Neutral Citation Number: [2022] EWHC 2095 (Comm)

Case No: LM-2021-000208

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2022

Before :

MS CLARE AMBROSE
(Sitting as a Deputy Judge of the High Court)

- -

Between :

EASTERN PACIFIC CHARTERING INC

Claimant

- and -

POLA MARITIME LTD

Defendant

- -
- -

David Semark (instructed by **Wikborg Rein LLP**) for the **Claimant**
Peter Stevenson (instructed by **MFB Solicitors**) for the **Defendant**

Hearing dates: 3rd-5th July 2022

- -

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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MS CLARE AMBROSE

Ms Clare Ambrose :

Introduction

1. This is the trial of a claim and counterclaim arising under a trip time charter ("the Charterparty") dated 18 September 2019 of a bulk carrier called "DIVINEGATE" ("the Vessel") under which the Claimant chartered the Vessel to the Defendant for the carriage of a cargo of pig iron via the Baltic sea to the Mississippi River in the USA. The cargo was loaded in Riga and discharged in New Orleans.

2. The Claimant, as disponent owner, claims outstanding hire, bunkers and some expenses totalling some US$99,982.79. There is no dispute as to the period under which the Vessel was under charter.

3. The dispute is as to whether the Defendant, as charterer, can answer the claim by way of its own counterclaims. It seeks deductions from hire and also claims damages for breach of charter regarding the Vessel's performance. It also makes a separate counterclaim for US$72,629.01 as damages in tort on grounds of the Claimant's allegedly wrongful arrest of a different vessel, the POLA DEVORA. The counterclaims are made by way of set-off and if the Defendant is successful on both aspects of the counterclaim, then the balance would give rise to a judgment in its favour in the sum of US$59,129.25.

4. In light of the sums at stake it is surprising that the parties have chosen to incur substantial costs in pursuing this matter to a High Court trial listed for 4 days (following a half-day CMC before Cockerill J), especially where the court made directions for ADR at an early stage and both parties expressed disappointment at the matter going to trial.

5. Performance disputes under charterparties would more commonly be subject to arbitration but under clause 93 of the Charterparty the parties agreed that any dispute (unless the amount in issue was less than US$50,000 and referable to LMAA Small Claims arbitration) would be submitted to the exclusive jurisdiction of the High Court in England and Wales.

Procedural background

6. On 4 August 2020 the Claimant issued its Claim Form and filed its Particulars of Claim. On 7 September 2020 an ADR order was made by Foxton J but mediation did not take place.

7. The Defendant served a defence and counterclaim on 10 November 2020. By an application dated 15 December 2020 the Claimant challenged the court's jurisdiction to hear the Defendant's counterclaim for wrongful arrest.

8. That application was heard by Deputy Judge Patricia Robertson QC on 14 June 2021 and in her judgment dated 28 June 2021 [2021] EWHC 1707 (Comm), she dismissed the application holding that:

a) the Defendant's counterclaim arising out of the arrest of the POLA DEVORA came within the scope of the Charterparty jurisdiction clause properly interpreted;

b) it was appropriate to exercise a discretion available under Article 22 of the 1968 Brussels Convention (which regulates jurisdiction as between the Courts of Gibraltar and the UK) so as to refuse to decline jurisdiction or to stay the wrongful arrest claims, even though this court was second seised as between two sets of related proceedings.

Evidence

9. There was a large amount of documentary evidence, including photographs, a number of videos, weather routing reports, large extracts from the Vessel's deck and engine logs, noon reports, correspondence between the parties' solicitors and material relating to the Vessel and also the POLA DEVORA, including charters and documentation including certificates.

10. Both parties relied on expert evidence on the Vessel's speed and performance. The Claimant called Captain Ian Hodges of TMC, and the Defendant called Mr Nicholas Chell of ABL. The Claimant also served a statement from the Master, Captain Kalender but did not call him to give evidence. The Claimant served a statement from Mr Raymond Triay on the law of Gibraltar, and the Defendant served a statement from its solicitor, Mr James Burrows but it was agreed that they need not be called to give evidence.

Factual background

Prior to the Charterparty

11. The Vessel is a bulk carrier almost 200m in length with 4 cargo cranes and a single fixed pitch propeller. It was built in 2019 and only left the shipyard in March 2019 so was still relatively new when entering into service under the Charterparty. On an earlier voyage the Vessel had stayed at Paradip as her then loadport between 9 June and 11 July 2019. Following this voyage, cleaning of the underwater hull and propeller took place on around 20 July 2019 at Trincomalee in Sri Lanka. There was a dispute as to the state of the hull both before and after cleaning.

12. The Vessel subsequently sailed to Nueva Palmira, Uruguay and loaded a separate cargo, staying there between around 22 and 26 August 2019. She discharged that cargo in Rotterdam in September 2019 directly prior to delivery under the Charterparty.

Performance of the Charterparty trip in Oct/Nov 2019

13. There was considerable common ground as to the basic facts relating to the disputed trip. The Vessel was delivered into the Charterparty at Rotterdam at 0700 on 21 September 2019 and it is perhaps worth noting that the trip covered (and hire was payable for) the ballast leg from Rotterdam to Riga, and then the laden leg from Riga to New Orleans.

14. Following delivery, the Vessel departed Rotterdam on 21 September 2019 and proceeded in ballast to Riga, where she loaded a cargo of 56,992.06MT of Pig Iron and 2,145MT of Ferro Manganese. The Vessel departed Riga on 3 October 2019 and then sailed to New Orleans.

15. It is common ground that the Defendant's instructions were for the Vessel to steam at eco-speed on the laden voyage.

16. On 5 October 2019, the Vessel called at Skaw for bunkers and departed the following day. The Vessel arrived at New Orleans on 27 October 2019 and completed discharge on 1 November 2019.

17. During the laden voyage from Riga to New Orleans Owners employed the services of a weather routeing company – Applied Weather Technology ("AWT") and also the linked entity StormGeo. AWT reported that there was a loss of time of 1.15 hours and no overconsumption of heavy fuel oil and marine gas oil.

18. Following completion of discharge at New Orleans, a surveyor from Fernandez Maritime Consultants LLC ("FMC") attended on board on 1 November 2019 to inspect the Vessel on behalf of the Defendant. Their report states that *"the vessel had considerable marine growth (barnacles) on her visible hull area… After disembarking from the vessel we again made an inspection around the "DIVINEGATE" by launch and found barnacles all around the vessel that started approximately from her load line (13 meters draft) down to the water level".*

19. The Vessel was redelivered to the Claimant at 0415 on 3 November 2019.

20. On 8 November 2019 the Defendant sent a message to the Claimant stating that the Vessel's performance was '*significantly affected'* during the voyage to New Orleans and asserted that this was likely caused by hull fouling identified in New Orleans or a breach of the Claimant's '*obligations under Clause 8 of the Charter*'.

21. On 21 November 2019 the Defendant wrote to the Claimant enclosing a statement of hire, a report prepared by StormGeo showing a loss of time of 22.73 hours and the FMC survey report it had commissioned at New Orleans, stating that a claim would be advanced under clause 15 and/or clause 1 of the Charterparty; and reserv4r a right to provide further analysis when deck and engine logs were supplied.

22. On 17 January 2020 the Defendant's solicitors sent the Claimant a letter before action providing an account of the performance claim that the Defendant was advancing. In that message the Defendant's solicitors:

    a) confirmed the existence of a dispute 'with regard to certain underperformance issues which arose during a voyage between Riga, Latvia and New Orleans, USA in October 2019';

    b) alleged that the Vessel had underperformed during the voyage and attributed this to fouling of the hull which had been observed following the FMC inspection at New Orleans and attached that report;

c) asserted that damages would be assessed by reference to the average performance of the Vessel throughout the voyage and asked for all deck and engine logs to be disclosed to permit a further investigation of the cause and impact of the underperformance;

d) reserved the Defendant's rights to advance the claim on alternative bases when the Vessel's documents were provided.

The Arrest in July 2020

23. On 1 July 2020 the Claimant's solicitors (who were newly instructed) contacted the Defendant's solicitors indicating that they were instructed in relation to the claim for hire and that "*Pola need to pay up as soon as possible, otherwise, legal proceedings and appropriate action to obtain security are to follow without further notice."*

24. Late in the day on Thursday 2 July 2020, the Claimant (acting through its lawyers in Gibraltar, Triay & Triay) effected an arrest of a different bulk carrier the POLA DEVORA in Gibraltar to secure its claim against the Defendant for hire ("the Arrest").

25. The Arrest was sought on the basis of a claim form dated 2 July 2020 issued by way of admiralty claim in rem in the Supreme Court of Gibraltar exercising its Admiralty Jurisdiction giving a declaration stating that the Defendant was beneficial owner of the POLA DEVORA and containing a statement of truth signed by the Claimant's Gibraltarian lawyer, Mr Raymond Triay. In an annex to that declaration he made a witness statement stating that the vessel was owned by the Defendant, and he exhibited a Lloyd's List Intelligence Vessel Report ("the Lloyd's List Report") which he stated confirmed that the vessel was beneficially owned by the Defendant.

26. The Claimant's London solicitors had privately obtained the Lloyd's List Report on 1 July 2020. This was a 17 page document on the POLA DEVORA with vessel details, movements, ownership, inspections and detentions, and also casualties over the vessel's lifetime. It described her as being currently Russian flagged, and the current registered owner as being a Russian entity called Pola Rise LLC ("Pola Rise", also referred to as Pola Rise OOO) from 5 July 2019 and the Defendant, i.e. Pola Maritime Ltd, as being the beneficial owner of the POLA DEVORA since 5 July 2019. It reported that PJSC State Transport Leasing Company (GTLK) had been beneficial owner from June 2018 to 4 July 2019, and for this period the Registered Owner had been GTLK Five Limited, Malta ("GTLK Malta").

