IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ADMIRALTY COURT (QBD)
Case Nos: AD-2015-000131, AD-2016-000017

[2019] EWHC 163 (Admlty)

Court No 8

The Rolls Building
100 Fetter Lane
London EC4
29 January 2019

Before:

MR JUSTICE ANDREW BAKER

BETWEEN:

NAUTICAL CHALLENGE LTD

Claimant/Defendant

-v-

EVERGREEN MARINE (UK) LIMITED

Defendant/Claimant

MR N JACOBS QC and **MR P HENTON** (instructed by Ince Gordon Dadds LLP) appeared on behalf of Evergreen Marine (UK) Limited.

MR V SOKOLENKO appeared with the permission of the Court for Nautical Challenge.

Approved Judgment

MR JUSTICE ANDREW BAKER:

Introduction

1. On 11 February 2015 off Jebel Ali at 23.42 hours local time the *Ever Smart*, a 7,024 TEU container ship, drove into and almost through the *Alexandra I*, a Suezmax tanker. *Ever Smart* made contact at an angle of about 42° to *Alexandra I's* heading. At impact *Ever Smart* was making 12.4 knots over the ground, 10.3 knots through the water, *Alexandra I* just 2.4 knots over the ground. The point of impact was on *Alexandra I's* starboard bow, thankfully forward of her collision bulkhead and cargo tanks. She was laden with about 975,000 barrels of condensate, loaded (as I find) in Iran, for discharge at Jebel Ali. *Ever Smart* was exiting Jebel Ali carrying a mix of laden and empty containers, as is typical for a container ship on a regular liner rotation.
2. These two claims have been collision actions between the owners of the two vessels at the time of the collision, Nautical Challenge Ltd, the owner of *Alexandra I*, and Evergreen Marine (UK) Ltd, the owner of *Ever Smart*.
3. Teare J determined that, whilst both vessels were at fault, responsibility for the resulting damage should be apportioned 80:20, i.e. the damage is to be borne as to 80% by *Ever Smart* and as to 20% by *Alexandra I*: see [2017] EWHC 453 (Admiralty), [2017] 1 Lloyd's Report 666. That apportionment was upheld by the Court of Appeal: see [2018] EWCA Civ 2173. An application by *Ever Smart* for permission to appeal to the Supreme Court is pending on the papers, I was told.

4. It now falls to the court to assess the damages recoverable, subject to apportionment, by *Alexandra I* and *Ever Smart* respectively, upon the basis of which final monetary judgment can be entered. I shall not refer again until the end of this judgment to the 80:20 apportionment. All references to amounts will be to amounts claimed or adjudged to be recoverable at 100%, i.e. prior to the application of that or any other apportionment.
5. A major issue to consider in assessing the damages recoverable by *Alexandra I* is the impecuniosity (as asserted) of its owner, Nautical Challenge. A little over two years after the collision, in April 2017, *Alexandra I* was sold by judicial auction, having been arrested in Singapore for non-payment of crew wages. She was then the *Ambassador*, having been re-named after the collision repairs in mid-2016.
6. Whatever I make of Nautical Challenge's claim of impecuniosity as regards the position at the time of and in the two years or so after the collision, until she was finally sold in Singapore, it is certainly impecunious today. Having been represented ably by Clyde & Co and leading and junior counsel at all stages, it failed to put them in funds for the final hearing of the damages assessment and they came off the record. With my permission, Mr Vitali Sokolenko represented Nautical Challenge at the hearing, he having authority from Nautical Challenge to do so under a power of attorney granted on 8 January 2019.
7. Mr Sokolenko is Ukrainian by nationality, now resident in Switzerland, and I accepted from him -- although this was not formally evidenced -- that his wife was and is the ultimate beneficial owner of Nautical Challenge. This was an exceptional grant of a special right of audience, but for which Nautical Challenge would have been unrepresented at the damages assessment hearing. Mr

Sokolenko vindicated my assessment both that he knew the case well, having, as he said, lived with it for the past four years as Clyde & Co's effective client, and that he would be capable of presenting the case for Nautical Challenge sensibly and appropriately. That said, he was not always able to restrict himself to submissions upon the evidence adduced at trial, but strayed at times into asserting matters of fact not in evidence. I do not criticise him for that, but equally I shall judge the case solely on the evidence.

8. Whilst paying tribute, I should also record that through Mr Jacobs QC and Mr Henton, instructed by Ince Gordon Dadds LLP, *Ever Smart* did not seek to take advantage of the inequality of legal arms resulting from Clyde & Co's departure. They presented the case as a whole, and the arguments on particular points, fairly to both sides. One conspicuous example was that, pursuant to CPR 35.11, Mr Jacobs QC put in evidence the experts' reports that had been served by Clyde & Co on behalf of *Alexandra I*, whilst also calling the experts whose reports had been served by Ince on behalf of *Ever Smart* (experts whom Mr Sokolenko cross-examined both respectfully and with admirable economy).

9. Thus, I was invited to have regard to the expert evidence served by Clyde & Co, even though Mr Sokolenko was not in a position to call the experts in question and so Mr Jacobs QC was unable to cross-examine them. Of course, where there were important points of difference I have borne well in mind that the expert evidence served by Clyde & Co has not been tested in cross-examination. That is not to be unfair to *Alexandra I* given the inequality of arms, but only to avoid unfairness to *Ever Smart*.

