting Mr Kritsas raised again the implications for him of the Lagarde list and the claim he was facing from the Greek tax authorities. He also reported on the charter position of the vessels. The Bank informed Mr Kritsas that it could not reconsider restructuring unless the ACR breach were remedied, and proposed this be done by Mr Kritsas granting a second mortgage over the *Aurora Amethyst*, which was already mortgaged to Alpha Bank, together with a pledge over part of the cash in the account at HSBC's Geneva affiliate. The Bank requested Mr Kritsas's response by 1 May.

44. On 29 April 2015 Mr Marinakis emailed the Bank, stating that the proposals sent on 2 April did not properly express what had been conveyed orally, and revised the restructuring proposals: while interest would continue to be paid, it sought a moratorium on payment of principal for a year until mid-2016, with a reduction after that of 50 percent for another year and a half until the end of 2017. Other aspects of the 2 April 2015 proposal remained. The email stated: "[O]nly a deferment of this magnitude would allow the company to maintain its capacity and make it through".

45. At a meeting with Kritsas Shipping on 30 April, Ms Karageorgi (as she reported in an email to Ms Kallantzi the same day) insisted on the second mortgage of the *Aurora Amethyst* and cross-collateralisation of the *Aurora Pearl* and *Aurora Onyx*. In the

email to Ms Kallantzi she recalled that she had received a valuation of US$ 6.5 million for the *Aurora Amethyst*, which left enough equity in the vessel after taking into account the US$ 2.835 million owed to Alpha Bank.

46. There was a further meeting on 11 May 2015 between Ms Karageorgi for the Bank, and Mr Kritsas and Mr Marinakis. Ms Karageorgi reported on it to Ms Mendoros in an email of the same date. At a meeting, the email recorded, Ms Karageorgi told Mr Kritsas that there could be no restructuring until there was further security. Mr Kritsas said that he was in discussions with Alpha Bank about a second mortgage over the *Aurora Amethyst*. He also mentioned the possibility of selling the *Aurora Pearl*, with the Bank taking any loss, which Ms Karageorgi rejected. Other than this reference to the sale of the *Aurora Pearl*, there is no evidence that Mr Kritsas proposed the sale of both vessels at this point; that came later in early 2016.

47. Mr Marinakis sent the Bank a further proposal on 15 May 2015, as Mr Kritsas had promised at the 11 May meeting. That would grant a grace period for the payment of principal until mid-2018, in other words for three years. In addition, the loan period was to be extended 3-5 years, and the ACR covenants were to be waived until 31 December 2017, then reduced to 110 percent for the remaining term. The idea of a one-off capital repayment through the release of funds currently pledged was dropped.

48. However, for the benefit of the Bank the *Aurora Amethyst* would be mortgaged, the *Aurora Pearl* and *Aurora Onyx* would be cross-collateralised, and there would be an earnings recapture clause so that the Bank would benefit following a recovery in the market. The letter concluded that these arrangements were "absolutely necessary and prudent". They would enable the business "to reap the benefits of the next hire spike, enabling repayment of the loans.

49. Ms Karageorgi forwarded a credit memorandum to Ms Kallantzi on 4 June 2015, which contained detailed analysis including vessel cash flows to show whether repayment of the loans was sustainable. Over a week later, on 15 June 2015, Mr Marinakis emailed that the 15 May proposal had been with the Bank for a month and that he would take its silence as consent.

50. There was internal discussion and analysis within the Bank. That included review of Ms Karageorgi's credit memorandum in London by Mr Terry Clarke, director of the Europe loan management unit. There was also consideration of how an earnings recapture clause would work. Kritsas Shipping was sent a draft earnings recapture clause and Mr Marinakis sent a revised version and comments on 1 July 2015. Confirmation was obtained that Mr Kritsas had US$ 1.5 million with HSBC Geneva. On 2 July Hartland Shipping valued the *Aurora Amethyst* at US$ 6 million, the *Aurora Pearl* at US$ 6.5 million and the *Aurora Onyx* at US$ 7.5 million.

51. On 22 July 2015 the Bank informed Kritsas Shipping of its response. It would agree to capital repayments being reduced to a third for a year until mid-2016, and to the ACR covenants being reduced to 100 percent until the end 2016, then to 110 percent for a further year until the end 2017, whereupon they would revert to the 135 percent figure in the loan agreements. The Bank agreed with the security proposals in Mr Marinakis's 15 May email, but required that Mr Kritsas should also maintain a US $1.5m cash balance in his HSBC Geneva account. It agreed to an earnings capture clause along the lines agreed with Mr Marinakis.

52. Mr Marinakis replied the following day, 23 July 2015, on behalf of Pearl and Onyx. While he appreciated the position of the Bank, Pearl and Onyx had to operate within their financial capabilities and under the existing dire market conditions. There should be a full moratorium on capital repayments until the end of 2016 and the ACR covenants should be waived completely for the remaining term of the loans. Mr. Kritsas should not have to maintain balances.

53. On 28 July 2015 the Kritsas account was downgraded and transferred to LMU Greece. Ms Kallantzi now had overall responsibility for the account, and Mr Nikolaos Parousis became the relationship manager. The following day, 29 July 2015, formal requests were sent to Pearl and Onyx to remedy the ACR shortfall within 30 days.

54. There was a handover meeting for the account on 5 August 2015 between Mr Parousis and colleagues from the Bank and Mr Kritsas and Mr Marinakis. According to Mr Parousis's account of the meeting, Mr Kritsas informed the Bank that

> "he maintains funds of US$ 5 million (out of which of US$ 1 million not readily liquid) in order to be able to support his business (advised that this amount is enough for two more years of bad market) and another US$ 1.5 million to settle any possible dispute with tax authorities."

Despite his difficulty in recalling details of the meeting, Mr Kritsas denied having said this. There is no reason for Mr Parousis to confect this statement, not least when he needed accurate information about an account he had just taken on.

55. Mr Parousis's account of the handover meeting then recorded that after further discussion Mr Kritsas accepted the Bank's proposals for rescheduling, except that he would only maintain US$ 0.75 million, not US$ 1.5 million with HSBC in Geneva. Mr Kritsas's evidence was that at that point the business was desperate so they took what the Bank proposed. However, he accepted at the hearing that at that point he thought his companies could survive.

56. Two days later, on 7 August 2015, Mr Parousis prepared a credit memorandum for HSBC London for approval of what had been agreed, including the US$ 0.75 million figure. The memorandum noted that Pearl had paid the instalment due on 14 July after discussion with the relationship manager, but that Mr Kritsas could not confirm that he would accept the Bank's proposal of 22 July 2015. Until then his track record was impeccable, the memorandum continued, and Alpha Bank had reported that it was satisfied as well. Mr Kritsas was reputable, trustworthy and dedicated to his work. The Bank's security package gave comfort, "and the provision of the personal guarantee demonstrates principal's intention to stand by his business."