27. The report had been downloaded but the Defendant's solicitor, Mr James Burrows explained in his statement that when on the internet the heading "Beneficial owner" can be opened to give a definition as follows:

> *"Beneficial Owner is our opinion as to who is or may be the ultimate owning entity, controlling party or representative thereof, (either individual, company, group or organisation). According to our in-house research methodology, the Beneficial Owner may be the "vessel's" management company or the trading name of a group, both of which are, in our*

> *opinion, perceived to represent the ultimate owners of the vessel."*

28. At 0632 on 3 July 2020 Mr Matt Illingworth of Wikborg Rein LLP ("the Claimant's solicitors) gave notice to Mr Mark Seward of MFB Solicitors ("the Defendant's solicitors"), that the Claimant had arrested the POLA DEVORA and demanded that security be provided.

29. Following the Arrest fairly intense but courteous correspondence took place between these London solicitors, Triay & Triay, and Isolas LLP who described themselves as instructed by the Owners of the POLA DEVORA. This correspondence also included some settlement discussions on the underlying claim.

30. At 0824 on 3 July, Mr Seward responded confirming that he was taking instructions and requesting a copy of the relevant papers so as to understand how "*the arrest is permissible given that you* [sic] *claim lies against a totally different entity to the Owners of Pola Devora."*

31. This email was followed by a further message, at 0858, in which Mr Seward advised Mr Illingworth that:

> *"Owners retained Lawyers (Isolas) advise that the arrest is unlawful (indeed it is obviously unlawful and we await sight of the founding affidavit as a matter of urgency). However, we are told that Owners of Pola Devora simply do not have time to argue about that now as there is a very tight timetable for the vessel, and losses are mounting. Our clients will therefore agree to post security for the principal sum under the Divinegate charterparty by Club LOU or deposit in cash to our bank account to be held in escrow- the money is currently en route to us. Please confirm this is in order, by return. However, this is done under full reservation of rights and Isolas have been instructed to commence wrongful arrest proceedings forthwith on behalf of Owners of Pola Devora."*

32. There were then exchanges between the solicitors about the security that could be provided and also discussion of settlement of the underlying claim. The parties discussed payment into an account or the setting up of an escrow account, and the Defendant's solicitors asked for the vessel to be released against receipt of a SWIFT confirmation, although that was not provided, and the Claimant's solicitors were unwilling to release against a swift confirmation on grounds that it could be recalled.

33. Later on 3 July day at 1502 the Defendant's solicitors provided a draft escrow agreement (between the Claimant, Defendant and MFB). They said that unless an escrow agreement was agreed and the vessel released that day, *"our client's priority will cease to be the provision of security…and instead our instructions will be to file our own applications in Gibraltar on Monday morning to set the claim /arrest aside and bring a claim for wrongful arrest."*

34. Counsel for the Defendant explained that the Defendant's solicitors (MFB) were instructed by the Defendant and Pola Rise but not GTLK Malta, and the reference to Owners in these emails was to Pola Rise.

35. The Claimant's solicitors replied at 1611 commenting on the draft and stating that an application for wrongful arrest would fail.

36. At 1725 the Defendant's solicitors said that they had been contacted by the London Club who were described as holding the Owners' entry for POLA DEVORA. It was said that the Club would offer the Claimant a letter of undertaking which was attached to the email, "*we let you have the wording to give you time to think about it".*

37. The LOU was described as a standard form (and looked to be in standard terms). It inserted the Claimant's name and the claim form number. The LOU offered security to answer a judgment of a competent court against *"Registered Owners of Pola Devora, GTLK Malta Five or bareboat-charterers Pola Rise together ("the Owner") or the ship".*

38. At 1739 the Claimant's solicitors asked the Defendant's solicitors to take instructions about inserting Pola Maritime Limited as an additional responding party in the LOU, which it said was otherwise in acceptable form (this request was again made on 4 July and again promptly refused).

39. At 1740 the Defendant's solicitors immediately objected saying:

> *"You have arrested a vessel for claims against its owners. We fail to understand how this can require an independent third party to accept liability for claims it has no connection with."*

40. At 1744 the Claimant's solicitors said, "*The publicly available information is that our clients' debtor for the Divinegate, is the beneficial owner for the Pola Devora".*

41. At 1806 the Defendant's solicitors responded stating, "*No publicly available information states that our clients own this vessel and nor does the Lloyd's Intelligence Report that you rely on".* They attached a Seaweb ship report (similar in content to the Lloyd's List Report) naming GTLK Malta as Registered Owner between December 2017 and July 2019, and then Pola Rise from July 2019, giving its flag as Russian.

42. At 1814 the Claimant's solicitors responded stating:

> *"Publicly available information, including your clients' own website, does confirm that. No doubt that is why you offered the escrow proposal".*

43. On 4 July 2020:

    a) Isolas LLP, who were instructed on behalf of the owners of the POLA DEVORA, wrote to the Claimant's solicitors in firm terms indicating that the LOU was in an accepted form and the vessel must be released.

b) At 1221 the Claimant's solicitors again refused to accept the LOU without the Defendant being named.

c) At 1258 the Defendant's solicitors explained that the LOU probably could not be amended as the Defendant was not a member of the London Club.

44. On 5 July 2020 the Claimant's Gibraltarian lawyers (Triay & Triay) stated that:

> *"we maintain our position that it is entirely right to maintain the arrest on the basis of the publicly available information showing Pola Maritime Limited as the Beneficial Owner, which, as you know, is all we are required to do in law. Accordingly, the security currently on offer is obviously inadequate as it does not respond to the claim against Pola Maritime Limited as Beneficial Owner and thus Defendant in the proceedings. Be that as it may, we would ask you to provide evidence of vessel ownership immediately today. If such evidence satisfies us that Pola Maritime Limited is not the Beneficial Owner – despite the published information on which we were entitled to rely – our client would be prepared to agree the release of the vessel today, albeit we would reserve our client's position on costs and our client's right to arrest other assets if needed."*

45. At 1506 on Monday 6 July 2020 the Defendant's solicitors MFB also responded stating,

> *"Our clients have complied with Triay's request and they are now in a position to confirm that Pola Maritime Ltd does not own the Vessel. All publicly available data shows this to be the case as we explained to you."*

46. At 1522 on 6 July 2020, Isolas LLP responded maintaining that the arrest was wrongful, stating "*As per normal practice, we would have expected you to exhibit a transcript of registry to evidence the ownership when requesting the arrest of the Vessel.* It provided the following documents:

a) a transcript of registry ownership showing registered owners as GTLK Malta;

b) a copy of a bareboat charter dated 11 January 2018 between GTLK Malta and Avonburg Finance Limited ("Avonburg") (a Cypriot company);

c) a copy of a bareboat charter between Avonburg and Pola Rise dated 5 June 2019;

d) the Russian bareboat registration of Pola Rise as POLA DEVORA's bareboat charterer;

e) a copy of the time charter between Pola Rise and the Defendant dated 5 June 2019 in respect of the POLA DEVORA.

47. Within a couple of hours following receipt of the information from Isolas LLP, the Claimant released the POLA DEVORA from arrest on 6 July 2020. Mr Triay sent an email stating that:

> *"Moreover, beneficial ownership was corroborated in the public domain by Polar Maritime Limiteds own website that lists the Vessel as being its own fleet, Other Vessels appear as part of the fleet described as TC, yet the Vessel falls to be referred to as one which is own…No amount of public investigation could have ascertained the position now revealed in the private documents that you have provided as they are simply not available to the public. It is regrettable it took your client four days to produce these thereby unnecessarily lengthening the period of arrest."*

48. There was evidence of a website under the title Pola Maritime (but under copyright of Pola Maritime Limited) which presented a group of vessels as described by Mr Triay with some described as "owned" (including the POLA DEVORA) and others described as time chartered.

49. On 14 July 2020 security for the Claimant's claim was put up by the Defendant's P & I Club (Steamship Mutual).

The Charterparty terms

50. It was common ground that:

a) the Charterparty is contained in a fixture recap which incorporates and amends a pro forma charterparty consisting of an earlier amended NYPE 1946 form with Additional Clauses dated 20 March 2019;

b) the Charterparty also contained an implied term requiring the Defendant to indemnify the Claimant against any loss or other damage suffered as a result of the Claimant's adherence to the Defendant's employment orders unless on a true construction of the Charterparty the risk was one which the Claimant had agreed to bear;

c) hire was payable under the Charterparty at US$15,400 for the first forty days and at US$18,500/ day thereafter.