***Ever Smart's* Loss**

10. *Ever Smart* pleaded various heads of claim totalling just over US$5 million. Through concessions that included dropping a claim for loss of use pleaded at c.US$2.2 million, and taking account of the expert evidence as exchanged for the hearing, by the time of final preparations for the hearing, the dispute as to *Ever Smart's* recoverable loss had narrowed very substantially, leaving a difference between the parties of US$136,598.40 against a reduced claim of US$2,506,310.60.

11. In the event, Mr Sokolenko confirmed, in the written outline of the case he sought permission to pursue on behalf of *Alexandra I* that I directed him to provide, that the remaining points of dispute would not be pursued. *Ever Smart's* recoverable loss was therefore agreed at **US$2,506,310.60** prior to the customary claim for 'agency' at 1%. So, that is **US$2,531,373.71** in total.

***Alexandra I's* Claimed Losses**

12. The recoverable loss claimed by *Alexandra I*, as pursued at the hearing, comprised the following elements (prior to the customary claim for 'agency' at 1%):

    (i) Compensation for the damage to *Alexandra I* measured in the normal way by the reasonable cost of repairing the damage, plus compensation for loss of the use of the vessel as a profit-earning chattel for the period reasonably required for repairs. This part of the claim leaves out of account the consequences of impecuniosity as alleged by Nautical Challenge. One particular element of this basic loss was a claim that there had to be a first employment after repairs on less remunerative business for which the

vessel could compete without having a recent satisfactory SIRE inspection report. That item was in fact put forward (measured by reference to the first actual post-repair fixture, for Newton Shipping Ltd) as a separate element of the claim. But, in my judgment, it properly falls to be taken into account, or not as the case may be, as part of assessing this basic loss.

(ii) The aggravation of the basic loss resulting, as alleged, from impecuniosity. Thus, whereas the parties differed as to whether (leaving aside any impact of impecuniosity) *Alexandra I* ought reasonably to have been fully repaired and ready for service after the collision within 156 days (as contended by *Ever Smart*), 220 days (as contended by *Alexandra I*), or something in between (if so determined by the court), in fact she left the repair yard, DDW in Dubai, only in late July 2016, some 534 days after the collision. To some extent the repair bill itself (including ancillary costs) was therefore higher than it might have been. More significantly, *Alexandra I* was not available for employment for some 534 days, not only for the much shorter reasonable repair period absent impecuniosity.

(iii) Further claims for loss of use said to have resulted from subsequent periods under arrest in Malta and Singapore, together with claims for costs said to have been caused by those arrests.

(iv) An alleged permanent diminution in the value of *Alexandra I* said to have been caused by the fact she had suffered the collision and been repaired. The suggestion was that in her fully repaired state she was worth less than if she had never been hit.

(v) The loss said to have been suffered by reason that *Alexandra I* (re-named *Ambassador*) was sold in the event by judicial auction whilst under arrest in Singapore, rather than by a normal market, willing seller-willing buyer transaction.

13. The first post-repair fixture generated an arbitration claim by Newton Shipping, as charterers, in respect of which, somewhat ambitiously, *Alexandra I* claimed damages against *Ever Smart* asserting that any liability to Newton Shipping was caused by the collision. Mr Sokolenko sensibly did not pursue that claim at the hearing. I am surprised it was ever pleaded.

14. In all respects other than the claim for the basic loss -- as I have labelled it -- *Alexandra I's* claim was infected by a basic misapprehension that anything and everything, of which it might plausibly be said that it would not have happened to *Alexandra I* but for the collision, could be claimed. It was accepted that losses that may have been suffered by other businesses were too remote and could not be claimed. For example, it was said that one associated entity borrowed against the value of another vessel, the *Mila*, so as to lend to Nautical Challenge, leading ultimately to the loss of the *Mila*, and no claim arising out of that was advanced. But that is not where the boundary is to be drawn between loss effectively caused by the collision and loss not so caused, or at any rate it may not be where that boundary is to be drawn, depending on the facts.

15. To the extent *Alexandra I* advanced claims for loss alleged to have resulted from the impecuniosity of Nautical Challenge, there were issues of principle concerning the effect and proper application of the decision of the House of Lords in *Lagden v O'Connor* [2003] UKHL 64, [2004] 1 AC 1067, and there were issues

over whether Nautical Challenge had proved whatever it needed to prove on the facts, anyway. But there was also a question whether Nautical Challenge was entitled to pursue those claims at all, given the terms of an unless order of Teare J dated 14 December 2018 relating to disclosure.

The Basic Loss

16. It is convenient to deal first with two main questions, before turning to the amounts claimed in any detail.

17. Firstly, *Alexandra I* was repaired at DDW Dubai, although the initial quote of ASRY Bahrain was 17% lower. It is said that the decision to award the work to DDW was unreasonable and the court should assess the reasonable cost of repair by considering what the final bill would have been at ASRY.

18. Secondly, as I have already indicated, there was a difference between the parties as to how long it ought reasonably to have taken following the collision before *Alexandra I* was fully repaired, if delays consequent upon Nautical Challenge's impecuniosity are left out of account.