57. HSBC London approved the proposal, including the US$ 0.75 million figure with HSBC Geneva. On 14 August 2015, Stephenson Harwood sent a request to Mr Marinakis for corporate details, in particular regarding the ownership and directors of the three vessels, so it could prepare the rescheduling documentation. A few days later, on 18 August 2015, Mr Marinakis forwarded relevant details, promising to revert with the remaining information. On 26 August 2015 payment was made by Pearl in accordance with the new terms (one third of the instalment due).

58. Mr Parousis asked Mr Marinakis about progress on the documentation on 5 October 2015. He in turn made inquiries of the Kritsas lawyers, V&P Law, who reported that they had asked the lawyers representing Alpha Bank for the inter-creditor deed as regards the second mortgage which the Bank would take over the *Aurora Amethyst*. Mr Parousis made further inquiries of Mr Marinakis about progress at the end of October, who on inquiry forwarded an email from V&P Law: Alpha Bank's lawyers, it said, were considering the comments which Stephenson Harwood had made on the draft inter-creditor deed.

59. Pearl made reduced repayments at one-third of the amounts originally scheduled on 14 October 2015, and on 25 November 2015 Onyx made a reduced payment as well.

60. The formal documentation implementing the restructuring, the third supplemental agreements for the loans, was executed on 11-12 January 2016.

Further default and the Second Proposal

61. There was a further breach of the ACR covenants in the loan agreements in early 2016. At a meeting with Mr Kritsas on 21 January 2016, the Bank recorded that he accepted the breach, informed the Bank that his cash balances were diminishing after what he had injected into his companies, and requested the support of the Bank in disposing of the *Aurora Pearl* and *Aurora Onyx* apparently against debt repayment and forgiveness. The Bank recorded his words as: "These are your vessels." A formal proposal was to be sent shortly.

62. The Bank sent formal letters dated 10 February 2016 to both Pearl and Onyx, with copies to the guarantors, notifying the breaches and requesting the provision of additional security in one of the contractually specified forms, within 30 days, in accordance with clause 11.12 of the loans, as amended by clause 4.13 of the third supplemental agreements.

63. On 16 February 2016 Kritsas Shipping emailed a letter to the Bank on behalf of Pearl and Onyx dated the previous day, 15 February. The letter contained what is described as the "Second Proposal". It began by recalling the discussions in May the previous year when the owners

> "having foreseen, though to a lesser extent, the yet further deterioration of the market, but at the same time wishing to continue to meet their obligations"

had requested an extended grace period, which the Bank had rejected. The letter stated that although they wished to meet their obligations, "available funds to support the vessels were never limitless" and "reserves are about to be exhausted".

64. Times, the letter stated, were "dire". Average daily hire rates for the vessels had decreased from US$ 9,737 when the rescheduling was agreed in July 2015, to US$ 2,500 that month. The loss to shareholders of the two borrowers up until the end of 2015 was US$ 31 million. The only realistic course, the email continued, was to bring the loans to an end by selling the *Aurora Pearl* and *Aurora Onyx* through brokers, or to other clients of the Bank, at the latest by the end of March 2016. The pledged

deposits of US$ 2.45 million would go towards repayment. Interest would continue to be paid until the loans were terminated. Further,

> "no further claim [would] be made by the Bank against either the Borrowers and/or the Managers and/or the Guarantors."

65. On 19 February 2016 Kritsas Shipping received offers for the *Aurora Pearl* and the *Aurora Onyx* through Simon Ward of Ursa Shipbrokers. The offer price was US$ 5.75 million for the two vessels, less 3 percent commission. Mr Ward commented that it was a buyers' market, as much as he had ever seen. That information was forwarded to Ms Kallantzi of the Bank a few days later, with the comment that the offer was disappointing, but the owners

> "firmly believe that the fair price is close (if not above) to US$ 7 million for both ships. It and would have been higher (about US$ 8 million) had this offer been received immediately after the meeting on 21 January."

66. In an email dated 22 February 2016, the Bank said that it had no objection in principle to the vessels being sold by an appropriate mechanism, but could not agree to absorb the losses on the loans. Instead, it required firm proposals in respect of both the sale of the vessels and the time and method of repayment of the balance of the loans after application of the sale proceeds, together with appropriate security arrangements. In this email the Bank noted that the breaches of the ACR covenants were ongoing and reserved its rights in this regard. It also requested evidence of compliance with the minimum liquidity covenants. So that it could properly consider proposals from the owners, the email continued, the Bank requested

> "that you provide copies of the Owners' trial balances and invoices relating to its trade obligations and copies of the Owners' and the Guarantors' bank account statements…In addition, given your assurance that you value your relationship with the Bank and in light of your stated honest approach to this matter, the Bank also expects the Owners to be open with the Bank as to any negotiations taking place between the Owners and its other lender (eg Alpha Bank) and to be provided with information in this regard."

67. On 26 February 2016, Kritsas Shipping emailed that the Bank's approach was "totally unrealistic" and reiterated their 15 February 2016 proposal, i.e. a sale of the vessels combined with a "termination of the loan relation". It requested that the cash collateral held by the Bank be used to fund payment of Onyx's quarterly principal instalment of $100,000 and interest payment of $72,684.87, both of which fell due that day. It suggested talks with the Bank, adding that there seemed to be no other solution to what it proposed.

Payment default and sale to Newlead

68. Onyx defaulted in payment of principal and interest on 26 February 2016. On 11 March 2016 the Bank sent it a formal letter noting that an event of default had occurred by reason of its failure to provide additional security as duly requested on 10

February 2016 in response to the ACR breach, and the missed payments of principal and interest on 26 February 2016. The Bank reserved all of its rights in respect of the events of default.

69. On 11 March 2016 Mr Kritsas entered agreements to sell the shares in Pearl and Onyx to an affiliate of Newlead Holdings Ltd ("Newlead"), a company led by Mr Michael Zolotas. The agreements provided that the consideration for the transfer was US$ 1. Mr Kritsas gave oral evidence that Mr Zolotas also agreed to give him shares in his companies. When Mr Marinakis was asked he said he knew nothing about it.

70. The share sale agreements contained a clause, clause 3.2, that Mr Kritsas had the right to cancel the sale if within five business days following the date of the agreement the Bank gave instructions for the immediate sale of the vessel for its repayment. The agreement for the sale of shares in Kritsas Shipping came later, 22 March. Mr Kritsas's evidence was that all the shares had been transferred by 22 March 2016.