51. The fixture recap provided a performance warranty as follows:

> *"SPEED AND CONSUMPTION BASIS NO ADVERSE CURRENTS AND VALID UP TO AND INCLUDING DOUGLAS SEA STATE 3 / BEAUFORT FORCE 4*
>
> *BALLAST: ABT 14KT ON ABT 20.5MT IFO + 0.1 MDO LADEN: ABT 14KT ON ABT 25MT IFO + 0.1 MDO… 'ABOUT' SHALL MEAN AN ALLOWANCE OF PLUS/MINUS 0.5 KNOTS FOR SPEED AND PLUS/MINUS 5 PER CENT FOR FUEL OIL/DIESEL OIL CONSUMPTION…*

> *THE DESCRIPTION OF THE VESSEL'S SPEED APPLIES IN WEATHER CONDITIONS NOT EXCEEDING FORCE 4 ON THE BEAUFORT SCALE OR DOUGLAS SEA STATE 3, WITH THE VESSEL LADEN UNDERDECK TO HER SUMMER SALTWATER LOADLINE. ALL DETAILS ABOUT*
>
> *ECO CONSUMPTIONS ON ABT BSS AND: BALLAST: ABT 13.0KT ON ABT 16.0MT IFO + 0.1 MDO LADEN: ABT 13.0KT ON ABT 20.5MT IFO + 0.1 MDO BALLAST: ABT 12.5KT ON ABT 14.5MT IFO + 0.1 MDO LADEN: ABT 12.5KT ON ABT 19.0MT IFO + 0.1 MDO ALL DETAILS ABOUT"*

52. The amended proforma (also forming part of the Charterparty) expressly provided:

> *"[lines 21-22] Vessel on her delivery to be ready to receive cargo with clean- swept holds and tight, staunch, strong and in every way fitted for the service ….*
>
> *…*
>
> *1. That the Owners shall … maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.*
>
> *…*
>
> *8. That the Captain shall prosecute his voyages with the utmost despatch, in accordance with Charterers instructions ….*
>
> *…*
>
> *15. That in the event of the loss of time from deficiency of Owners' men or Owners' stores, default and/or strike of Master/Officers and crew…or by any other cause attributable to the vessel and/or crew, preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost, and all directly related and proven expenses to be for Owners' account; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra directly related and proven expenses shall be deducted from the hire.*
>
> *…*
>
> *74. Charterers have the liberty to use a reputable 'Weather Routing' service at their expense for monitoring Vessel's route and performance, Charterers to nominate the weather routing service but Owners to appoint them on Charterers' request. In case of discrepancy between the weather routing service data*

> *and Master's deck logs then the official weather reports of Shore Weather Stations of the area received through NAVTEX to apply as to the weather and the 'Admiralty Ocean Pilot charts' to apply as to the current, alternatively the matter to be referred to dispute resolution as per clause 93…For the purpose of this Charter Party, "good weather conditions" are to be taken as not exceeding maximum Beaufort Force 4 and Douglas Sea State 3 - which to be taken as a swell wave height of less than 1.25 meters and no adverse current.*
>
> *…*
>
> *93 Dispute Resolution Clause*
>
> *This Charter Party shall be governed by English law and any dispute arising out of or in connection with this Charter shall be submitted to the exclusive jurisdiction of the high court of justice in England and Wales…."*
>
> *…*
>
> *102. Performance Claims Clause*
>
> *Any claims by Charterers relating to the performance of the Vessel and/or the Vessel's equipment including speed claims are to be submitted to Owners in the form of a statement of claim with supporting documents within 90 days of the completion of each voyage concerned or otherwise be waived 'nullified', except cargo claims which are to be dealt with as per Charter Party."*

The Claimant's claim

53. The Claimant's claim is for payment of outstanding hire, bunkers and some expenses totalling some US$99,982.79. It alleges that this sum is contractually due to it on a reconciliation of the final charterparty accounts and that the Defendant, in breach of the Charterparty, has failed to pay such sums.

The Defendant's counterclaims

54. The Defendant maintained two distinct counterclaims. First, the Defendant maintains a counterclaim by way of deduction or set-off (in diminution or extinction of the Claimant's claim for hire) of the sum of US$93,074.55 representing the hire otherwise payable (and bunkers consumed) in a period of 83.6 hours which it asserts it lost during the laden voyage between Riga and New Orleans. This counterclaim is advanced on two distinct bases, namely that:

    a) 51.4 hours was lost because of the failure of the Master / crew of the Vessel to proceed with utmost despatch in accordance with the Defendant's instructions, which failure constituted a breach of clause 8 or a 'default of Master, officer or crew' for the purposes of clause 15; and

b) an additional 32.2 hours was lost as a result of hull fouling, which was said to amount to a breach of the Claimant's obligation to deliver and/or maintain the Vessel in a thoroughly efficient state in hull, machinery and equipment or a defect of the hull for the purpose of clause 15.

55. The second counterclaim is for damages in the sum of US$72,629.01 on grounds that the Claimant wrongfully arrested the POLA DEVORA. Here the damages claimed by the Defendant reflect the following categories of loss:

a) the losses sustained as a result of the Defendant being deprived of the use of the vessel during the arrest, which includes the hire paid up the line to Pola Rise (US$42,400);

b) the sums deducted from hire by the Defendant's sub- charterers, Vertom Shipping & Trading BV ("Vertom"), in respect of hire and bunkers consumed during the period of the arrest (US$16,024.61); and

c) the legal expenses incurred resisting the arrest (US$14,204.40).

56. The Defendant maintains that the Vessel was beneficially owned by GTLK Malta and bareboat chartered by GTLK Malta to Avonburg Finance Ltd ("Avonburg"), and further bareboat chartered by Avonburg to a Russian entity Pola Rise LLC ("Pola Rise") at a charter rate of US$4,977.75 per day. It was then time-chartered by Pola Rise to the Defendant under a 9 year time charter dated 5 June 2019 at a charter rate of US$9,750 per day. The Defendant then chartered the Vessel to Vertom at a charter rate of US$ 3,000 per day.

57. The Defendant's position is that where the Arrest was effected for the purpose of securing a claim against it, there was no basis upon which to place the vessel off-hire as against Pola Rise. It also says that the arrest prevented it from complying with its obligations under the sub-charter with Vertom such that the vessel was off-hire or the Defendant would have been liable in damages for the hire otherwise payable and bunkers

The counterclaim for underperformance

58. There were two distinct aspects of the Defendant's counterclaim relating to underperformance, namely slow steaming and hull fouling.

59. Here the main issues were:

a) is the claim time-barred?

b) is there a sufficient sample of good weather on the laden voyage over which to assess the Vessel's performance?

c) if so, whether the Defendant can show underperformance, including whether allowance should be made for positive currents?

d) if there is no good weather period for assessing performance, can the Defendant still establish a claim for underperformance, including whether breach of clause 8 and/or clause 15 (and consequential damages) can be

established by reference to the Vessel's engine speed as operated on the laden voyage?

e) the existence, extent and effect of any hull fouling on the Vessel's delivery under the Charterparty, including whether any claim for time lost arising out of hull fouling was already covered by the claim for time lost in respect of slow steaming?

Time bar

60. The Claimant acknowledged that the onus lay on it to show that the claim was time-barred and fell within clause 102. It referred to the test in *The Oltenia* [1982] 1 Lloyd's Rep 448 based on similar wording stating that "*the plain effect of the present clause, in particular because of its documentary requirement, is that the claim should be presented with at least reasonable precision as to details and amounts".* It submitted that the claim was not presented with supporting documents within 90 days of the completion of the voyage. It maintained that instead the Defendant had plucked a figure out of the air and provided no supporting documents to support the figures put forward or enable the Claimant to assess it properly.

61. The Defendant maintained that its correspondence of 21 November 2019 and 17 January 2020 met the requirements of clause 102. It met the purpose of such a clause as explained in *The Oltenia* which was to allow any claim "to be investigated and if possible resolved while the facts were still fresh". In addition the clause would not preclude it from defending the claim for hire by reference to clause 15 since this does not involve making a claim, it involves denying liability to pay hire because that obligation has not accrued.

62. Here, the Defendant's case is preferred and its counterclaim is not time-barred. The purpose of the time-bar clause was to require a charterer to make a claim within a prompt period and also provide supporting documents so as to put the owner on notice, and enable it to investigate and preserve its own documents. The Claimant's communications on 21 November 2019 and 17 January 2020 met this standard. Clause 102 does not require the charterer to have presented or quantified its claim with such precision and completeness that every aspect of the claim is properly supported by documentation. It was not necessary to decide whether clause 102 covered a defence under clause 15 but this appeared unlikely. Underperformance claims are typically made by way of deduction from hire. Ordinarily a charterer relying on clause 15 is treated as claiming off-hire, and claiming a right of deduction so it is likely that this type of clause would be intended to cover a defence relying on clause 15.

The counterclaim for slow steaming

63. Eco-speed under the Charterparty was defined in the fixture recap as '*ABT 13.0KT ON ABT 20.5MT IFO'* in good weather conditions '*NOT EXCEEDING FORCE 4 ON THE BEAUFORT SCALE OR DOUGLAS SEA STATE 3*', meaning that, proceeding at eco- speed in such conditions, the Vessel should have been able to achieve a minimum speed 12.5 knots on a maximum consumption of 21.525mt of fuel oil.

64. The Defendant contends that the Master did not comply with instructions to proceed at eco-speed and his failure to do so amounts to (a) "a default of Master, officer or crew" entitling the Defendant to put the Vessel off-hire for time lost under clause 15; or (b) a breach of the clause 8 obligation to prosecute voyage with utmost despatch or (c) a breach of the obligation under clause 1 to provide a Vessel that was "tight, staunch, strong and in every way fitted for service" and maintain her as such (d) a breach of the performance warranty at the time of delivery entitling the Defendant to recover damages for resulting losses or deduct the same amount.

The good weather method of assessment

65. The Defendant acknowledged that where the parties to a charter define the requested speed by reference to a particular speed and consumption in good weather the simplest (and conventional) way to prove these types of breach (and recoverable loss of time) is to establish that during periods of good weather the Vessel did not achieve the warranted speed and performance and pro-rate the underperformance against the entire period under review. For convenience I refer to this as "the good weather method". It was common ground that this good weather method is the conventional way to establish loss on performance. It follows the approach of Hobhouse J in *The Didymi* [1987] 2 Lloyd's Rep. 166 and involves a two stage process of identifying the breach and then assessing the remedy. It was endorsed by the Court of Appeal in *The Gas Enterprise* [1993] 1 Lloyd's Rep. 352.