19. I am satisfied on the evidence that the decision to use the DDW yard was reached essentially on safety grounds, given its proximity. *Alexandra I* was not disabled by the casualty, she was capable of main engine propulsion, navigation and manoeuvring. Indeed, Mr Jacobs QC emphasised the evidence that whilst waiting to go to the repair yard, since she had no usable anchor because of the collision damage, she adopted a pattern of repeatedly drifting, then regaining her position under her own steam. The total distance travelled in that pattern was assessed by Mr Bailey, the expert marine engineer called by *Ever Smart*, at c.270 nm.

20. Logically, about half of that will have been made good under power and about

half will have been travelled through drifting. The distance to ASRY Bahrain, meanwhile, was c.240 nm. In my judgment there is (or an owner could reasonably fear that there might be) a world of difference between crawling short distances, probably daily or every other day, to reverse natural drifting, and making a full sea passage, even if steamed very slowly. The vessel's technical managers, I-Ships, advised against taking her to Bahrain. I do not doubt the sincerity of Mr Bailey's view that *Alexandra I* would have made it safely. But, equally in my judgment, there is no basis to doubt the sincerity of the contemporaneous concern that that was by no means guaranteed. If the structural integrity of the vessel were impaired more severely than it was possible to assess prior to drydock, and *Alexandra I* had suffered further damage *en route* to Bahrain, perhaps resulting in the spillage of condensate (or worse), I have no doubt Nautical Challenge would have been criticised for taking the risk.

21. Furthermore, the final scope of work was so much more extensive than that quoted for initially by DDW and ASRY that I cannot be satisfied that the final bill would have been materially less than it was in fact if the work had been awarded to ASRY.

22. The decision to award the repair work to DDW was, I conclude, a reasonable decision and did not aggravate the losses resulting from the collision.

23. I turn then to the length of the reasonable repair period. There are two aspects to this, on both of which I prefer the case for *Alexandra I*, as I shall explain. The result is that the reasonable repair period is 220 days as claimed. The resulting loss of use claim period is therefore 218 days, recognising that without the collision *Alexandra I* was due to spend two days discharging her cargo before

being free for any further employment.

24. Firstly, *Alexandra I* made it to the yard at DDW for repairs on 8 April 2015, some 56 days after the collision. Upon the basis of an assessment of how quickly, all going well, the necessary operations in principle could have been done, *Ever Smart* contended that she ought reasonably to have made the yard no more than 20 days after the collision. However, I was shown no evidence that DDW or ASRY, if relevant, had availability to take the vessel prior to early April. Furthermore, there was in general no evidence that *Alexandra I* did other than carry out, when physically possible and in proper sequence, the necessary steps to get ready for repairs.

25. The one significant exception to that general statement is that although on 23 February 2015 a tanker called *Falcon Pride* had been engaged to take by STS transfer the whole of *Alexandra I's* cargo, that transfer operation was interrupted because of adverse weather, or at least the forecast of adverse weather, on 26 February and never resumed. *Falcon Pride* lifted about 55% of the cargo. The balance was only lifted over three weeks later by the *Gemini* in an STS transfer operation on 21-22 March.

26. The making of those arrangements, however, was in the hands of those interested in the cargo, ultimately Emirates National Oil Company ('ENOC'), and in my judgment it was reasonable of Nautical Challenge to expect those interests to make those arrangements and to rely on them to do so.

27. In the circumstances, I am not in a position to find that it ought reasonably to have taken *Alexandra I* anything less than the 56 days she actually took before making her repair yard.

28. Secondly, then, *Ever Smart*, relying on Mr Bailey's opinion, contended that the repairs themselves ought reasonably to have taken no more than 136 days. Mr Bailey's opinion in turn relied entirely on a projected repair programme drawn up by DDW on or about 24 May 2015. It is right to note, as Mr Bailey emphasised, that by then DDW had had the vessel at the yard for over a month and their assessments were by then, therefore, not only preliminary assessments such as might have been reached on initial inspections whilst *Alexandra I* was still offshore. However, Mr Lillie, the expert whose report had been served by Clyde & Co for *Alexandra I*, pointed out that that programme would have required an unrealistic steel fabrication rate of 13 m.t. per day. Re-assessing the programme on a realistic steel fabrication rate of 8 m.t. per day gave Mr Lillie his opinion that the repairs ought reasonably to have taken 164 days.

29. Conscious as I am that Mr Lillie's views were not tested by cross-examination, nonetheless his evidence as to steel fabrication rates derived both from his general experience, and his particular knowledge of the yard, seemed to me realistic and was not to my mind seriously gainsaid by Mr Bailey. Furthermore, the proposition that the 24 May 2015 repair programme was optimistic, rather than realistic, is borne out in my judgment by the actual chronology (even allowing for the fact that at this stage I must strip out any impact of Nautical Challenge's financial difficulties). In the event, save for the installation of a new windlass, the supply of which was Nautical Challenge's responsibility, repairs were purportedly completed only in November 2015. (I say purportedly because, as was shown by a helpful chronology prepared by Mr Jacobs QC and Mr Henton, snagging issues became apparent after the windlass had eventually been supplied and fitted,

leading to further time spent undergoing repair work, irrespective of any delays caused by financial issues.)