71. Kritsas Shipping had emailed the Bank with two options on 15 March 2016. "Option 1" effectively reiterated the existing proposal, that the vessels be sold and there be no further recourse for repayment. "Option 2" was for the shares in Pearl, Onyx, Kritsas Shipping and Lester to be transferred to Newlead, and for "servicing of the loans…to be made by the Owners, under the new shareholding structure/beneficial ownership."

72. The email recorded that an agreement which gave effect to "option 2" had been reached with Newlead, subject to "Owners'/Managers' reconfirmation" by noon on 22 March 2016. At the hearing, Mr Marinakis said that at this point Mr Kritsas was under great psychological pressure and saw Newlead as a way through. Both he and Mr Kritsas said that Newlead had a record of turning around situations like this. The Newlead transaction was not to enable Mr Kritsas to avoid liability on the personal guarantees.

73. There were immediate inquiries within the Bank about Newlead and Mr Zolotas. The Bank's head of shipping client management in Greece reported internally that Mr Zolotas was not someone with whom the Bank would want to have a relationship. Mr Zolotas had been associated with an insolvent company and had serious problems with his lenders, albeit that he had created a new structure which had been floated on Nasdaq.

74. Internal discussions in the Bank that day, 15 March 2016, included that option 2 could be investigated, but with the Bank choosing the vessels' managers, and that there might be partial release ("as discussed before") of Mr Kritsas's personal guarantee.

75. There was a meeting that day, 15 March 2016, between the Bank, Mr Kritsas and Mr Marinakis. The Bank's record of the meeting was that Mr Kritsas repeated his grim situation, that he had lost about US$ 35 million in shipping and his personal wealth as well. He would abandon shipping altogether. He clarified that option 1 in his 15 March 2016 email included the *Aurora Amethyst*. The Bank's record of the meeting also states that Mr Kritsas reiterated his position that he had tried to honour his personal guarantee, which was the reason he had continued to make payments to the Bank, and not considered selling the vessels.

76. The Bank sent a formal letter on 18 March 2016 referring to the Kritsas email of 15 March. The Bank, it said, had security, including the personal guarantee of a high net worth individual. Mr Kritsas now pleaded poverty, the letter continued, but the Bank rejected that. He wanted to be released from his personal guarantee, yet said he had no money. The letter contained this passage:

> "If he seriously wishes to maintain this stance, then he should support it with documentary evidence to demonstrate his supposed poverty, including his latest tax statements. Also, he should also instruct HSBC Private Bank (Suisse) SA to share his account statements with us, showing to where funds have been. Also, he should clarify the position as to his ownership interest in Purple Holdings. We invite him to give such transparent disclosure of this wealth without delay."

The letter went on to reject the proposed share-sale to Newlead. If the vessels were to be sold, it said, it should be done properly.

77. Mr Marinakis replied on behalf of Pearl, Onyx, Kritsas Shipping and Lester on the 22 March 2016. The companies had repeatedly sought to obtain the Bank's cooperation in light of the business reality. The email stated:

> "Unfortunately, the time has run out (as we have repeatedly said to the Bank) and the owners have been left with no alternative than to proceed with the one and only path available."

This was a reference to the sale to Newlead. That did not involve, the email explained, the release of Mr Kritsas's personal guarantee. The Bank needed, even at this late stage, to face the facts. If it did, the companies would cooperate and the repayment of the loans became a realistic scenario. The email ended:

> "We remain at the Bank's disposal and once again wish to assure the Bank that the owners and the guarantors continue to be more than willing to cooperate with the Bank for finding the best way forward."

78. The following day, 23 March, the Bank had confirmed to it by Mr Marinakis that the transfers to Newlead had occurred.

79. A week later, 30 March 2016, the Bank was contacted by Mr Michael Livanos, the vice president of Newlead, who sought a meeting and advised that Mr Kritsas was "no longer involved in the case". On 4 April 2016 Mr Livanos sent the Bank formal documentation dated 22 March regarding the sale of shares in Pearl and Onyx.

Acceleration, the Third Proposal and Hadjiyiannis sale

80. On 8 April 2016, the Bank sent supplemental notices of default to both Pearl and Onyx. In addition to breach of the ACR clauses, and Onyx's failure to pay, the transfer of ownership to Newlead was identified as an event of default.

81. On 14 April 2016 Pearl failed to pay its quarterly instalments of principal and interest, and these sums were taken from the cash collateral held by the Bank. In the absence of remedial action the next day, 15 April, the Bank accelerated the Onyx loan and demanded payment of $8,303,103.04. The "Notice of acceleration, termination and demand" noted that no sums had been received into the earnings or separate account since 8 March, despite the vessel clearly trading and having loaded a cargo of rice in India in late March. The notice was served on Mr Kritsas by way of demand under the personal guarantee.

82. That day, 15 April 2016, the Bank issued a Summons in Rem in the High Court of South Africa, Kwazulu-Natal Local Division, seeking possession of the *Aurora Onyx*, then in port in Durban, and judgment for the accelerated sums due under the loan agreement. Pursuant to that claim *in rem*, the Bank arrested the vessel.

83. Mr Livanos of Newlead contacted the Bank the same day, 15 April 2016, through the Bank's lawyers. He said that Newlead was willing to cooperate with the Bank and would contact the charterers to calm them about the arrest.

84. Three days later, on 18 April 2016, Mr Livanos sent a more detailed email which contains what is termed the "Third Proposal". The situation was critical, he said, with potential claims from the cargo owners and charterers of the *Aurora Onyx*. The email continued with an offer to service the existing Onyx loan (but not to pay capital instalments), and to purchase the *Aurora Onyx* (or both vessels) for $4 million, of which some 75 percent was to be financed by the Bank. The 18 April 2016 email was followed by another email a week later, 25 April 2016, in which the Bank was reminded that the cargo of rice remained at high risk.

85. Meanwhile the Bank identified Mr Hadjiyiannis, one of its existing clients, as being willing to purchase the *Aurora Onyx* for US$ 4.6 million, and to take delivery to allow her cargo to be preserved. Mr Hadjiyiannis received 100 percent finance from the Bank for purchase of the vessel.

86. The Bank approved the sale to Mr. Hadjiyiannis internally at a meeting on 25 April 2016, which was minuted by the Bank's chief risk officer, Mr Adam Seymour. The meeting noted Hartland's valuation of mid-March of US$ 3 million, but Hartland were conservative valuers and the market had improved 100 percent over the previous month. Newlead was asked whether it would match this $4.6 million offer but had declined. Even if it had, the minute continued, the Bank had no appetite to have Newlead as a customer or to see it or Mr Kritsas profit from having acted in bad faith.

