Neutral Citation Number: [2022] EWHC 1198 (Comm)

Case No: CL-2020-000221

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

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 17/05/2022

Before : **MR JUSTICE ANDREW BAKER**

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Between :

(1) PMAX QUEEN SHIPPING LIMITED **(2) EARTH MARITIME SA**	**Claimants**
- and -	
(1) OLAM AGRICOLA LTDA **(2) AXA CORPORATE SOLUTIONS ASSURANCE** **(3) AMLIN INSURANCE SE** **(4) BALOISE BELGIUM SA** **(5) ALLIANZ ESA CARGO & LOGISTICS GMBH** **(6) AXA BELGIUM SA/NV** **(7) GENERALI SCHADEVERZ MIJ. N.V.** **(8) SWISS RE INTERNATIONAL SE** **(9) TSM COMPAGNIE D'ASSURANCES VG** **(10) AXA VERSICHERUNGAG** **(11) HAMILTON MANAGING AGENCY LIMITED** **(on its own behalf and on behalf of the Underwriting Members of Lloyd's Syndicate 4000 for the 2017 underwriting year)**	**Defendants**

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Timothy Hill QC and Michal Hain (instructed by **Watson Farley & Williams**) for the **Claimants**
Robert Thomas QC and Christopher Jay (instructed by **Roose + Partners**) for the **Defendants**

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Hearing date: 16 May 2022

Judgment
(Approved Transcript)

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MR JUSTICE ANDREW BAKER

Epiq Europe Ltd hereby certify that this is an accurate and complete record of the proceedings or part thereof.

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Mr Justice Andrew Baker :

This is an approved transcript of the ruling given on 17 May 2022, at the start of the second day of a four day preliminary issues trial:-

1. This case has been carefully and successfully case-managed to this point by reference to the parties' cases as pleaded as to the correct basis upon which the contributory value of the vessel should be assessed, and by reference then respectively to the various bases asserted, either as primary or alternative cases in that respect, the parties' proposed figures.

2. It would be unfair and far too late to alter now at trial in any way that materially affected the architecture of those pleaded cases the way in which the parties have put their respective positions. That does not mean that it is impossible to consider amendments because of course not every amendment will alter the structure of the pleaded case.

3. Against that background, as to my approach, I am going to take matters in a sense in reverse order, by starting with the minor areas of dispute raised by the proposal to amend the Reply.

4. It seems to me that the proposed addition to paragraph 34(a)(iv) creates no unfairness, difficulty, or prejudice to the defendants, in needing to deal with the aspect of fact raised by the proposed amendment. The question whether that head of cost is or is not properly to be taken into account if adopting the approach to contributory value advanced by the claimant at paragraph 34(a) (or, by cross-reference, under paragraph 34(c)) is a matter for argument.

5. I understood that the only objection to the introduction of a new, cross-referencing, paragraph 34(c)(iii), was that by cross-referencing 34(a)(iii) and (iv) it would bring into the approach pleaded at paragraph 34(c) the new bit of 34(a)(iv) to which objection was taken. Since I am allowing that new bit (paragraph 34(a)(iv)(1)), I therefore allow also the proposed new paragraph 34(c)(iii).

6. However, as regards the proposed addition at paragraph 34(c)(v), the suggestion that there needs to be taken into account under the pleaded approach of paragraph 34(c) – which is the point in the pleading at which the claimant sets out its case as to the appropriate figures to use, if the defendants' approach as to principle is adopted – in my view it is not arguable that on that approach one ought to consider bringing into account the cost of ballasting the repaired vessel back from China to Montevideo. Further, in any event, it is far too late to introduce to the case an investigation into what those costs would have been, the claimants' case to the effect that the exercise can be done relatively straightforwardly notwithstanding. I am not prepared to take that as necessarily the case and to introduce to the case a potentially contentious, hypothetical, factual complication which, to my mind, does not give rise to an arguably valid element of the calculation.

7. That will mean that in the final version of the Amended Reply that should, if at all possible, now please be formalised and served between now and tomorrow morning, the various amendments that were not contentious will obviously be included. The two amendments for which I am granting permission will be included, but paragraph

35(c)(v) will not be included. In Annexures C4 and C5, the references there to the suggested cost of a return voyage, China to Montevideo, of US$1.125 million-odd, will need to be removed and totals adjusted accordingly.

8. Subject to the checking that will be done as part of finalising that, I think I am right in saying that that change does not affect the claimants' ability to say, if everything else they say at that point in the pleading is correct, that those Annexures still bring in an overall figure that is below zero. Therefore, the conclusion pleaded at paragraph 34(c)(vi) – "In the premises the vessel had a negative notional contributory value" – I think will still apply and will not need to be changed.