30. Though it is clear to me that without Nautical Challenge's apparent difficulties in meeting financial obligations on time, the vessel ought reasonably to have been finished at DDW fully repaired and ready for employment long before she actually was in late July 2016, I do not accept she ought reasonably to have been so in less than the 220 days assessed by Mr Lillie. To the contrary, I find that the reasonable period after which, absent financial difficulties affecting Nautical Challenge or some other unusual cause of delay, *Alexandra I* ought to have been fully repaired and ready for employment, was 220 days.

31. On the basis of those conclusions as to yard and period for repairs I can now turn to quantify the reasonable cost of repairing the damage to *Alexandra I* as follows:

(1) The reasonable cost of de-slopping prior to repair was agreed at **US$57,942.93**.

(2) The reasonable cost of replacement outfitting, i.e. owners' supplied items, was agreed subject to one disputed item at **US$198,037.18**. The disputed item was that Nautical Challenge paid US$34,000 to airfreight the replacement windlass to DDW, whereas it could have been carried by sea on a container service for US$2,500. It is commonplace for there to be sufficient urgency about the provision of specialist spares or replacement parts or equipment during ship repairs for the use of airfreight to be reasonable. Indeed, there can be situations where the progress of repairs will otherwise be held up at (typically) far greater consequential cost to the shipowner than the extra he will pay to transport the part or piece of equipment by air. But that was not this case. Even on the most

optimistic of assessments of how quickly the repairs might be done the fitting of the windlass would come at the end of the repair programme and there was plenty of time to order it with delivery by sea in good time. In the event, there is the further irony that, within the vessel's hugely prolonged period at DDW, as it became, Nautical Challenge only procured delivery of the windlass to the yard in early February 2016 and it was then only fitted some six weeks or so later. Whereas carriage by sea would not have taken more than three weeks.

In my judgment, it was unnecessary and unreasonable to use airfreight for the windlass, and the extra cost generated by that choice is not for *Ever Smart's* account in this damages assessment.

(3) The reasonable cost of repair supervision by the technical managers, I-Ships, gave rise to two specific points. The first is that for no reason that is explained adequately or at all in evidence I-Ships charged, and it seems Nautical Challenge either paid or agreed to pay, or at least did not object to, a rate of US$1,500 per day, although the governing contract between them entitled I-Ships to charge only US$850 per day. On the expert evidence, even that contractual rate may have been on the high side, but very fairly Mr Jacobs QC accepted he could not say it was unreasonable. In the damages assessment, therefore, I-Ships' involvement as technical managers in supervising the repairs should be allowed at US$850 per day. The second specific point to which this item gave rise was the length of time over which that charge should reasonably be allowable. That follows my conclusion as to the length of the reasonable repair period. In the circumstances, for 220 days, that gives an allowable claim, in my judgment, of **US$187,000**.

(4) The vessel consumed bunkers and luboil during the 56 days between the casualty and making the repair yard. The only difference between the parties on the reasonable cost to be allowed is a by-product of their disagreement as to how much of that period should be treated as for *Ever Smart's* account. I have found in favour of *Alexandra I* on that dispute. The reasonable cost to be allowed should therefore be that assessed by Mr Lillie on that basis, namely US$125,000 for bunkers and US$10,000 for luboil, a total of **US$135,000**.

(5) In relation to agency fees, Mr Bailey assessed a reasonable allowance at **US$42,411.57**. Whilst a much larger claim had been pleaded and, for his part, Mr Lillie would have allowed quite a lot more than Mr Bailey, in the event Mr Sokolenko was content to agree Mr Bailey's figure.

(6) There was a surprising and substantial difference between the parties over the reasonable cost to be allowed for the hire of tugs to assist the vessel during the 56 day period offshore after the collision. The factual evidence, such as it is, shows that the local maritime authorities only imposed a requirement for there to be one tug (with fire-fighting capabilities) to be in attendance for the STS transfer operations to off-load *Alexandra I's* cargo of condensate, that that was also Nautical Challenge's understanding at the time, and indeed that, at least initially, it only ordered a single tug, for the planned STS transfer on to *Falcon Pride*. I also accept Mr Bailey's clear expert evidence that there was no need for greater tug assistance than that. In keeping with all of that, *Alexandra I* was not attended by any tug until she was preparing to off-load cargo to *Falcon Pride* two weeks or so after the collision. But it seems that she was attended at all times thereafter by at least one tug, and sometimes two, even though for most of that time she was not

engaged in STS transfer operations or in truth doing anything other than the holding station pattern I described earlier, waiting initially for the second STS transfer, then for her shift to the repair yard, it may be with certain onboard operations by the crew in preparation for the repairs but which there is no suggestion required tug assistance. The enormous cost of tugs incurred in the event was US$626,000. I have some sympathy with the notion, in the abstract, that an owner in Nautical Challenge's position is not likely to run up such a large bill without good reason, whether or not it had particular financial troubles. But the ordering of this level of unnecessary tug assistance cries out for a more specific explanation, yet is not explained by evidence. Mr Bailey, for his part, would have allowed only US$58,500, but that was on the basis of his view that *Alexandra I's* entire cargo should have been offloaded in a single STS transfer operation. That has not been my finding, however, and there was evidence, accepted by Mr Jacobs QC, that any use of a tug would have involved a minimum commitment to pay for three days, even if it was needed for less than that, e.g. for just a single day. On that basis, the proper cost of tugs to allow in this damages assessment is in my judgment **US$117,000**.