87. The Bank's Greek CEO, who attended the meeting, questioned whether the US$ 4.6m was too low given the Kritsas exposure to the Bank and the expected rebound in the market over the next few years. It was decided that given its age the vessel could not be warehoused, and that figure was some 10-15 percent above its value. It needed to be a good price to enable the Durban marshal to release it without an auction and to defend any subsequent claim that it was sold at an undervalue.

88. The Bank obtained fresh desktop valuations of the *Aurora Onyx*. Allied Shipbroking Inc gave a valuation of US$ 4 million on 26 April 2016, and Hartland Shipping gave a valuation of US $3.8million on 27 April 2016. There was a credit memorandum

within the Bank which recorded that "No value is given at this moment at Kritsas Personal Guarantee."

89. On 12 May 2016 the US$ 4.6 million offer was put into irrevocable form for the purpose of being approved by the South African court. In an email to the Bank's South African solicitors, Newlead stated that it did not intend to oppose the Bank's application for a court sale. The court approved the sale for that amount on 19 May 2016, without requiring an auction. The *Aurora Onyx* was delivered to her new owner on 25 May 2016.

90. Mr. Livanos requested that the Bank release Newlead and Mr Zolotas from any liability for its acquisition of the companies, and also clear both vessels' trading debts, in return for Newlead's continuing co-operation. By a subsequent exchange of emails on 20 and 26 May 2016 Newlead agreed to cooperate in the sale of both vessels. The Bank agreed to the conditions.

91. As for *Aurora Pearl*, the Pearl loan had been accelerated on 26 April 2016 and payment of US$7,676,637.94 demanded. The acceleration notice observed that there had been a failure to pay the instalment owing a fortnight earlier. As with the Onyx loan, the notice of acceleration was served on Mr Kritsas by way of demand under the personal guarantee. On 5 May 2016 Newlead offered a scrap value of US$ 1,555,000 million for it.

92. Mr Hadjiyiannis agreed to purchase the vessel for US$ 3.1 million, with 100 percent finance from the Bank for its purchase. Newlead did not pay the trade debts of the vessel, but it re-delivered the *Aurora Pearl* into the Bank's possession on 14 June 2016 after the vessel completed discharge at Shanghai, whereupon the Bank directed the vessel to Hong Kong. The same day Hartland Shipping valued it at US$ 2.8 million. The bill of sale for the transfer of the vessel from Pearl to Woodlock Shipping Company Limited, a company controlled by Mr Hadjiyiannis, was dated 4 July 2016 and recorded the price as US$ 3.1 million. The vessel was delivered to Woodlock on 5 July 2016.

GREEK LAW DEFENCES

93. Article 862 of the Greek Civil Code regarding extinction of guarantee through fault reads in a translation agreed by the experts as follows:

> "*Extinction of guarantee*. A guarantor is released, if by reason of fault of the creditor the satisfaction of his claim by the debtor has been rendered impossible."

94. In their Joint Memorandum the experts agree that the Article 862 defence has three cumulative elements: (i) the borrower is unable to satisfy the lender; (ii) the lender is at fault; and (iii) the lender's fault is the cause of the borrower's inability to satisfy the lender." "Fault" in this context includes simple and gross negligence. The experts agree as to the meaning of these concepts as follows:

> "(i) Simple/minor negligence: a failure to take the care that would be taken by the average prudent and diligent person acting within the same professional environment; which cannot

> exist unless it is possible to predict and avoid the unlawful consequence of the action.
>
> (ii) Gross negligence: as above, but the deviation from the behaviour of the average prudent and diligent person must be very great, manifesting total indifference for the consequences for other parties."

95. In the context of allegations against a Bank, in particular over its obtaining a guarantee, Professor Grammaticaki-Alexiou stated in her oral evidence that the reference to the "same professional environment" would refer to the environment of a bank or lending institution. The issue was whether the behaviour of the Bank's officials conformed to average behaviour. Thus Article 862 permitted a range of possible actions, all of which conform to average prudence and diligence.

96. Professor Grammaticaki-Alexiou accepted that one matter to which the average banking official could legitimately have regard at any given time was the terms of any agreements made previously with a customer. For example, if the Bank was considering how to take matters forward where the customer had agreed to do something, and a year later, the customer stopped doing that thing, the matters the average banking official could legitimately have regard to included the terms of any agreements he/she had previously made with the same customer.

97. As to causation in Article 862, again the experts agree in their Joint Memorandum:

> "For causation to be established, the lender's fault must be a causa adequata, i.e. it must have the tendency to lead to the borrower's inability to satisfy the lender, in the normal course of events; this tendency is judged by reference to the perception of the average prudent person and the information existing at the time of the lender's fault."

98. If the requirements of Article 862 are met, the experts agree that the guarantor is released from his guarantee obligations to the same extent as the impossibility of satisfaction that has been caused by the lender's fault. As they explain, "total impossibility caused by the lender entails total release; partial impossibility caused by the lender entails partial release."

99. Article 281 of the Greek Civil Code regarding abuse of rights reads in agreed translation as follows:

> "*Abuse of right*. The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by the good faith or morality or by the social or economic purpose of the right."

100. The experts agree that Article 281 applies where the exercise of a right involves "an indisputable or obvious breach" of the requirements of either (i) good faith, or (ii) the boni mores, or (iii) the social and economic purpose of the right. Their explanation of those three concepts is as follows. In her first report Professor Grammaticaki-Alexiou

stated that "[t]he transcendence of the limits has to be significant, indisputable, obvious."

101. In their joint memorandum, the experts agree that good faith "indicates the trust, honesty and integrity necessary in transactions, and includes taking into consideration the justified interests of a contracting counterparty"; that boni mores "indicates the morality of the average prudent, honest person"; and that the social and economic purpose of its right "is the more general economic interest that the law seeks to satisfy in the provision of a given right." The experts then add:

> "There are certain categories of behaviour, as defined by case law or doctrine, which constitute abuses of right, the most important being (a) malicious exercise of a right, (b) estoppels by laches ("weakening of a right") and (c) contradictory behaviour. (The categories are disjunctive, not cumulative)."