66. This approach was also confirmed by Popplewell J in in a claim for slow steaming in *The Pearl C* [2012] EWHC 2595, where he also explained [at 53] that there is a breach of the utmost despatch obligation if there is an unjustifiable decision not to operate the vessel's engine at an RPM at which she was capable of meeting her warranted speed.

67. The Defendant relied on Mr Chell's evidence to contend that there was a period of 32 hours of good weather between 1600 on 23 October 2019 and 2359 on 24 October 2019 during which the Vessel achieved an average speed of 11.6 knots, and this was a sufficient period to assess the Vessel's performance. For this purpose Mr Chell relied on the AWT weather data.

68. In his second report Mr Chell's explained that applying that performance across the laden voyage would result in a time loss of 37.64 hours. This position was explained in the parties' agreed reading list where it was made clear that the Defendant's case was that a loss of time could be demonstrated using a traditional extrapolation of the vessel's performance in the good weather period as well as its alternative approach in the absence of good weather.

69. Captain Hodges indicated that the deck log data was more reliable than that of AWT because it reflected the Vessel's actual position. He considered that this period could not count as a good weather period because the good weather requirement of Douglas Sea State 3 required a square root calculation based on the swell and wave height which gave a swell of 1.44m, higher than the good weather parameter of 1.25m. He also objected to the reliability of the calculation because he did not have the final position of the Vessel over this period or its fuel consumption for the last 8 hours.

70. Based upon Mr Chell's AWT analysis the Defendant submitted that the Vessel underperformed by 16 hours if no account is taken of positive current, or 37.64 hours if 0.5 knots is deducted as suggested by Mr Chell taking account of the Admiralty Pilot charts.

71. The Defendant argued that in any event Captain Hodges had also identified a 25 hour period from noon 22 October 2019 which had only been excluded on the basis of the deck log records of adverse current which he accepted were unreliable. Applying his approach he accepts that the Vessel achieved a speed of 11.83 knots for this period, and extrapolated for the entire voyage of 6064 nm (extracted from the noon reports) this results in a loss of time of 24.47 hours.

The RPM method

72. The Defendant's case was that underperformance or slow steaming can also be established by reference to the Vessel's reported engine settings, in particular by reference to the measured RPM (revolutions per minute) of the engine which reflect the engine speed maintained by the crew. The Defendant relied on Mr Chell's evidence to assert that the actual speed at which the engine was operated on the laden voyage (generally 92 RPMs or less as shown in the engine logs) was insufficient to achieve the warranted good weather speeds. It maintains that the engine speed reflected the crew's default in not maintaining sufficient engine speed to meet the warranted eco-speed.

73. The Defendant relies on calculations by Mr Chell involving the Vessel's RPMs and also an assessment of the distance a vessel can theoretically travel for every revolution of the propeller. This calculation uses a measurement called the propeller pitch which was defined by the experts as the "*theoretical distance a propeller moves longitudinally during the course of one revolution".* The propeller pitch is a physical measurement based on the size of the propeller and takes no account of resistance. The experts agreed that the data in the logs showed it was 4.224m, and this figure reflected the ship's particulars. The propeller pitch can be used to establish the theoretical distance that a vessel can travel in a given time period. To calculate the nautical mile engine distance achievable in one hour (which can then be converted into the speed in knots as nautical miles per hour) the formula is as follows:

$$\text{Engine Distance} = \frac{\text{Pitch x Revolutions Per Minute x 60 (minutes in an hour)}}{\text{1,852 (metres in a nautical mile)}}$$

74. Mr Chell then makes an allowance for the minimum resistance that a vessel will experience in real life because a propeller (and hull) travels through water and will lose distance as a result of hull friction and weather (among other forces). The loss of distance resulting from these forces is described as the vessel's 'slip' and is measured as a percentage. The slip will vary depending upon the conditions but the experts agreed that, operating in good weather conditions, and without a favourable current, a laden vessel will have a slip of between 5 and 10%. Mr Chell notes that it is possible for the slip to be negative i.e., the vessel's actual speed is greater than the theoretical speed and this can occur if there is a following current.

75. The Defendant says that applying a minimum slip of 5%, reflecting good weather conditions and with no adverse current, the DIVINEGATE could not have achieved her eco-speed of 12.5 knots unless her engine was operated at 96.1RPM or higher:

$$\frac{4.224\text{m} \times 96.1\text{rpm} \times 60 \times 0.95}{1{,}852} = 12.5 \text{ nautical miles}$$

76. The Defendant's case is that the Vessel's main engine was operated at 92RPM or lower throughout her laden voyage. It says that this means that breach of clause 8 can be established irrespective of whether there was a sufficient period of good weather against which to test her performance warranty.

77. The Defendant says that the crew were at fault in not maintaining the Vessel's main engine at a speed of at least 96RPM during the voyages. In order to achieve an eco-speed of 12.5 knots (i.e. "about 13 knots" as warranted) her main engine had to be operated at a speed of at least 96RPM and as a consequence of operating at a speed of 92RPM or lower Mr Chell calculates it took an additional 51.4 hours to complete the laden voyage.

78. The Defendant alleges that the crew were not maintaining the requested eco-speed (i.e. 12.5 knots) in response to bad weather conditions. Mr Chell says there is nothing in the logbook entries to suggest that the engine speed was being reduced to respond to weather conditions or increased engine load. He took account of the engine load indicator, pressure and temperature readings, as well as the absence of any entries referring to weather. The Defendant relies on the absence of any explanation from the Vessel as to why the engine speed was maintained at 92RPM, noting that the Master did not address this and was not called to be cross-examined even though his choices on engine speed were in issue.

79. The Defendant also refers to instructions given by the Claimant's managers to the Master on an earlier voyage (in ballast) stating:

> *"…kindly note it is self-explanatory in case you notice unfavourable weather or adverse swell or whatever weather condition which prevent vessel to reach her optimal CP speed you do not need to keep rpm on max in order to save bunkers as far as full CP speed".*

80. Mr Chell analysed the engine logs and concluded from these that fuel consumption was consistently maintained at around 21.5MT/per on most days of the laden voyage, just below the Charterparty warranty of 21.525MT/day for eco-speed. He says that the only inference to be drawn is that the crew operated the Vessel's engine speed so as to stay within her warranted fuel consumption (and thereby avoid the Claimant having to pay for overconsumption of bunkers), and that they were not reducing speed for safety reasons or to achieve a more tolerable passage for those on board.

81. On the law the Defendant says that the good weather method adopted in *The Didymi* (and approved in *The Gas Enterprise*) is merely a methodology for assessing breach and quantum of a speed warranty, and it is inherently imprecise. They refer to *Time Charters* suggesting that it "*may owe more to pragmatism than principle".* They also refer to express statements in *The Ocean Virgo* [2015] EWHC Comm 3405 and *The*

Gas Enterprise suggesting that this is one methodology but that it would be open to a charterer to prove loss by alternative evidence.

82. On assessing the Vessel's performance and loss of time using the good weather method the Defendant makes a deduction of 0.5 knots for positive currents based on currents reported in the Admiralty Charts. There was an issue as to whether currents should be deducted and this was a question of law and practice.

The Claimant's position

83. The Claimant's case is that there was no good weather period on the laden voyage to serve as the basis for a reliable assessment of the Vessel's ability to meet the warranted performance. It says that in the absence of any such period no underperformance or breach as alleged can be established, and this is shown by *The Pearl C* and the absence of any authority for such an assessment. The performance warranty is the agreed benchmark and in the absence of good weather the Owners get the benefit of the doubt because this is practical and reflects many decades of practice. It says that in any event the Vessel met the warranted good weather speed on the ballast voyage and on the period closest to good weather in the laden voyage.

84. The Claimant relies on the views of Captain Hodges who identified two good weather periods during the ballast voyage during which he says the Vessel exceeded the minimum ballast performance warranty. However, in his report he was unable to identify a sufficiently representative period of good weather during the laden voyage although he identified a 10 hour period during which the Vessel did meet the minimum warranted speed.

85. In evidence Captain Hodges fairly accepted that the crew's recorded deck log assessment of adverse currents was unreliable and difficult to make sense of when taking account of the Vessel's actual speed, as against her theoretical speed (using the equation set out above). He acknowledged that the distances covered were inconsistent with the adverse currents recorded. He also acknowledged that it was the deck log record of adverse currents that had caused him to rule out the period between 23/24 October as good weather. He acknowledged that if that period was treated as good weather and a deduction for positive current was made then the Vessel would not be treated as meeting her performance warranty.

86. The Claimant says that Mr Chell's approach using the engine's RPM is not a recognised way of assessing underperformance. The speed at which the engine was operated (which it acknowledges was generally below 92RPM) reflects the weather conditions faced by the crew. Counsel referred to weather reports referring to Tropical Storm Melissa. The Claimant says that there was no obligation to maintain the Vessel's engine at 96 RPM since there was no good weather on the laden passage such that the Vessel was not expected to achieve 12.5 knots. It refers to the experts agreeing that a ship will reduce RPM during heavy weather as a matter of routine, and here the Vessel encountered bad weather on the laden voyage, again showing that the actual RPM (which was below 96RPM) cannot provide grounds for the claim for underperformance and slow steaming.

Comments on the expert evidence

87. Both experts gave their evidence honestly and fairly. Captain Hodges had greater experience of speed and performance analysis than Mr Chell whose main expertise is in marine engineering. Captain Hodges's evidence better reflected that area of practice. Captain Hodges fairly conceded adverse points put to him in cross-examination, and acknowledged the limitations of his expertise.