(7) A reasonable allowance for paint was agreed at **US$90,169.23**.

(8) A reasonable allowance for Classification Society charges incurred was agreed at **US$68,107**.

(9) There was a small difference over the reasonable cost to be allowed for travel and accommodation expenses. In the event, however, Mr Sokolenko agreed the figure proposed by *Ever Smart* for that, namely **US$10,093.50**.

(10) The reasonable cost to allow for the repair bill itself was not far from

being agreed. Mr Bailey, for his part, would have allowed US$6,612,923, whereas Mr Lillie assessed the reasonable cost at US$6,967,620. A helpful spreadsheet prepared by Mr Bailey identified and explained in summary the particular points of difference. To the extent they turned on matters of technical engineering or ship repair expertise, Mr Sokolenko did not pursue those points of difference. Where, however, they were by-products of the difference between the experts on the reasonable period to allow for repairs, or otherwise not dependent on specific expertise, Mr Sokolenko took his stand upon Mr Lillie's figures. On that basis, the only differences pursued were where Mr Lillie allowed general services charges and shifting costs during the repair works, as incurred, up to mid-September 2015 (when on Mr Lillie's assessment of the reasonable time required the collision repairs ought to have been completed). Having found in favour of *Alexandra I* on the repair period to allow, in my judgment it is right to allow Mr Lillie's rather than Mr Bailey's figures on those items. (I also note and have no reason not to accept Mr Lillie's factual evidence that Nautical Challenge would not have had any choice, as per DDW's normal practice, over the shifting required by the yard and the associated charges actually billed). If my arithmetic is correct, that means adding to the reasonable repair cost that Mr Bailey calculated (a) US$28,393 in relation to general services, (b) US$18,660 in relation to shifting costs. That gives a reasonable repair cost of **US$6,659,976**.

32. Totalling all of those items, the amount recoverable by *Alexandra I* to represent the reasonable cost of repairing her collision damage (leaving aside any allowance for loss of use) is **US$7,565,737.41**, plus ‘agency’ at 1%, giving a total recoverable amount of **US$7,641,394.78**. As to ‘agency’, I do not accept the

submission of Mr Jacobs QC, for which no authority was cited, that there is some element of double recovery if the customary 1% is added where some of the allowable repair cost represents the cost of external services from technical managers and local agents.

33. I turn to the claim for loss of use. It is important at the outset to note that *Alexandra I* did not set out to establish precisely what fixtures, for whom, earning what freight, she would probably have undertaken during whatever was held to be the relevant period. In the terminology of the older authorities, she did not seek special damages based upon some particular lost business, but general damages on the principle that her owner had been deprived of her use as a profit-earning chattel: see the *Mediana* [1900] AC 118 and the discussion in *Marsden and Gault on Collisions at Sea*, 14th Ed., at 17-056 to 17-063.

34. Also, as Mr Sokolenko put it in a memorable plea, it is important not to forget that *Alexandra I* was not a young lady. She was a 1997 build with her 5-year Special Survey cycle due to expire in April 2017. Whilst there is no absolute rule against large tankers 20 years old and older finding work, I accept the evidence of Mr Pearce, the chartering market expert called by *Ever Smart*, that there would not have been any significant market on which *Alexandra I* could have found employment after her 20th birthday. In February 2015, as I find, therefore, but for the collision *Alexandra I* was entering her penultimate year of useful employment. All things being equal, she could have expected to find employment for two years through Q1 2017, at which point in all probability she would have been scrapped.

35. Furthermore, and all going to narrow, but therefore render reasonably certain, her normal employment prospects, on Mr Pearce's evidence -- which again I accept --

there were only two trade routes on which *Alexandra I* could realistically have been employed: Arabian Gulf to India (West Coast or East Coast) if she had and could maintain a satisfactory up-to-date SIRE inspection report; Mediterranean or Black Sea to the Far East if not.

36. In either case, of course, there might occasionally be some other specific opportunity, perhaps quite favourable, e.g. an intra-Gulf voyage, but it is essentially speculative to know whether such business would have arisen at all or been capable of being secured for *Alexandra I* if it did arise.

37. Meanwhile, the evidence of what business *Alexandra I* had actually undertaken, in the year since she was acquired by Nautical Challenge prior to the casualty, was incomplete and unsatisfactory.

38. As regards SIRE inspections, she had been inspected by Koch in March 2014 and by ENOC in September 2014. Both inspection reports were similar, in the sense that they picked up deficiencies that would need to be addressed for her to be treated as having a satisfactory SIRE inspection status. There was evidence demonstrating that those deficiencies had been addressed to Koch's satisfaction in relation to their report, meaning that *Alexandra I* had a clean SIRE inspection status from March to September 2014. The evidence of her having addressed deficiencies to ENOC's satisfaction after the September inspection was missing, but, in February 2015, she was plainly acceptable to and accepted by ENOC, as her casualty voyage was then for ENOC's ultimate account. Notwithstanding Mr Jacobs QC's criticisms of the disclosure, in my judgment the probability is, and I find, that *Alexandra I* had a clean SIRE inspection status from September 2014 also.