102. Professor Georgiades appended to his report *SC judgment 1198/1995, Chamber D*. There in the context of a bank refinancing, the Greek Supreme Court observed that as a result of the lending the Bank had no share in the borrowers' profits "and is therefore under no obligation to undertake any part of their risks, by writing off all or part of the loan it has granted or of any amount of interest it expects to gain." The court noted the cyclical nature of the shipping market and later said this:

> "[T]he bank had no obligation – from contract or in the context of the bona fide performance of contractual obligations, pursuant to Section 288 CC or under the trade usages – to consent to a restructuring of the loan or to continue to satisfy the claims of the group's demanding creditors from its own resources – which was bound to jeopardize seriously its own interests – because the group's maritime operations were no longer profitable."

103. In another case before the Piraeus Court of Appeal, *Judgment no 753/2009*, there is the observation that in assessing the soundness of a creditor's conduct when exercising its right and deciding whether its conduct contravenes the moral conventions, one needed to take into account the limitations imposed by Article 281. The court added:

> "Such limitations are exceeded if, following a thorough assessment of the interests of both sides (creditor's and debtor's), the creditor's conduct appears to be blatantly inconsistent with the average person's sense of justice."

104. In oral evidence Professor Grammaticaki-Alexiou was asked about the passage in the judgment in *SC 1198/1995* and whether Greek law required banks to offer debt forgiveness (a "haircut") to borrowers. She agreed with the statement of principle and accepted in light of it that even the requirements of good faith could not force a bank to follow that course. In my view it follows that the same applies under Article 862.

105. Professor Grammaticaki-Alexiou also said in her oral evidence that causation, in the sense of causa adequata, was relevant to Article 281.

106. Article 332 of the Greek Civil Code provides for the waiver of liability arising from fault. In the agreed translation it reads:

> "*Agreement for waiver of liability arising from fault*. Any agreement made in advance, restricting or excluding liability arising from wilful misconduct or gross negligence, is considered as null and void.
>
> As null and void is also considered any in advance agreement that the debtor shall not be liable even for minor negligence, if the lender is at the debtor's service or liability arises from the exercise of a business following concession of a public authority. Same applies if the waiver clause is included in a term of an agreement that was not subject to personal negotiation or if it provides for release of the debtor from liability arising from insults of goods that derive from personality, especially life, health, freedom or honour."

107. The experts agree that whether a specific agreement containing a waiver clause was in practice subject to personal negotiation was to be examined on an individual basis, following assessment of the factual background of the specific case. However, they disagreed as to when a term of an agreement was subject to personal negotiation.

108. The experts agreed that a guarantor is entitled to the protection of Act 2251/1994 if the borrower, whose debt is guaranteed, is a consumer, and the guarantor acted outside the scope of his professional or business activity. The Joint Memorandum continues:

> "These conditions will not be met if the borrower/guarantor has significant experience, financial capacity and organisational structure…Several Court decisions have refused to treat a guarantor as consumer on the ground that the guarantor was strongly connected with the borrower company…"

109. On my interpretation of the Joint Memorandum, both experts agree that the burden of proof regarding personal negotiation rested on the person alleging its absence, unless that person was a consumer within the consumer protection regime under Act 2251/1994 of the Greek law. If the person is a consumer, the burden is reversed.

110. The Joint Memorandum stated as follows in relation to the applicability of the provisions:

> "A guarantor is entitled to the protection of Act 2251/1994 [i.e. consumer protection] if 1. The borrower, whose debt is guaranteed, is a consumer; and 2. The guarantor acted outside the scope of his professional or business activity…These conditions will not be met if the borrower/guarantor has significant experience, financial capacity and organisational structure…Several Court decisions have refused to treat a guarantor as consumer on the ground that the guarantor was strongly connected with the borrower company…"

THE GUARANTOR'S DEFENCES

111. The Bank's claim on the personal guarantees which Mr Kritsas gave for the Pearl and Onyx loans is governed by Greek law. Mr Kritsas defended the claims by reference to various provisions of the Greek Civil Code. The Greek law experts agreed in the Joint Memorandum that he bears the burden of proof in establishing the defences. The two defences he advanced are fault under Article 862 of the Greek Civil Code, and abuse of rights under Article 281. These were said to be established by the way the Bank treated his First, Second and Third Proposals. Mr Kritsas also contended that his waiver of rights in his personal guarantee is void as regards Article 862.

The First Proposal, April 2015

112. It is said firstly, that the Bank is disentitled to rely on Mr Kritsas's personal guarantee because of its fault as regards what earlier in the judgement was called the First Proposal, that dated 2 April 2015.

113. The argument was that the First Proposal was a reasonable request for further relaxation of loan conditions. The Bank's fault in its response to that proposal was the cause of Pearl and Onyx's inability to mitigate the losses under the loans in a reasonable manner. This constituted causative negligence under Article 862 of the Greek Civil Code and a failure to take into account the interests of the borrowers and guarantors as required by Article 281.

114. The argument for Mr Kritsas was advanced in various ways. First it was submitted that the Bank's response to the First Proposal (and indeed to the Second and Third Proposals) had to be seen against the background of what had happened with the breach of the ACR covenants in 2012 and 2013. The Bank was supportive in 2012, and in February 2013 there was the agreement that the ACR covenants should be temporarily relaxed to 120 percent. It was open to the Bank to have prevented what later occurred by electing to enforce its security at a time when the value of the vessels would have been sufficient to pay off the loans.

115. Having chosen not to do that, but to relax the ACR covenants, the submission continued, the Bank knew that the only way ACR breaches would be remedied would be a rise in the market, which everyone accepted would occur at some point. With the background of a declining shipping market, and having committed itself to a relaxation in the ACR covenants in 2013 until the end of 2014, the argument ran, the Bank had to continue to support the borrowers until the value of the ships rose and could cover the loans. Mr Marinakis' evidence was that this rise in values sufficient to pay off the loans would have been accomplished by 2018.

116. As Mr McDonald for Mr Kritsas put it at one point in his oral closing, having picked a horse in 2013, the Bank could not change horses mid-race and recoup itself differently through a claim under Mr Kritsas's personal guarantees, The Bank should be treated as having elected to pursue a strategy of supporting the vessels until prices rose. To do otherwise was a breach of Articles 862 and 281.

117. Secondly, the defence submissions ran, the Bank was negligent in its slow response to the First Proposal and in agreeing what was to become the Third Supplemental Agreement. One factor was that the loan accounts were no longer based in Greece but

London. That cannot but have adversely affected the way the Bank dealt with the borrowers, since decisions were now been made by those more remote from the Greek shipping market.

118. As to delay, the submission ran, the market was in steep decline but it was not until 22 July 2015 that the Bank formally responded to the First Proposal, and that was after the chasing email from Mr Marinakis of 15 June 2015. During that time the worsening market meant that the value of the vessels continued to decrease, causing the borrowers to be unable to satisfy the loan agreements.