88. Mr Chell acknowledged that others had contributed to his report, for example some of the distances and plotting had been provided by the solicitors instructing.

89. In his report Mr Chell had uncritically accepted and incorporated an opinion and supporting academic articles provided by a separate individual with expertise on hull coatings, Dr Petrone of ABL (apparently also instructed by the Defendant's solicitors). He used Dr Petrone's opinion in order to put forward a figure for loss of time for hull fouling. This opinion (and the supporting academic articles) had been incorporated by Mr Chell without any discussion or assessment. On their face the articles suggested that there is no established formula for the practical measurement of the impact of fouling on speed. The research was based on very differently shaped warships. Mr Chell was also frank as to the limitations of his expertise. He may have been unaware that the court had only allowed one expert from each side on speed and performance. However, the inclusion of an opinion from a second expert had certainly not been envisaged in the case management directions. For these reasons, the court approached that aspect of Mr Chell's opinion on hull fouling with caution.

The law in applying the performance warranty

90. Speed and performance claims very commonly arise out of the performance of time charters (and trip charters). Both parties acknowledged that there is a very significant industry involving everyday practice and expertise in the assessment of routes, weather, performance and consumption, and where scientific advances (including GPS) have introduced considerable sophistication in the assessment of these claims. Where these disputes arise they commonly raise questions of law, fact and practice. The charter provisions are to be applied (whether by the parties themselves, arbitrators or the court) in light of the fact that the parties, when contracting at least, will generally have expected to achieve certainty and commercially pragmatic solutions. The approach adopted in the authorities reflects commercial practice in assessing performance and the specific wording chosen by the parties, rather than the court imposing legal methodologies.

91. The good weather method was not adopted in *The Didymi* (and later authorities) as the sole and exclusive available means to establish that a breach of clauses 1 or 8 or the performance warranty has caused a loss of time, or that a deduction can be made for off-hire under clause 15. I accept the Defendant's argument that it is not the only available methodology for making a claim for underperformance, and it does not bar compensation being claimed on alternative methods. This is apparent from statements in *The Gas Enterprise* and *The Ocean Virgo* [2015] EWHC Comm 3405 (although alternative available methods have not yet been identified).

92. In *The Pearl C*, Popplewell endorsed the conventional approach in the context of a claim for breach of the duty to proceed with utmost despatch. However, the good

weather method was available on the facts and his decision does not preclude an alternative method. It was common ground that the conventional approach is the simplest one and reflects the express terms of the Charterparty.

93. These cases suggest that where the parties have adopted a performance warranty based on good weather performance then applying the warranty will be the primary method for assessing any claim since it reflects the chosen benchmark for performance. The cases (and the experts' evidence as to their practice) also show that there are situations where there may be no good weather sample (or a dispute as to the good weather sample) so that the issue is not an academic one.

94. The authors of *Time Charters* suggest that modern means of measuring performance could provide a more finely tuned method, that would not depend on a good weather sample. This appears likely although no method was put in evidence. However, any alternative method must be established as reliable and consistent with the express performance warranty, especially in circumstances where the conventional method has been adopted for many years in an area of significant expertise, resources and innovation.

Positive currents

95. On the question as to whether positive currents were to be deducted from the Vessel's speed using the good weather method I preferred the Claimant's position both on the law and on practice.

96. In practice Captain Hodges acknowledged that currents could be significant but his evidence was that they are generally excluded because a master should not be penalised for finding a favourable current, since this is in everyone's interest because the vessel will go faster and burn less fuel. However the evidence also suggested that weather routing companies include currents and current factors in their analyses. Both experts accepted that the impact of currents would depend on their direction and acknowledged that there is industry debate as to how weather routing companies assess current factors.

97. The Defendant acknowledged that measuring currents is difficult although it indicated that the parties had agreed to refer to the Admiralty Pilot Charts to assess current under clause 74, and the experts had agreed that these were a reliable source.

98. In *The Didymi* it was agreed that currents were not to be factored into the calculation, largely on grounds that it would be an unnecessary complication and they would cancel each other out over a 5 year charter period. *Time Charters* (7th edition) indicates that there has not been consensus on the issue of currents and as to whether positive currents should be taken into account. The majority of tribunal decisions referred to suggest positive currents are excluded if not provided for. The Claimant referred to these different decisions, and London Arbitration 15/07 where a tribunal rejected a deduction for a positive current on grounds that "*the very fact that the charter warranty made express reference to "(no adverse currents)" gave the lie to the charterers' argument, although the position would not necessarily have been different if those words had not appeared. The fact that the parties chose to insert [*those words*] into the warranty, however, clearly showed that it was only adverse*

currents that were to be taken into account when considering whether the warranty was met or not, and that charters could not claim a benefit for favourable currents".

99. Mr Stevenson (for the Defendant) forcefully argued that logically a positive current should be factored in as it may dramatically affect the Vessel's performance. For example in the ballast voyage it may have added 25% to her speed. He said that the parties had chosen for adverse currents to be taken out so owners should not have the benefit of a positive current. He argued that the warranty went to the Vessel's own capability on delivery regarding her hull and engine rather than including the assistance of external non-ship based factors such as currents, and express provision would be required for them to be ignored.

100. However, the performance warranty reflects a vessel's capability regarding speed and bunker consumption against defined weather conditions, not merely the engine's performance against those conditions on delivery (or later in the charter). The authorities show that the warranty is tested against actual performance at sea during the charterparty rather than a paper calculation of the engine's capability. If the Master maximises the weather or currents (or fails to do so) then that is part of the Vessel's capability as much as the capability of its engine or the condition of the hull during any period of review. The Vessel's better performance is for the benefit of the charterers (as well as the owners). In the absence of wording excluding the benefit of positive currents (or weather that is better than "good weather") such benefit is not to be deducted in measuring the Vessel's speed for the purpose of the performance warranty.

101. This approach reflects the majority of tribunal decisions and the reasons given in London Arbitration 15/07. It also reflects Captain Hodges's evidence on practice and avoids adding another layer of complexity in measuring the impact of currents, especially where such currents will generally cancel each other out over most time charters.

102. On the wording of this Charterparty the parties had expressly agreed (by the words "NO ADVERSE CURRENTS") that time spent sailing with adverse currents was not to be treated as good weather against which the performance warranty was agreed. It is fair to conclude that time spent sailing with a positive current would be counted and the parties could have made express provision excluding positive currents if they had wanted these to be deducted. The reference to currents identified in the Admiralty Pilot Charts in clause 74 was not sufficient to show an intention that positive currents be excluded, and could be given effect when identifying adverse currents for the definition of good weather.

Breach and loss due to slow steaming

103. The 32 hour period on 23/24 October 2019 identified by Mr Chell was a representative period of good weather within the Charterparty parameters, and appropriate for assessing the Vessel's performance against the agreed warranty. Captain Hodges agreed that this period of time would be sufficient. It was fair to rely on the AWT data where Captain Hodges agreed that the deck log records of adverse currents were unreliable. In addition the Charterparty had defined the Douglas Sea state as "*a swell wave height of less than 1.25 meters".* The experts acknowledged that the measurement of Douglas Sea State is debated. The Charterparty definition

was accordingly decisive and Captain Hodges's application of the square root calculation used to measure significant wave height was misplaced.

104. The absence of consumption figures for the last 8 hours of this period was not sufficient to rule out an assessment of the Vessel's performance since, as Mr Chell explained, her bunker consumption had remained consistent throughout and in the absence of any explanation from the Master it was fair to take account of that consistent level of consumption. Similarly the absence of a vessel position in the logs at 2359 (because deck log positions were taken at noon) was not decisive since the satellite plot of the Vessel's position was of adequate accuracy.

105. The 24 hour period between noon on 22 and 23 October 2019 was also a representative period of good weather since Captain Hodges accepted that the record of adverse currents in the deck log were unreliable.

106. The Claimant had a full opportunity to address the analysis of the Vessel's performance on the basis of Mr Chell's chosen period of good weather. This analysis had been fully debated in the experts' reports, the opening submissions and questions in oral evidence. In the agreed reading list the issue as to whether such claim could be made on the good weather method was expressly agreed as in issue (under Issue 2). The Claimant knew this claim was being put forward on the basis of its positive case as to the correct method. In these circumstances its objection in closing submissions that the claim should be precluded on grounds that it had not been pleaded lacked merit. If this argument were to be raised it should have been raised at the outset, and indeed the Claimant identified no prejudice. I also find that the claim based on the good weather method was implicit in the pleaded case that there had been time lost due to underperformance, as based on Mr Chell's analysis of the AWT data.

107. Captain Hodges' analysis of the deck log data for 22/23 October only emerged in cross-examination and accordingly it is fairer that the Defendant's claim is based on its own evidence as exchanged in the expert reports and discussed in the joint memorandum.

108. Given my findings on the effect of positive currents I find that there was underperformance against the performance warranty giving rise to a loss of time of 16 hours.

109. The Claimant established that there was a failure to proceed with utmost despatch since it established an unjustified underperformance by reference to the Vessel's speed during the good weather period. This can be extrapolated against the entire laden voyage since if she underperformed in good weather she will do so in bad weather too (*The Didymi*). The claim arises because the Vessel failed to meet the warranted speed of 12.5 knots in good weather. The logbook evidence (supported by Mr Chell's analysis) firmly suggested that the engine was unjustifiably being operated at lower engine speeds to maintain her consumption below the Charterparty warranty rather than in response to weather conditions.