39. Nautical Challenge planned to change technical managers after the casualty voyage and, by then, in any event, the last SIRE inspection would have been five months old. So, there would have been a need to undergo a fresh SIRE inspection, but there is in my judgment no basis for thinking that she would not have come through that satisfactorily, and I find on the balance of probabilities that she could and would have done so. I wonder whether in fact *Alexandra I* would have been able to achieve a continuously satisfactory SIRE status through her change of technical management, but Mr Pearce's evidence as to the effect of the change of management was that it would be regarded as invalidating her extant SIRE status. Taking that language at face value -- and it was not challenged by Mr Sokolenko -- I cannot find that *Alexandra I* would have been available for the better paid, or possibly better paid, AG-India business without first completing a 'non-SIRE' fixture and being inspected under the SIRE scheme when discharging.
40. Subject to an overarching argument advanced by Mr Jacobs QC, in those circumstances I would assess the value of the loss of the use of *Alexandra I* over 218 days, from 14 February to 19 September 2015 inclusive, by reference to Mr Pearce's assessments of the earnings available for an initial 'non-SIRE' voyage to the Far East, followed by trading on the Arabian Gulf-India market.
41. Mr Jacobs' overarching argument was that because the disclosure of the actual trading history for the preceding year was incomplete and unsatisfactory, I should disallow the claim entirely. There were two strands to the argument. One was that the court should say simply that no loss of use claim had been proved, but that misunderstands the nature of the claim made, which is for general damages

for loss of use, not for the loss of some particular fixture or fixtures. The other strand was that the probable explanation for the issues with the disclosure was that for significant portions of the year *Alexandra I* had been running Iranian cargoes in breach, or arguably in breach, of then extant sanctions relating to trading with Iran. Yet, at the same time, the disclosure was sufficient, when taken together with Nautical Challenge's annual accounts, to see that *Alexandra I* had been very profitable for the year, and that indeed was Nautical Challenge's factual witness evidence.

42. It seems to me those two are linked. That is to say, Mr Jacobs QC is right to contend, and I find, that the reason the disclosure as to the vessel's trading during the year leading up to the casualty is not what one would normally expect is because there was substantial Iranian trading involved. I am not in a position to find whether, and do not find that, this was known to Nautical Challenge or only to its commercial managers, Transland. It does not follow though that Nautical Challenge is not entitled to substantial general damages for loss of use measured by reference to the earnings that would have been available to *Alexandra I* on normal, lawful markets. This is not a case of a finding that although net earnings of US$X would have been available to a vessel of the relevant type, the particular vessel would not have earned as much, or anything at all, because of some peculiarity about her or her owners, or her owners' trading intentions. It is a case where net earnings of US$X would have been available through trading on normal markets, the options for which are restricted, but therefore clear and narrowly defined, and if those earnings would not have been achieved, it is because in fact the owner would have made exceptional profits greater than those

earnings, the loss of which is not visited upon the tortfeasor. I therefore do not accept the overarching argument for disallowing any damages for loss of use.

43. Before turning to the resulting claim amount to be allowed, three particular points need to be addressed.

44. Firstly, on Mr Pearce's evidence, including a convincing analysis derived from comparing reported TCE earnings on AG-India voyages as between West Coast India and East Coast India, I am satisfied that it is right in any assessment of available net earnings to make an allowance for security guards to deal with the threat of piracy in the Gulf of Aden that would be for owners' account; in Mr Pearce's calculations and assessments he makes that allowance.

45. Secondly, again based on Mr Pearce's evidence, in my judgment the correct assumption to make as to idle time, so as to derive overall lost profits from market TCE rates for employment, assessed on a round voyage basis, is 50%. In that regard, Mr Jacobs QC sought to rely upon an analysis that during the vessel's Iranian trading her idle time was higher, but so were her earnings and, again in my judgment, those two will have been related.

46. Thirdly, to derive an effective daily loss of profit, from daily net lost earnings derived in turn (adjusting for idle time) from market TCE rates, account must be taken of the fact that, as explained by Mr Pearce, the use of TCE rates to measure the loss of earnings would effectively assume that the vessel's standing costs, for example crew wages, were the same under repair as they would have been whilst trading. Mr Pearce therefore adjusted his TCE rates (adjusted for idle time) to a more relevant daily operating profit (or loss) for the claim assessment by deducting operating expenses saved of US$10,550. That figure was agreed as

representative of the full daily operating expenses of the vessel whilst trading. Mr Lawrie, the expert whose reports were served by Clyde & Co for *Alexandra I*, gave evidence with which Mr Pearce agreed that there would not have been a full saving on operating expenses. Mr Pearce offered no evidence of his own as to the likely level of residual operating expenses at the yard. Mr Lawrie's view was that they would have been 20% or so of normal operating expenses. True it is that Nautical Challenge ought to have been in a position to provide chapter and verse through disclosure, but the exercise here is an assessment of recoverable general damages for loss of use and a pretence of precision should be avoided. It seems to me that Mr Lawrie's 20% is a reasonable assessment and likely to be conservative, if anything, as to the residual cost incurred. Thus, I shall deduct 80% of the agreed full operating expenses, that is to say US$8,440 from the daily figures derived by Mr Pearce initially from TCE earnings rates, rather than the full US$10,550 used by Mr Pearce.