9. I turn to what was the bigger aspect of the matter argued yesterday. In my view the pleadings are and always have been very clear, that is to say that:

   i) the claimant pleaded, by adopting the Average Adjustment, that the correct approach was to fix the vessel's contributory value by reference to the US$1.5 million price paid under the MoA that was in fact entered into as part of the complex, not fully arm's length, arrangements made within the Cyprus Sea Lines Group as part of dealing with the aftermath of the grounding;

   ii) the challenge in the Defence was to deny that that is the appropriate approach – indeed to assert that the MoA price is not relevant – and to assert instead that as a matter of law the approach I shall be saying should be adopted is to deduct from the vessel's sound market value as at the date of the discharge of the cargo at Montevideo the costs of the repairs actually undertaken, subject to an assessment of whether they were reasonable;

   iii) it is plain from the case management discussions and the directions granted for these preliminary issues this week that that was the court's understanding and the parties' understanding of what was involved by the defendants' case as to principle, and that therefore the factual exercise to be engaged in at this hearing by reference to the defendants' pleaded approach was one of assessing what the court would say it should take as the reasonable cost involved in the repairs actually effected;

   iv) the response, by way of reply – strictly by way of amendment of the claimants' approach, but I am not troubled in a general average case by the fact that this came in through the Reply because the claimants chose in the first instance to rely on the Adjustment and see what points of challenge were raised – was to plead four cases in a waterfall of alternatives. The primary and second alternative cases, as pleaded, paragraphs 34(a) and 34(c), are the same in concept, that is to say they plead a case that the contributory value of the vessel is to be taken as her sound value, less the reasonable costs of the repairs actually effected. The difference between the two is that the primary case, paragraph 34(a), asserted that the sound vessel value to be taken was that of the post-repair sound vessel in February 2019 as distinct from that of the hypothetically undamaged vessel in February 2018 when the cargo was discharged, that being the starting point which would match that of the defendants' approach and the starting point therefore of the second alternative case under paragraph 34(c);

v) the third alternative case under paragraph 34(d), not now in the event pursued at trial this week, was to fall back ultimately, if necessary, upon the approach adopted by the adjusters in the adjustment, the MoA price of US$1.5 million;

vi) in between the primary and second alternative case, as they were pleaded in the Reply, at paragraph 34(b) there is a case to the effect that the proper approach in this case is to take the value of the vessel as at February 2019 but assessed as a vessel to be scrapped. As it happens, in the event, that now gives rise to no factual issue before me as to value because of the extent to which expert evidence has proved non-contentious, and because the claimants have made clear, since pleading the various alternative approaches in the Reply, that although all of them, other than the MoA price approach, would result in a figure below, indeed they say well below, that US$1.5 million, the claimants do not seek to amend their ultimate claim so as to claim a greater contribution in general average than a contribution based upon a contributory value of US$1.5 million.

10. Against the background of that analysis of the pleadings, my judgment is clear as to what is and is not open to the claimant, although the effect of that judgment is, it may be said, a touch nuanced. I express it as follows:

i) It is not open to the claimants on their pleaded case to argue – and I will not entertain argument to the effect – that the proper approach in this case is to fix a price that a reasonable seller and reasonable buyer would have agreed for the sale of the vessel as she was in Montevideo in damaged condition on completion of the discharge of the cargo, with the range of different hypothetical factual enquiries and assessments, including expert assessments, that might have been required to investigate properly any such positive case.

ii) However, as the argument demonstrated yesterday, the claimants at no stage specified in their pleading, nor were they asked to particularise or otherwise explain as part of their pleading, the basis upon which they asserted that scrap value, now agreed to be certainly no more than and almost certainly less than the US$1.5 million by reference to which they ultimately make their claims, is the appropriate value to take.

iii) In those circumstances, in principle it is open to the claimants to argue, as best Mr Hill QC for closing conceives he is able to argue it on the material that is available at this trial, that it is sufficiently clear that no reasonable buyer would have entertained anything other than a scrap purchase, that the court should adopt a scrap valuation.

iv) In the context of any such argument, it remains open to Mr Thomas QC, to the fullest extent he conceives he is able to do so, to invite the court to consider whether the nature of the materials that the parties, pursuant to the case management directions, have thrown at this preliminary issues trial, enables the court to reach any satisfactory, positive conclusion of that sort, such as to inform a finding in the claimants' favour that scrap value is the correct approach to take. That is, of course, over and above what will be, as I understand it, Mr Thomas's primary case in any event, that none of this comes into play because what he has pleaded as the correct approach, which is

the claimants' second alternative as pleaded in the reply, paragraph 34(c), is, as a matter of law, the approach that must be adopted, because the vessel was in fact repaired so as to become again in sound trading condition.

11. If Mr Thomas QC is wrong on that, which is his primary legal argument, then, as I say, in responding to the argument from Mr Hill QC as to why scrap value should be taken at paragraph 34(b), it will be open to Mr Thomas to place such reliance as he perceives is appropriate upon the nature of the material available to the court, and matters that are not available for the court or have not been explored as part of testing the argument, for a consideration of whether that material enables the court to reach a given conclusion which Mr Hill may invite it to reach. None of this is to suppose that the argument Mr Hill may present in that regard is necessarily dependent wholly upon any one particular aspect of the evidence. But, as I say, it seems to me he must be entitled to pursue, by way of argument upon the materials available such as they are, why it is his clients say that the scrap value now agreed between the experts to be certainly not more than the US$1.5 million on which the claimants have based their case, is the correct value to take.

12. To whatever extent that means – and it may indeed mean this – that elements of what Mr Hill QC has presented in his skeleton argument for opening, under a heading of what, as pleaded, was his second alternative case, paragraph 34(c) of the Reply, will need in closing, in effect, to be repackaged as points he relies on, not for putting a figure on that alternative case as his alternative case but as reasons why the court should say what is now his primary case (scrap value) should be adopted, so be it. Counsel certainly are, and I hope their court is, mentally agile enough to be able to cope with that adjustment to the packaging of the various points that arise under different headings within the case.