110. The weather conditions relied upon by the Claimant were not sufficient to justify the Master's operation of the Vessel. It would have been open to the Claimant to answer the allegation of slow steaming with evidence from the Master or crew explaining why the Vessel's RPMs and speed had been kept low throughout the voyage, even

where weather conditions were reasonable or had improved. The Vessel had not encountered good weather (as defined) but that was unsurprising on an Atlantic passage in October. Counsel relied on reports of Tropical Storm Melissa and the Master sending a message about concern to minimise rolling with a cargo of pig iron. However, these did not establish heavy weather throughout that might, on the experts' joint view, in itself have justified a consistent reduction in RPM. No evidence was adduced to justify the Master's approach, and in the absence of any explanation the fair inference was that the decision could not be justified on the basis of weather conditions (or any other navigational reason).

111. The Claimant's obligation to proceed at utmost despatch (including instructions to proceed at ecospeed) must be construed in light of the parties' express agreement as to warranted performance for eco-speed, namely 12.5 knots on the agreed consumption during good weather. The good weather method accurately reflected underperformance, including where the Master had unjustifiably not applied sufficient engine speed in breach of clause 8 (or where there is breach of clause 1 or clause 15 can be invoked).

112. To assess damages for the Claimant's breach by assuming that the Vessel must have operated at 96 RPMs to achieve 12.5 knots eco-speed regardless of weather conditions would be directly inconsistent with the parties' express agreement on performance and would inaccurately overcompensate the Defendant for the breach.

113. Even if it had been open to the Defendant to ignore the performance warranty and seek damages on an alternative basis, the RPM method was not a reliable method to identify loss of time. It incorrectly assumed that resistance on the hull would be the same whether the engine was being run at 92 or 96 RPMs. It also failed to make any allowance for weather conditions being a reason for reducing the engine speed, and artificially assumed constant 96 RPMs being maintained over a voyage of over 6000 nm that included some periods of heavy weather during an Atlantic crossing. Its premise (that the Vessel was physically incapable of meeting the warranty) also ignored the fact that the Vessel had actually achieved the warranted speed over a 10 hour period on 3 October 2020 and on the ballast voyage. This meant that it was a very theoretical calculation and it was not a reliable measure of loss. The Defendant fairly suggested that the good weather method was also inherently inaccurate. However, it has been commercially tested and adopted for many decades. The RPM method was not shown to be a reliable measure of loss on the facts here.

The counterclaim for hull fouling

114. It was common ground that there was some fouling by way of barnacles found on the Vessel's hull in New Orleans, the issues were as to:

a) the extent, origin and cause of any fouling; and in particular whether it was present on delivery on 21 September 2019;

b) whether fouling constituted a defect in or breakdown of a part of the Vessel's hull;

c) the effect of any fouling on the Vessel's performance whilst in service under the Charterparty.

115. The Defendant's case was that the Vessel's hull was fouled on delivery and rendered the Claimant in breach of their obligation to deliver the Vessel "*tight, staunch, strong and in every way fitted for the service",* and to exercise due diligence to maintain her "*in a thoroughly efficient state in hull, machinery and equipment for and during the service*".

116. Mr Chell's evidence was that a former colleague at ABL, Dr Petrone, had reviewed the photographs from New Orleans and concluded that hull fouling was severe and may have accounted for approximately 20% increase in frictional resistance. He suggested that the barnacles could not have developed between Trincomalee and New Orleans and would have been present on delivery.

117. Mr Chell's view was that although underwater cleaning was carried out at Trincomalee, it was not effective at removing the fouling that occurred as a result of the Vessel's earlier idle periods. He suggested that even though barnacles may be removed, the bases can remain behind, increasing the hull roughness. His view was that between the cleaning at Trincomalee and the Vessel's arrival at the Mississippi there was no period of sufficient length required to give rise to the severe level of fouling observed there. He considered it was likely that the fouling that was observed in the Mississippi in November 2019 must have developed on the Vessel's vertical sides during this period of inactivity.

118. Using Dr Petrone's 20% figure Mr Chell calculated that the engine power would have to be increased by 12-15% to maintain the Vessel's speed by reason of the fouling. He considered that if the engine power was not increased then the fouling would have resulted in a loss of speed between 0.52 and 0.61 knots, giving a net loss of time of 27.2 to 32.2 hours.

119. The Claimant maintained that the videos at Trincomalee showed that the hull had been properly cleaned, and that the photographs at New Orleans only showed *de minimis* fouling that had already been factored into the performance analysis made by Captain Hodges.

Conclusions

120. For reasons given above limited weight could be given to Mr Chell's calculations based on Dr Petrone's untested opinion. The Defendant acknowledged that the fouling was complex and Dr Petrone had not considered the videos relating to the cleaning. These indicated varying patterns of fouling. In addition, as Captain Hodges commented, the research relied upon by Dr Petrone did not show a reliable method for assessing the impact of fouling on the speed of bulk carriers.

121. Given that I have rejected the claim based on the RPM method, it was not necessary to decide whether allowing recovery under the RPM method and also the lost time calculated by Mr Chell for hull fouling would have allowed double recovery for the same underperformance (what counsel described as double dipping). It was significant that Mr Chell considered that there would be duplication.

122. In circumstances where the Claimant had established a loss from the slow steaming under the good weather method, there would be double recovery if Mr Chell's

calculation was added since the good weather method covers underperformance by reason of hull fouling (and any other matter affecting performance).

123. For all these reasons I reject the Defendant's claim for time lost solely in respect of hull fouling. It is also unnecessary for me to draw factual conclusions about the level of fouling and what impact it might have had on performance.

The counterclaim for damages for wrongful arrest?

What is the applicable law?

124. There had been an issue as to whether the Defendant's claim in tort should be decided under English law or Gibraltarian law. However, it was common ground that the law of Gibraltar on admiralty jurisdiction (and wrongful arrest) is identical to that of English law. Accordingly, expert evidence was not required and the arguments related to English law (and the English statutes are referred to for convenience, without deciding which legal system would have applied if it had been in issue).

125. It was agreed that there were two principal issues (and potentially a third):

a) Was the Arrest lawful? This turned on whether the Defendant was the beneficial owner as respects all shares in the POLA DEVORA for the purpose of s21 of the Senior Courts Act 1981?

b) If not, is the Claimant liable in tort for wrongful arrest?

c) If so, what is the quantum of recoverable damages?

Was the Arrest lawful? Was the Defendant the beneficial owner as respects all shares in the POLA DEVORA?

The Law on "beneficial owner"

126. There was not a great deal of dispute between the parties as to the meaning of "beneficial ownership" for the purpose of the Senior Courts Act 1981, and I accepted Mr Stevenson's analysis.

127. Section 21(4)(ii) of the Senior Court Act 1981 defines when a charterparty claim relating to one ship (which falls within s20(2)(h)) can give rise to an arrest by way of action in rem against a second ship (sometimes described colloquially as a sister ship).

> *"In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—*
>
> *a) the claim arises in connection with a ship; and*
>
> *b) the person who would be liable on the claim in an action in personam ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,*

> *an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—*
>
> *i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or*
>
> *ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.*
>
> *[Emphasis added, and "the relevant person" is the person against whom the claim is brought]*

128. Accordingly, establishing beneficial ownership is one of the key factors in establishing jurisdiction to arrest a ship. The reference to *"shares*" in the second ship (here POLA DEVORA) is not to company shares in an owning company but to the 64 shares into which property in a ship is divided under s5 of the Merchant Shipping Act 1894 (now repealed but laid down in the Merchant Shipping (Registration of Ships) Regulations 1993/3138, section 2(5)).

129. The authorities make clear that beneficial ownership means equitable ownership and does not cover a person who operates or manages a ship, a bareboat charterer or the person who owns the company shares of the registered owner. This conclusion is explained by Meeson and Kimbell in *Admiralty Jurisdiction,* 5th Ed, where they state at #3.43:

> *"In The "I Congreso del Partido" Robert Goff J held that the words "beneficially owned" in the corresponding provisions… referred only to cases of equitable ownership, whether or not accompanied by legal ownership, and were not wide enough to include cases of possession or control without such ownership, however full and complete such possession and control may be. He said: "the intention of Parliament in adding the word 'beneficially' before the word 'owned' … was simply to take account of the institution of the trust, thus ensuring that, if a ship was to be operated under the cloak of a trust, those interested in the ship would not thereby be able to avoid the arrest of the ship." In that case the relevant person was the operator and manager and the ship was held not to be beneficially owned by them."*

130. The Court of Appeal in *The Evpo Agnic* [1988] 1 WLR 1090 is the leading authority and Donaldson LJ confirmed the position where ships are registered under the names of single-ship owning companies (often in a group of companies). The case suggests that ownership by one-ship companies is the usual and legitimate form of ownership for shipping groups. Donaldson LJ makes clear that the presumption is that a single-ship owning company is the legal and beneficial owner of all the shares in the ship

irrespective of the corporate structure in which it sits. Donaldson LJ explained at p.1096E:

> *"in real commercial life, thus far at least, registered owners, even when one-ship companies, are not bare legal owners. They are both legal and beneficial owners of all the shares in the ship and any division between legal and equitable interests occurs in relation to the registered owner itself, which is almost always a juridical person. The legal property in its shares may well be held by A and the equitable property by B, but this does not affect the ownership of the ship or of the shares in that ship. They are the legal and equitable property of the company."*

131. This presumption or inference or starting point is also confirmed by the Hong Kong Court of Appeal in *Tian Sheng No. 8* [2000] 2 Lloyd's Rep. 430 stating at p.44 that:

> *"It is possible that registration is, as a matter of law, not conclusive on the issue of ownership; conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship: the fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive, and it would take a wholly exceptional case for it to be otherwise".*

132. *The Evpo Agnic* provides assistance in relation to the standard to be applied as to whether an arresting party may go behind the registered ownership to attempt to displace the presumption where the "relevant person" is not the registered owner. Donaldson LJ suggests that the court will only look behind the registered ownership where there is actual evidence of a trust or agency relationship or a sham arrangement, or a real prospect of showing that equitable ownership is separated from the legal registered ownership; speculation is unjustified. He states at p.1090:

> *"there has to be some real indication that further facts may exist which will affect the issue. Ironically the plaintiffs put the point much higher — and possibly too high — in their skeleton argument when they said that a judge should order discovery where the plaintiffs raise a strong prima facie case of the same beneficial ownership and when, in the absence of co-operation by the defendants — either voluntarily or as a result of a court order — there are no further steps that the plaintiffs can reasonably take to ascertain the true position. Something less than a strong prima facie case might well suffice in such a situation, but here there is no indication of any case at all."*

Was the Defendant the beneficial owner of the POLA DEVORA?