47. Applying all these conclusions, with the assistance of Mr Pearce's extremely helpful assessments, I judge the proper amount to allow by way of compensation for loss of use to be as follows:

(1) 100 days at US$8,585, on the basis that Mr Pearce's calculations indicate a typical 100-day round voyage duration for the ‘non-SIRE’ business he analysed and his TCE earnings rate for what he called ‘Period 2’, the 218 day period I have concluded is relevant for such business, was US$17,025; that is a loss of **US$858,500**.

(2) 118 days at US$6,713.50, on the basis that Mr Pearce gives a daily TCE earnings rate for ‘Period 2’ on SIRE business, adjusted for idle time at 50%, of

US$15,153.50; that is a loss of **US$792,193**.

(3) The sum of those gives a total recoverable claim for loss of use, prior to 'agency', of **US$1,650,693**.

(4) In customary fashion, agency of 1% falls to be added to that loss, so the final recoverable total becomes **US$1,667,199.93**.

48. The recoverable basic loss, as I have called it, resulting from the collision and suffered by *Alexandra I* is therefore, I find, **US$9,308,594.71**.

Extended Loss

49. I fear I shall do a disservice to the earnestness with which Mr Sokolenko pursued the suggestion that every financially adverse circumstance affecting *Alexandra I* after the collision was caused by the collision and should be for *Ever Smart's* account, subject to apportionment. Likewise, to the range and detail of Mr Jacobs QC's and Mr Henton's contrary submissions. For it seems to me that there is a simple, but clear and sufficient, answer to all of the elements of claim beyond the basic loss as I have labelled it, and which I have now assessed at a little over US$9 million.

50. Before stating that answer, it is right that I should record one of Mr Jacobs QC's particular arguments since it raises a point of principle. He submitted that for the consequences of Nautical Challenge's impecuniosity to be visited upon *Ever Smart* under *Lagden v O'Connor*, the relevant impecuniosity had to be foreseeable. Here, the relevant impecuniosity is an inability to pay for the collision repairs in cash. It is nothing to the point that, up to and immediately prior to the collision itself, Nautical Challenge would not have regarded itself as impecunious, but, to the contrary, profitable and with net assets of perhaps

US$4-6 million. What it could not do, it says, is fund collision repairs costing of the order of US$7.5 million absent a prompt payout by hull and machinery underwriters, and there was no such pay out. Indeed, as matters stand, underwriters have never paid out and have not been pursued to do so because Nautical Challenge, as it says -- I make no finding, could not afford to pursue both the collision proceedings and a separate claim against the underwriters.

51. In his submission, Mr Jacobs QC invited me to disapprove the following view expressed in *McGregor on Damages*, 20th Ed, at 8-113:

"*It is to be noted that Lord Hope [in Lagden v O'Connor at [61]] links his test of reasonable foreseeability to the familiar rule that a wrongdoer must take his victim as he finds him. This is important because it avoids the argument which might well be advanced that in the circumstances of a particular case the claimant's impecuniosity could not have been reasonably foreseen. We have noted when dealing with physical abnormalities that what must be reasonably foreseeable is the type or kind, and not the degree, of damage or loss ... . After Lagden v O'Connor what has formerly applied to the claimant with the egg-shell skull is to apply equally to the claimant with the egg-shell bank balance.*" (my emphasis, being the sentence criticised by Mr Jacobs).

52. It will not be necessary to express a final view on Mr Jacobs' submission. Provisionally, however, I think it reads too much into the sentence in question and the criticism only follows as a result.

53. I do not read McGregor as suggesting that there is no need for a finding that relevant impecuniosity must be foreseeable, only that so long as relevant impecuniosity is foreseeable there is no call for an enquiry into precisely how or

why the particular claimant came to be materially impecunious. Thus, as Mr Sokolenko observed, the House of Lords did not sanction or suggest a need for any enquiry into how and why Mr Lagden came to be impecunious for the purpose of rendering recoverable the charges he agreed with a credit hire company for a replacement car since he could not afford to hire a replacement car at normal hire rates available to someone who had immediate means to pay. He had to prove that he was indeed impecunious in that way, and that he therefore had no choice but to agree those hire charges, else his claim would fail as a matter of causation anyway. That might or could involve some exploration of his individual circumstances, but that fact-finding had been done in the lower courts and is not what the House of Lords was addressing.

54. I am prepared to assume, in favour of *Ever Smart*, that it must be shown to be reasonably foreseeable that the owner of a commercially trading Suezmax tanker might be unable to fund collision repairs absent a prompt payout or acceptance of liability to pay by hull underwriters. But then, provisionally, I would be minded to find in favour of *Alexandra I* (a) that that is indeed reasonably foreseeable, and (b) that it is also reasonably foreseeable that an owner may or may not be able to achieve a prompt payout or acceptance of liability from his hull underwriters. That latter in particular was very contentious between the parties, and if the extended loss claims would otherwise have succeeded, I would have wanted to take more time to consider judgment on this assessment.

55. As it is, however, the extended loss claims do not succeed anyway, in my judgment. That is for the simple reason that I am not persuaded that causation has been made out on the facts. For that purpose, it is not necessary to examine

whether *Alexandra I's* hull underwriters were correct to take the view, as they promptly did, that they had no liability or could not lawfully discharge any liability they might otherwise have if the collision voyage had been from Iran with a cargo of Iranian origin (as in fact I find it was). In particular, therefore, I have not read, let alone taken into account, certain further submissions received from *Ever Smart* without seeking permission or even giving prior notice of any intention to make further submissions after the case closed last week, in relation to the legal analysis of the position under the hull policy.