119. In addition to delay, the submission continued, the Bank rejected what were the reasonable requests contained in the clarified First Proposal of 29 July 2015. Under them interest continued to be paid, there was a grace period of a year on capital repayments, followed by a further 18 months of half repayments, but in return the Bank obtained the earnings recapture clause and the additional security in the form of cross collateralisation.

120. Yet when the formal response came, the argument ran, it was far more restrictive than what the borrowers had already said was essential to allow them to make it through. At the 11 May 2015 meeting the Bank made clear that it would not approve any restructuring unless the ACR breach was rectified. By contrast the following year it provided 100 percent financing to Mr Hadjiyiannis to purchase the vessels while there was still a breach of the ACR requirements.

121. The submissions recalled the borrower's modified proposal of 15 May, where they requested a 3 year moratorium but offered the additional security of the *Aurora Amethyst*. They had emphasized that this was effectively the only possible strategy to ensure repayment of the Bank. It was at a time, it was contended, when the vessels' values would have permitted the loans to be repaid in full, without recourse to the personal guarantees. But the Bank's response was a far less comprehensive package, with no moratorium on capital repayments.

122. Given what the borrowers had told the banks, it was submitted, this meant that money, which could have been used to support the ships until prices rose was instead required to be paid to the Bank. This lack of resources in the borrowers ultimately caused them to be unable to pay the loans and so caused Mr Kritsas to be required to pay under the personal guarantees. Since adopting the course of action the borrowers had stated to be necessary for their survival would have resulted in full payment to the Bank, it was its own actions that caused the loss suffered.

123. Finally, the submission ran, it was the Bank's response to the First Proposal which caused loss, both by the decline in the vessels' values with the continuing fall in the market, and by imposing terms on Mr Kritsas such that he no longer had the liquidity to perform the loans.

124. In my view none of what happened in the Bank's reaction to the First Proposal constituted a breach of either Article 862 or Article 281 of the Greek Civil Code.

125. To recount briefly what happened: there were breaches of the ACR in early 2015 once the period of relaxation of covenants under the 2013 agreements ceased; the borrowers made their proposal to remedy the breaches in the First Proposal; that was

followed by a meeting between the parties three weeks later, with the Bank insisting on its security position in any rescheduling; then Mr Marinakis emailed the Bank on 29 April 2015, stating that the proposals sent on 2 April did not properly express the borrowers' proposal and setting out another version; further meetings between the parties occurred on 30 April/11 May, followed by the borrowers' revamped proposal on 15 May; Ms Karageorgi prepared a credit memorandum, with its analysis including vessel cash flows; that was reviewed in Greece and London; there was further internal discussion and analysis in the Bank, including about the earnings recapture clause; valuations of the ships were obtained and there was contact with HSBC Geneva about Mr Kritsas's account there; on 22 July 2015 the Bank informed Kritsas Shipping of its response and agreement reached.

126. My characterisation of all this is that the borrowers were in breach of their loan covenants and in their First Proposal suggested how they could remedy the breaches. The matter went back and forth in the course of ordinary negotiations between them and the Bank. The defendants did not like the Bank's stance; the Bank in turn would not budge on what it regarded as fundamentals. At various points there was internal consideration within the Bank in accordance with its procedures. A compromise was reached in July, with final agreement in August. There was no negligence (either simple or gross) in the Bank refusing to accept the First Proposal. Nor was there a lack of good faith or other abuse of rights in the Bank in acting in the manner it did.

127. In particular there was no breach of the provisions in Greek Civil Code in the Bank insisting on maintaining the ACR as the price of any relaxation in payment terms. In his evidence Mr Kritsas said that all he ever heard in these meetings was "ACR, ACR, ACR." I accept the Bank's submission that there is nothing unreasonable about a secured lender trying to find a way to continue its relationship with distressed borrowers on the basis of adequate security, rather than on the basis that the relationship transforms into one of unsecured lending.

128. In relation to this, Professor Grammaticaki-Alexiou accepted in cross-examination that one of the matters the average banking official could legitimately have regard to, at any given time, was the terms of any agreements the Bank had previously made with the same customer. In other words, the Bank was not obliged to share any view that the ACR covenants were just "technicalities".

129. Nor was the Bank somehow bound to a specific course of action because it had adopted particular restructuring proposals in 2013. Part of Mr Kritsas's case was the submission, developed out of cross-examination and advanced in closing, that the Bank ought to have sold the vessels in April 2015, in other words, that its failure to do so was negligence by omission. That the Bank should sell the vessels was not part of the First Proposal. Selling the *Aurora Pearl* was raised, but quickly dismissed by the Bank because it meant Pearl would be released completely from liability. Mr Kritsas's suggestion in oral evidence that sale of both vessels was regularly canvassed in 2015 confused, in my view, what the borrowers did suggest the following year.

130. I accept the Bank's submission that sale of the vessels at this point was reasonably ruled out, since Mr Kritsas always associated it with a "haircut", where the borrowers' outstanding indebtedness would be forgiven and no claim made under the personal guarantees. The point about the 100 percent financing to Mr Hadjiyiannis to purchase

the vessels in 2016 goes nowhere: the context was different and, as I explain below, there was no fault in the Bank pursuing that course at that point in time.

131. So there was no fault under Article 862 in the Bank failing to accept the First Proposal and negotiating with the borrowers over several months to reach the compromise agreed in early August. To put it another way, Mr Kritsas has not established that the Bank's response to his First Proposal fell short of the standard required by Article 862, characterised by the experts as what "the average prudent and diligent person acting within the same professional environment" would do. There were a range of reasonable rescheduling possibilities, but it cannot be said that the final compromise - instalments reduced to one-third, ACR covenants relaxed, but additional security required - fell outside the range.

132. It took time to reach the agreement, but Mr Kritsas has not established that the delay constitutes Article 862 fault. What was involved was a not insignificant restructuring of two US$15 million loan facilities, including new security over a third vessel, already with a first mortgage to another bank. On 29 April Mr Marinakis accepted that the proposals sent on 2 April did not properly express the borrowers' view, and revamped proposals were sent on 15 May. So the clock in effect started about then. Apart from what Mr Kritsas had to retain in his Swiss HSBC account the compromise terms were agreed in the third week of July. Given the Bank's internal, ordinary procedures, for approval, and that Ms Karageorgi had more than Mr Kritsas as a customer (as she made plain in her evidence), I cannot see that what was effectively less than three months of back and forth negotiation constitutes fault under Article 862.