The Defendant's case

133. The Defendant's case was that GTLK Malta held both legal and beneficial ownership of the vessel at the date of the Arrest.

134. The Defendant's counsel put forward a positive case that it was part of a group of companies, with the trading name of Pola Maritime, and that the Defendant bareboat charters and time charters a number of vessels. He submitted that Pola Rise was another company in the group that had time chartered the POLA DEVORA to the Defendant, and that charter was not an arm's length transaction. He also explained that GTLK Malta was Russia's largest leasing company and it had advanced the finance for the purchase of the POLA DEVORA.

135. He submitted that the bareboat charter dated 11 January 2018 (between Avonburg and GTLK Malta) was a standard bareboat charter lease concluded to finance the purchase of the POLA DEVORA under which GTLK Malta leased the vessel to Avonburg who would then pay charter hire in lieu of interest. Effectively the hire instalments would pay the purchase price in an arrangement akin to hire purchase, whereby GTLK Malta's security was its beneficial ownership, and at the end of the bareboat term when all instalments were paid, title would pass to Avonburg.

136. He explained that a bareboat charter is commonly registered, and here it was registered on the Russian register. He submitted that there was nothing unusual about a vessel being registered on the Russian bareboat charter register, and there was nothing unusual about these ownership arrangements. He suggested that the arrangements for bareboat charters were entirely standard and would give rise to no grounds for doubting that beneficial ownership was held by the registered owner. These matters were not challenged or admitted by the Claimant. Some aspects appeared likely from the Lloyd's List Report, the website for Pola Maritime (which was marked as copyright of the Defendant), the bareboat registration certificate and the terms of the bareboat charters. However, the broader factual explanation of the commercial relationships and registrations, and whether they were usual only emerged from submissions, and was not tested in evidence.

137. The Claimant had initially maintained a positive case that beneficial ownership lay with the Defendant but it later maintained its case on the basis of estoppel (which was rejected) and more significantly arguing that wrongful arrest had not been established.

138. Based on all the factual background and evidence set out above, including the documents produced by Pola Rise on 6 July 2020, I find that the Defendant was not the beneficial owner of the POLA DEVORA at the time of the Arrest.

Is the Claimant liable in tort for wrongful arrest?

The test for wrongful arrest

139. The Defendant accepts that the test is not in dispute (although reserved the position to argue that it is wrong on appeal). It accepts that it must establish that the arrest proceedings were commenced or continued in bad faith or with "*crassa negligentia*" or gross negligence, *The Evangelismos* (1858) 12 Moo PC 352; 14 E.R. 945. The test applies to the circumstances arising at the time of the Arrest.

140. It maintains that the test is whether, when the Claimant arrested the POLA DEVORA, the evidence (upon which the arrest was based) disclosed sufficient grounds to demonstrate a genuine but understandable mistake. If not then that establishes a

prima facie case of bad faith or gross negligence, and the onus would lie on the Claimant to justify its position.

141. Counsel for the Defendant suggests that the modern statement of the test is laid down in *The Kommunar (No.3)* [1997] 1 Lloyd's Rep. 22 and suggested that there were two alternative limbs to satisfy. First, bad faith, namely that the arresting party has no honest belief that it was entitled to arrest. Second, gross negligence where there was so little basis for the arrest that it can be inferred that the arresting party acted without any serious regard as to whether there are adequate grounds for the arrest of the vessel. He suggested that the second limb does not entail gross negligence which implies malice. Instead, it is satisfied merely by asking whether there was a "*genuine but understandable mistake",* and whether the person "*acted without any serious regard to whether there are adequate grounds for the arrest of the vessel",* and entails no implication of malice. He also relied on Colman J's analysis at p.31 to suggest that the test was whether "*it should have been obvious to the plaintiffs"* that they had no right to arrest.

142. The Claimant accepted that the Defendant could establish a wrongful arrest by showing that the evidence and circumstances relied upon as pointing to the Defendant as beneficial owner were so insubstantial that the only inference that can be drawn is that the arrest was driven by actual malice or bad faith, or by gross negligence which implies malice. This broadly reflects the burden that lies upon the Defendant in establishing a wrongful arrest, and explains when the onus lies on the arresting party to justify its conduct.

143. The cases on malicious prosecution provide some guidance on what evidence is expected and suggest malice includes improper motive. *Gibbs v Rea* [1998] AC 786 was relied upon by the Defendant in criticising the Claimant for not putting forward evidence to explain its position. In that case the Privy Council explained:

> *"To allow a defence to be maintained simply by unsupported speculation that there might have been good grounds cannot be justified and the authority cited is no support for it. The other aspects on which some comment on the approach of Harre C.J. is appropriate is that of a shifting burden of proof. Their Lordships find such terminology unhelpful: Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co. [1989] S.T.C. 520 , 532; Tan v. Cameron [1992] 2 A.C. 205 , 225E. The preferable approach is to consider the matter in the round and determine whether the evidence as a whole satisfies the standard of proof. It was of course open to the defendants to elect to give no evidence and simply contend that the case against them was not proved. But that course carried with it the risk that should it transpire there was some evidence tending to establish the plaintiff's case, albeit slender evidence, their silence in circumstances in which they would be expected to answer might convert that evidence into proof."*

144. The Defendant put a gloss on the tests laid down in *The Evangelismos* and confirmed in *The Kommunar (No.3)* and also *The Alkyon* [2019] QB 969 which was unnecessary

and at least partly incorrect. *The Evangelismos* was a Privy Council case involving a claim for wrongful arrest where The Rt. Hon. T. Pemberton Leigh said this:

> *"Undoubtedly there may be cases in which there is either mala fides, or that crassa negligentia, which implies malice, which would justify a Court of Admiralty giving damages, as in an action brought at Common law damages may be obtained. In the Court of Admiralty the proceedings are, however, more convenient, because in the action in which the main question is disposed of, damages may be awarded. The real question in this case, following the principles laid down with regard to actions of this description, comes to this: is there or is there not, reason to say, that the action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff, or that gross negligence which is equivalent to it?"*

145. In *The Kommunar (No.3)*, Colman J explained the test as follows:

> *"Two types of cases are thus envisaged. Firstly, there are cases of mala fides, which must be taken to mean those cases where on the primary evidence the arresting party has no honest belief in his entitlement to arrest the vessel. Secondly, there are those cases in which objectively there is so little basis for the arrest that it may be inferred that the arresting party did not believe in his entitlement to arrest the vessel or acted without any serious regard to whether there were adequate grounds for the arrest of the vessel. It is, as I understand the judgment, in the latter sense that such phrases as "crassa negligentia" and "gross negligence" are used and are described as implying malice or being equivalent to it. The reference at the end of the passage from the judgment just cited to there being circumstances which afforded grounds for believing that the arrested ship was the one that had been in collision suggests that if on the evidence there is a genuine but understandable mistake as to the identity of the vessel, that will not amount to crassa negligentia. Taking the judgment as a whole, it would not appear that mere absence of reasonable care to ascertain entitlement to arrest the vessel would necessarily amount to [crassa negligentia] in the sense there used."*

146. In *The Alkyon* Teare J explained the test as follows:

> *"As long ago as 1858 it was established that where an arresting party acted in bad faith or with such gross negligence as implies malice he was liable for any damage caused by a wrongful arrest: see The Evangelismos (1858) 12 Moo PC 352 . That remains the law: see Centro Latino Americano de Commercio Exterior SA v Owners of the Ship Kommunar (No 3) [1997] 1 Lloyd's Rep 22 , per Colman J and Willers v Joyce*

> *[2018] AC 779 , paras 69-78, 82-85, per Lord Clarke of Stone-cum-Ebony JSC."*

147. The Court of Appeal acknowledged that its decision in *The Alkyon* would impinge on the well-established test for wrongful arrest, even if the test was not directly in issue. It upheld the existing test under *The Evangelismos,* emphasising that English law is well established:

> *"no damages can be claimed for wrongful arrest absent malice (bad faith) or (effectively) gross negligence on the part of the arresting party: The Evangelismos 12 Moo PC 352 ; The Kommunar (No 3) [1997] 1 Lloyd's Rep 22 , 29 et seq; Willers v Joyce [2018] AC 779 , per Lord Clarke of Stone-cum-Ebony JSC, at paras 68-78. It is recognised that this rule of English law is capable of bearing harshly on a shipowner in circumstances where it subsequently transpires that the arrest was unjustified, but the shipowner is left without remedy for his loss: The Kommunar (No 3) , p 33. None the less, that is the rule and it carries Privy Council authority: The Evangelismos 12 Moo PC 352 ."*

148. The Court of Appeal went on to survey the English authorities, the academic debates relating to the test in *The Evangelismos,* the international case law and it considered the correct process for any change in the law, suggesting legislation would be required rather than reactive case law. It carefully analysed the criticisms put forward for *The Evangelismos* test but concluded that it would be wrong to undermine very longstanding English law and it accepted Lord Clarke's comment in *Willers v Joyce* [2018] AC 799 [68] that a claim for wrongful arrest is analogous to a common law action for malicious prosecution.