56. The sufficient point for present purposes is that it was perfectly obvious to Nautical Challenge that it would be receiving neither a prompt payout, nor even a prompt acceptance of liability to indemnify from hull underwriters. On its own case, as to its financial position in those circumstances, Nautical Challenge's only realistic option for repairing *Alexandra I* was to conclude the sort of agreement it did eventually conclude with DDW, for credit to be extended by the yard secured against the ship. That that was the position is to my mind supported by the factual evidence, contrary to a submission by Mr Jacobs QC that I should find that Nautical Challenge was or should have been readily able to raise funds by other means, or at all events that its inability so to do had not been established. But then Nautical Challenge ought reasonably to have acted promptly so to agree with DDW and, in my judgment, there is simply no reason why its need for credit from the yard should have delayed the vessel at the yard beyond the reasonable time required to complete repairs, let alone for 10 months beyond that time.

57. There is no basis upon which I could find that if repairs had been completed in orderly time, as they should have been, including the concluding of necessary

credit terms with DDW, any of the extended consequences would have resulted that are sought to be laid at *Ever Smart's* door. In particular, as to that, the unreasonably extended stay at DDW meant that *Alexandra I* emerged from repairs, the best part of a year older than she should have (in circumstances where realistically she had been within her final two years of trading life when the collision occurred anyway) and after there had been a significant collapse in the chartering market. The scale of that collapse can be seen from Mr Pearce's assessments -- and he confirmed in his oral evidence that this pattern was indeed explained by a collapse in the market -- that whereas TCE earnings on SIRE business for a tanker such as *Alexandra I* were available that with 50% idle time would have generated an operating profit averaged over the 218 days I have held to be the reasonable repair period of c.US$4,600 per day (albeit on a steadily falling trend over that period), by the time she had actually emerged from the yard in late July 2016, the sort of daily operating profit then available from that same market was (US$6,045) i.e. a substantial operating loss.

58. I do not find it particularly surprising that a severely cash-strapped owner, as Nautical Challenge claims to have been, found it impossible, in the event, to trade its way out of its financial difficulties on that collapsed market; that being in essence what Nautical Challenge says ultimately occurred. But then, even assuming in Nautical Challenge's favour the prior steps in the claim logic, in my judgment the collision in combination with Nautical Challenge's impecuniosity did not cause the extended consequences for which claims are made. That impecuniosity did not cause *Alexandra I* to spend an extended time at DDW or therefore to become exposed at what was then the critical time to a collapsed

market. The consequences of Nautical Challenge's failure to ensure that *Alexandra I* was repaired within a reasonable time, in my judgment an unreasonable failure, and of the collapsed market into which she then emerged some 10 months after she should have been ready again to trade, were not caused by the collision and are not *Ever Smart's* responsibility within her liability for negligence in respect of that collision.

59. It is unnecessary in the circumstances, therefore, to deal with the separate point, perhaps strictly even a logically prior point, whether because of Teare J's unless order the extended claims for loss were open to be pursued in any event. I shall therefore not lengthen this judgment significantly by dealing with that in detail. Suffice it to say that there was no answer apparent to me to the compelling submissions developed in detail by Mr Henton on behalf of *Ever Smart* for the conclusion that the unless order had indeed not been complied with. No application for relief from sanctions was made and, in my judgment, that cannot be explained simply by the fact that at the hearing itself *Alexandra I* was no longer legally represented. Her cause was being advanced until the beginning of the hearing, when Clyde & Co finally came off the record, by very experienced solicitors, who made a tentative suggestion in correspondence on 27 December 2018 that some limited relief from sanctions might be considered but made no application, and for detailed reasons that were set out in a helpful written closing note from Mr Jacobs QC and Mr Henton, and dealt with in closing by Mr Henton, I am quite clear that an application for relief from sanctions could not have succeeded.

60. Strictly and finally before concluding, everything I have thus far said as to what

I have called the extended loss answers all but one of the extended loss claims. The exception is the item I numbered (iv) at the outset, the claim that a fully repaired *Alexandra I*, having suffered a significant collision, was permanently diminished in value as against the value she would have had if she had never been hit. The short answer to that claim, which it was recognised was different in kind and therefore, for example, was not made subject to the unless order, is that it failed on the facts. There was no evidence before the court to justify the suggestion of a permanent stigma in the second hand and/or scrap sale and purchase market. The expert evidence called by *Ever Smart* from the very experienced Mr English was, in terms, that there was no such stigma and, indeed, he had never come across the suggestion that there might be.

Conclusion

61. For all the reasons I have endeavoured to state: the recoverable loss suffered by *Ever Smart* resulting from the collision, inclusive of 'agency' at 1%, is **US$2,531,373.71**; the recoverable loss suffered by *Alexandra I* resulting from the collision, inclusive of 'agency' at 1%, is **US$9,308,594.71**.

62. I shall ask the parties for assistance as to the form of order to be drawn up, given that there are two separate claims, one in each direction, rather than a single claim in which a counterclaim was made, and given that as things stand (i.e. subject in due course to any different result in the Supreme Court if their Lordships were to grant *Ever Smart* permission to appeal) those losses fall to be apportioned 80:20 in favour of *Alexandra I*.