133. Nor for these reasons can it be said that on these facts there was an abuse of rights, not least because of the high threshold of Article 281, as explained by the experts. Compliance of the Bank with the standards required by Article 281 is underlined by Ms Karageorgi's behaviour throughout. In her internal memoranda she was consistently complimentary about Mr. Kritsas. I accept her evidence that in her negotiations with him (and Mr Marinakis) she had tried to find a solution to sustain the relationship, was mindful of his and the borrowers' interests and had tried to give them what she could at the relevant times, within the bounds of the Bank's policy. Indeed in his evidence Mr Kritsas accepted that she was always open with him about what she thought she could realistically take to the credit committee.

134. I accept the Bank's submission that its compliance with Article 281 was borne out in the compromises reached in 2012 and 2013 and the further compromise reached in July/August 2015. *En passant* I note that Mr Kritsas accepted the compromise and acted in accordance with it with reduced one-third capital payments in August, October and November 2015.

135. Given my conclusion that the Bank did not fall below the standard imposed by Articles 862 and 281, there is no need to examine in detail whether there is causation of the borrowers' losses. Suffice to say that a variety of factors bear on the analysis of what followed, for instance Ms Karageorgi's consideration in her credit memorandum of the borrowers' ability to repay, Mr Kritsas's confidence at the 5 August meeting that he had liquid resources to support his ships for two more years, the payments in August and the following months of 2015 in accordance with the new terms, and the acknowledgment in Mr Marinakis' letter of 15 February 2016 that the difficulties at

that point were caused by a yet further, unanticipated and dire decline in the shipping market.

136. For the same reason, even if bad faith had been established under Article 281 Mr Kritsas could not establish that it was causa adequata, in other words (as the experts put it), had the tendency in the normal course of events to lead to the borrowers' inability to repay the Bank the following year.

137. Since Mr Kritsas has no defence under Article 862 there is no need to address the issue of the waiver clause in the personal guarantees.

The Second Proposal, February 2016

138. The submission for Mr Kritsas under this head was that the Bank wrongly rejected the borrowers' so-called Second Proposal contained in the letter of 15 February 2016 to take immediate steps to ensure maximum recovery through the sale of the vessels before their value declined yet further. This caused the borrowers' inability to satisfy the loan agreements. As was predictable given what the Bank had been told about Mr Kritsas's financial position in 2015, by February 2016 his resources had been effectively exhausted. The 15 February letter explained how further losses of some US$ 5.28m were suffered as a result of declining freight rates, and that there was no reasonable hope (as proved to be the case) for a recovery in the shipping market in 2016 or 2017.

139. The submission continued that the Bank's earlier failure to agree to the First Proposal meant that the borrowers' ability to weather the downturn was destroyed. It was the exact opposite of the strategy that ought to have been pursued given that the Bank had in essence adopted a course of supporting the vessels until the values rebounded. In the circumstances, the 15 February offer that the vessels be sold and that the borrowers and guarantors released from any further claim was likely to result in the highest return for the Bank. Its response on 22 February, that it would only permit a sale if it paid the balance on the loan and gave appropriate security, was in reality an outright rejection.

140. Thus, it was said, the Bank imposed a condition impossible to fulfil because Mr Kritsas in particular had used up all or virtually all his resources in making the payments required under the Third Supplemental Agreement. Had the Bank accepted that proposal, the vessels would have been sold for a higher price than they were ultimately sold for. That reduction in value was caused by the Bank's decision not to accept the proposal.

141. In my view there was no breach of the standards imposed on the Bank under Articles 862 and 281 in its handling of the Second Proposal. That required that the borrowers be released completely from their payment obligations along with the guarantors. In return the Bank would recoup itself as far as possible through the sale by the end March 2016 of the *Aurora Pearl* and *Aurora Onyx* (later the *Aurora Amethyst* was added), and the release of the deposit pledges and their application to reduction of the outstanding amounts. The Bank's response (within seven days) was that in principle it had no objection to the sale of the vessels but it could not countenance a release of the borrowers/guarantors i.e., a haircut.

142. As we saw earlier Greek law does not require a Bank to give haircuts in the commercial, maritime context: see the passage quoted from SC judgment 1198/1995, Chamber D and Professor Grammaticaki-Alexiou's comment on it. Consistently with this, as Ms Kallantzi explained in her evidence, a "haircut" was not something she could easily offer to a customer. The customer would need to make a business case for it by reference to objective evidence, including appropriate disclosure of assets.

143. In this case the Bank's email of 22 February 2016 and the letter of 15 March 2016 asked Mr. Kritsas to provide full disclosure of his assets through his tax return, bank statements for his Swiss accounts, and his ownership interest in Purple Holdings. In his oral evidence he said that he did not refuse to provide the information since the Bank already knew about his Geneva bank account. He did not "know" (or "own") Purple Holdings.

144. I cannot accept this. The Bank (rightly) had only limited access to the account with its Geneva affiliate to check the liquidity requirement. It did not have access to other accounts, for example the account with Pictet it was told about at the outset of the relationship. Nor did it have access to other information about Mr Kritsas' assets. In effect Mr Kritsas refused to disclose the information and he did not make the business case the Bank required to consider a relaxation of his personal liability.

145. As for the sale of the vessels, the Bank obtained for them as much as, if not more than if there had been an immediate sale as required by the Second Proposal. Newlead offered US$ 4 million for the *Aurora Onyx*, and US$ 1.55 million scrap for *Aurora Pearl*, US$ 5.55 million in total. Ursa Shipbrokers produced an *en bloc* offer for the *Aurora Pearl* and the *Aurora Onyx* of US$ 5.75 million, less 3 percent commission. That was a low price, as Mr Ward of Ursa explained, and there is something to Mr Marinakis's statement in oral evidence that prospective buyers "smelt blood" of a distressed sale. When the Ursa figure was forwarded to the Bank, Mr Marinakis asserted that a fair price was at least US$ 7 million and would have been higher (about US$ 8 million) had the offer been received immediately after the meeting on 21 January 2016. Of course that date precedes the date of the Second Proposal, 15 February 2016.

146. Importantly, through the sale to Mr Hadjiyiannis the Bank recovered US$ 3.1 million for the *Aurora Pearl* and US$ 4.6 million for the *Aurora Onyx*, US$ 7.7 million in total. That was more than the Newlead offer and the Ursa valuation. Indeed it was around the US$ 7-8 million figure at the time Mr Marinakis asserted the vessels were worth. (I note in passing that there is no objective evidence supporting the US$ 10.9 million figure which Mr Marinakis calculated well after these events happened; it is inconsistent with the figures given at the time and must be discounted.)