149. I do not accept the Defendant's analysis of gross negligence for the purpose of wrongful arrest. There was no indication in *The Kommunar* (*No 3)* that Colman J was intending to change the law and remove any element of implied malice from *crassa negligentia.* Even if he had been, the Court of Appeal in *The Alkyon* unequivocally indicated that the test in *The Evangelismos* was long and firmly established, even if it could operate harshly for an owner. It refers to *The Kommunar* in the context of endorsing the test in *The Evangelismos,* and also firmly endorsing the judgment of Teare J which makes clear that gross negligence involves the implication of malice. The test for gross negligence was not lowered in *The Kommunar (No 3)* and it is not merely whether "*it should have been obvious that the plaintiffs"* were not entitled to arrest.

150. The first limb of the test in *The Kommunar (No 3) (*and also *The Evangelismos*) suggests an enquiry as to the actual belief of the arresting party (i.e. whether it was honest or malicious) while the second limb appears to be a more objective question as to whether malice is to be implied. Indeed, an objective approach was the way in which the Defendant pleaded its case.

Was the arrest wrongful?

The Defendant's position

151. The Defendant maintained that the arrest was made with an improper motive of putting illegitimate pressure on the Defendant to come to the table to settle the hire claim, in circumstances where the Claimant could not justify its mistake in naming it as beneficial owner. The Lloyd's List Report gave absolutely no grounds, let alone sufficient grounds, to conclude that the Defendant held equitable title. It emphasised that the Claimant had provided no explanation in the form of a witness statement explaining how it had interpreted the information in the Lloyd's List Report or the Defendant's group website. This was significant and it was not open to the Claimant to speculate as to how its mistake arose. It submits that the Claimant knew full well that the arrest was unjustified and that the POLA DEVORA would be released by the court in Gibraltar. It says it was blindingly obvious that the Lloyds Register Report was referring to beneficial ownership in the sense of identifying the ultimate beneficial owner of the POLA DEVORA, rather than in the sense of whether equitable ownership was held by the Defendant. It also submitted that the Pola Maritime website was also obviously explaining the usual position of a fleet of one-ship owning companies within a group of companies.

152. The Defendant argued that the Claimant's approach was wholly unusual and outside the norm. It submitted that "sister ship" arrests were very rare because beneficial ownership is given a narrow meaning, and an arrest not based on registered ownership is generally limited to exceptional cases where there is evidence of a sham or fraudulent registration, or where there are complex issues going to succession of title (for example *The Guiseppe di Vittorio* [1998] 1 Lloyd's Rep 136 (CA)).

The Claimant's position

153. The Claimant maintained that the evidence and circumstances at the time of arrest pointed to the Defendant as beneficial owner since the Lloyd's Register Report described it as such, and its definition of beneficial owner is wide enough to encompass an owner with an equitable interest in the vessel. GTLK Malta was known only to be a leasing company and the Defendant held itself out as owner of the POLA DEVORA rather than as time charterer. It pointed out that the evidence disclosed after the arrest indicated that the Defendant was the beneficial owner since the time charter between it and Pola Rise was on unusual terms, with no evidence of hire being paid until shortly before it served its pleading claiming damages, suggesting that it was operating the POLA DEVORA as if it was the registered owner, so as to suggest an equitable ownership.

154. It also argued that the Claimant's post-arrest actions did not give rise to an inference that the test for wrongful arrest was made out. It submitted that funds in escrow were offered but no proof of receipt was ever tendered. It was also reasonable for the Claimant to seek an LOU that answered against a claim against the Defendant since the arrest had involved issuing an *in personam* claim against it.

155. In closing the Claimant's counsel raised an argument of estoppel arising from the Defendant making a representation and Mr Triay's opinion that a Gibraltar court

would hold it to that representation. I reject that argument since there was no unequivocal representation or conduct that would give rise to an estoppel.

Conclusions on wrongful arrest

156. The Claimant's conduct in making the Arrest and maintaining it until 6 July 2020 did not give rise to an inference or finding of malice or *crassa negligentia*. Even on the Defendant's preferred test for gross negligence (as discussed above) I would not have concluded that there was gross negligence. The publicly available information (both from the Lloyd's List Report, and also the Seaweb report relied on by the Defendant's own lawyers on 3 July 2020) suggested that the POLA DEVORA was a Russian flagged vessel and that its registered owner was Pola Rise. Mr Stevenson acknowledged that this was wrong since the POLA DEVORA was actually registered under the Maltese Register and its registered owner was a leasing company GTLK Malta.

157. At the time of the Arrest (and subsequently) GTLK Malta appear to have had no involvement in the matter. At that stage the Defendant's own solicitors referred to Pola Rise as "Owners" in the context of maintaining that the Defendant was not the beneficial owner of the POLA DEVORA. The POLA DEVORA was registered under the name of Pola Rise on the Russian bareboat register but this was a separate matter and did not evidence ownership (beneficial or otherwise). It was notable that in its Defence the Defendant initially pleaded that the POLA DEVORA was owned by Pola Rise rather than GTLK Malta, and in its pleadings it made no positive case that GTLK Malta was the beneficial owner.

158. In these circumstances, there was a lack of clarity in public documents as to the registered ownership of the POLA DEVORA at the time of the Arrest. Whether considering the position objectively, or subjectively based on the correspondence, it would not have been obvious to the Claimant at that stage that the beneficial ownership of the POLA DEVORA was held by GTLK Malta. Pola Rise could also not be clearly identified as a beneficial owner even though it had some registered interest. The Defendant, Pola Maritime Ltd, was at least named on some public records as beneficial owner so it could not be said that the Claimant had paid no serious regard to whether it could arrest.

159. Notwithstanding intense correspondence the position was not resolved until the registration documents and charterparties for the POLA DEVORA were produced by Pola Rise's lawyers in Gibraltar, Isolas LLP, on 6 July 2020. These documents showed that beneficial ownership did not lie with the Defendant. It was notable that neither the Defendant nor Pola Rise indicated at the time that beneficial ownership lay with the leasing company GTLK Malta, and the registration documents also left this open since Pola Rise was described as registered bareboat charterer. While these documents showed that beneficial ownership did not lie with the Defendant, the previous lack of clarity as to registered ownership (arising from errors in information in the public domain, that were not immediately or clearly corrected by the Defendant or Pola Rise) meant that the Claimant's arrest based on the Lloyd's List Report and the Defendant's own website was a genuine but understandable mistake.

160. The Claimant's conduct after the arrest does not give rise to an inference of malice or *crassa negligentia.* By 3 July 2020 the Defendant's solicitors were indicating that

their clients were willing to put up security for the hire claim notwithstanding their position that there was no right of arrest. The parties had exchanged a draft escrow agreement which would secure funds to secure the Claimant's claim under the Charterparty.

161. In these circumstances, it was unsurprising that the Claimant and its solicitors were pressing to secure the best possible security to answer the Claimant's hire claim before releasing the vessel. Correspondence was being exchanged under pressure to resolve the intended release, and on a Friday evening. The Claimant had also been told by the Defendant's solicitors that funds were en route to meet the escrow agreement. The Claimant's representatives acted reasonably in not recommending the release of the POLA DEVORA without exploring adequate security or payment into escrow. The requests for a copy of the SWIFT confirmation or an LOU answering to a judgment against the Defendant do not evidence a failure to have serious regard to whether the arrest was justified. It was significant that the Claimant immediately released the POLA DEVORA when registration documents and the bareboat charters were produced.

162. I accept that if the Defendant had made an application to release the arrest on Tuesday 7 July (or Monday 6 July) then it had a good argument that the LOU provided adequate security to secure the claim made in rem against "the owners of the POLA DEVORA". However, until the Defendant produced the registration documents and charterparties on 6 July this was not clear since ownership remained unclear. During the period up to 6 July it was unsurprising that both parties were trying to carve out a commercial compromise so as to secure a release of the vessel immediately and, ideally, agree a settlement of the underlying dispute. I do not draw an inference of malice or *crassa negligentia* on the part of the Claimant in refusing to release the arrest against the LOU.

163. The Defendant overstated the significance of the absence of evidence from the Claimant as to how it understood the Lloyd's List Report or website. First, its case was based on gross negligence which is based on an objective standard and does not depend on the Claimant's actual state of mind. Secondly, the Claimant's basis for arrest had been made clear in its declaration seeking the arrest and the correspondence exchanged at the time of the arrest. The absence of a statement was perhaps unsurprising where the Defendant had not provided evidence of the legal and commercial relationships between the various parties, and this only emerged in argument.

164. *Gibbs v Rea* did not support the Defendant's case on *"crass negligentia"* for the purposes of wrongful arrest. In that case the prosecuting party put forward no evidence whatsoever as to its grounds for taking action by way of search warrant against the claimant. Here, however, the Claimant had spelled out in its original declaration and in its pleading (supported by a statement of truth) the basis for making an arrest, and this was supported by the actual documents relied upon and the correspondence evidencing the parties' exchanges.

165. For all these reasons I dismiss the claim for damages for wrongful arrest. It is not necessary to investigate whether the Defendant established the quantum of its claim in damages.

Overall conclusions

166. The claim for damages for wrongful arrest is dismissed. The counterclaim for slow steaming succeeds to the extent that the Defendant established a loss of time of 16 hours that falls to be deducted from hire. I trust the parties can translate this decision into an agreed US dollar figure for the order on judgment.