147. So in my view the Bank acted in relation to the Second Proposal according to the standards set for it in Articles 862 and 281 of the Greek Civil Code. There is no need to address causation or waiver of Article 862. If there had been a need to consider causation the figures just quoted put paid to the argument that it was the Bank's failure to accept the Second Proposal which caused a fall in the Bank's mortgage security, through falls in the value of the vessels.

The Third Proposal, April/May 2016

148. Breach of Articles 862 and 281 are also said to have occurred between March and May 2016 by the Bank's failing to accept the proposals of Newlead. The argument ran that the defendants had sought to increase the prospects of satisfying the loan agreements by selling the vessels to new owners. Those sales were not to avoid liability. The Bank unreasonably refused to countenance the sales. Under the Third Proposal Newlead would continue to make the contractual payments under the loan agreements.

149. The rationale of the deal, the submission continued, was that Newlead could afford to support the ongoing running of the vessels, unlike Mr Kritsas. The basic strategy was to await a rise in the market value. All that was changing was the beneficial owner. Ms Karageorgi confirmed that in these circumstances the bank would suffer no financial loss. The submission underlined that the Bank on 15 March 2016 had noted internally that a partial release of the personal guarantees had been considered, although that was not communicated to Mr Kritsas. As was made clear in a letter of 22 March with the transfer to Newlead, there was no request for their release.

150. All the bank had to do was to allow Newlead to run the ships pending the rise in value which would benefit the Bank, which would be repaid in full. Instead, for reasons apparently related to their internal policy rather than an assessment of which route would produce the better financial outcome, the bank chose to enforce their security and to sell the vessels. The time at which it did so was the worst possible time. Having chosen not to enforce much earlier, but to allow the value of the vessels to fall below the value of the loans, the correct course consistent with Articles 862 and 281 was for the Bank to give time for the value of the vessels to rise. The Bank made a deliberate decision to allow the losses on the loans to increase because they knew they had Mr Kritsas' personal guarantees. It was incumbent on them to minimise the liability under them, not to act in a manner at his expense.

151. In addressing these submissions, there is the initial issue that the Third Proposal was made by Newlead, not the defendants. In its submissions the Bank characterised the transaction with Newlead and Mr Zolotas as suspicious and pointed to a number of features suggesting it was not at arms' length: the evidence of Mr Kritsas at trial about the shares he was to receive in Mr Zolotas's company; the right Mr Kritsas had under clause 3.2 of the share sale agreements to row back on them; the pressure this was said to place on the Bank to release the guarantees (coupled with what was conveyed about the unhappiness of the charterers as to the arrest of the *Aurora Onyx*); and the offer of the defendants to continue to negotiate even though shares in the vessels had been sold to Newlead.

152. In my view there is no need to take this issue further. That is because I have reached the conclusion that there was no fault or abuse of rights in the Bank refusing to accept the Third Proposal. First, the Bank was entitled to resist the sales to Newlead. They were in breach of the loan agreements and concluded without the approval of the Bank. The agreements for sale of shares in Pearl and Onyx had already been signed when the Bank learnt of them on 15 March 2016. The record of the meeting that day suggests that the sale of shares was undertaken knowingly in breach of the transfer of ownership clauses. The share transfers took place no later than 22 March, yet it was not until 8 April that the Bank heard from Newlead.

153. Further, the Bank was entitled to take the view that it did not want Mr Zolotas as a customer. Apart from the requisite "know your customer" inquiries (which on Ms Kallantzi's evidence would have taken at least a month), the Bank had a reasonable basis for that decision in Mr Zolotas's unsatisfactory reputation with other lenders. Subsequently, as the acceleration notice for the Onyx loan on 15 April 2016 pointed out, no sums had been received into the earnings account since Newlead had taken over (reinforced by the evidence that later the Bank had to pay the vessels' trade debts during enforcement). Further, Pearl missed the first loan repayment that fell during Newlead's involvement on 26 April 2016.

154. Instead, the Bank was entitled, as "the average prudent and diligent person acting within the same professional environment", to prefer Mr Hadjiyiannis, an existing customer, who as Ms Kallantzi explained had a considerable fleet of vessels and was without the reputational risks posed by Mr Zolotas. As we have seen, the confidence in Mr Hadjiyiannis was justified in the price he paid for the vessels. Nothing in the evidence lends support to an argument that the Bank acted indifferently to the best deal for the vessels, since they knew they could rely on Mr Kritsas' personal guarantees. As the May 2016 credit memorandum noted the Bank was uncertain about what the claims on them would yield.

155. Secondly, there is no support for the argument that the Bank should not have enforced against the vessels but should have stayed the course until the market revived. To an extent that argument was addressed in relation to the First Proposal. In relation to the Third Proposal it faces some insurmountable hurdles. First, it relies on hindsight as to when the markets would revive. No-one knew when that would occur, only that the market was cyclical and so would eventually rise in the next few years. Secondly, the Bank only accelerated when in breach of the loan agreements ownership of Pearl and Onyx was transferred to Newlead, without notice and the necessary approval. Thirdly, the Bank obtained prices for the vessels more than Newlead was willing to pay, and at least as much as the defendants thought they were worth.

156. Since the Bank did not fall short of the standard set by Articles 862 and 281 in relation to the Third Proposal the issues of causation and waiver do not arise.

Other matters

157. In the course of his cross-examination, Mr McDonald suggested that V&P Law did not act independently in advising Mr Kritsas as to entering the guarantee in 2010. The firm was on the Bank's panel of lawyers. The conflict of interest it had was demonstrated when in the present litigation (as Mr Kritsas noted in his witness statement) he had asked the firm to act for him but they informed him they could not do so since they were lawyers of the Bank.

158. In my view this unpleaded allegation cannot go anywhere when Mr Kritsas has not obtained his file with V&P Law and there is no evidence from them. We do know that under a new procedure required by the Bank in 2014 V&P Law certified giving independent advice to Mr Kritsas when he gave a deed of confirmation of his personal guarantees with the reflagging of the vessels. Further, in his evidence Mr Kritsas accepted the firm's good reputation in shipping matters in Greece and that they acted in a professional manner. That was underlined by his approaching the firm when this litigation arose. Their declining to act for him is unsurprising: it is common

knowledge that law firms handling significant transactional or advisory work for large clients refrain from handling litigation against them.

CONCLUSION

159. For the reasons given Mr Kritsas's defences under Greek law to the Bank's claims on the personal guarantees fail. He has not pleaded any other defence and the Bank is entitled to judgment. On quantum Mr Kritsas did not advance any case as regards the borrowers or the guarantors (including his personal guarantee). In its absence the Bank should have judgment against the five defendants on the losses it has calculated.