Neutral Citation Number: [2023] EWHC 444 (Comm)

Claim No. CL-2022-000301

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Monday, 27th February 2023

Before:

MR STEPHEN HOUSEMAN KC
(sitting as a Judge of the High Court)

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Between:

(1) HAVILA KYSTRUTEN AS
(2) HAVILA KYSTRUTEN OPERATIONS AS
(3) HK SHIP III AS
(4) HK SHIP IV AS **Claimants**

- and -

(1) STLC EUROPE TWENTY THREE LEASING LIMITED
(2) STLC EUROPE THIRTY FOUR LEASING LIMITED **Respondents**

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MR. ALEXANDER WRIGHT KC and MR. EDWARD JONES (instructed by Wikborg Rein LLP) appeared for the Claimants.

MR. CHRIS SMITH KC and MR. ANDREW LEUNG (instructed by Tatham & Co) appeared for the Respondents.

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Approved Judgment

I direct that 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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MR STEPHEN HOUSEMAN KC

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MR STEPHEN HOUSEMAN KC :

Introduction

1. This is my judgment following a hearing in the Rolls Building last Thursday, which concerned three related actions with the following claim numbers: CL-2022-000301 (concerning 'Polaris' and 'Pollux' - known as the "Hulls Action"); CL-2022-000323 (concerning 'Capella'); and CL-2023-000056 (concerning 'Castor'). Various issues specific to orders for summary judgment granted in the latter two actions were dealt with at the hearing itself and do not require repetition or recap. Those orders are already made and sealed.

2. The issues restored before me in the Hulls Action concern the calculation of Termination Sums. These sums are payable by the relevant claimants (Lessees) to the respective defendants (Lessors) pursuant to clauses 28 and 29 of the bareboat charter for each vessel, as addressed in my prior judgment dated 8 December 2022 (see [2002] EWHC 3166 (Comm)) and Order made on 16 December 2022 ("16 December Order").

3. The matter came back before me originally on paper, pursuant to a specific liberty to apply contained in the 16 December Order, for the determination of the amount of the "Global Termination Sum" as defined therein. Although, strictly speaking, only the parties to the Hulls Action i.e. those privy to the charters for 'Polaris' and 'Pollux' are involved, the other sets of parties are bound by agreement so far as applicable. Not all issues are applicable across the four vessels, given that some remain in the yard in Turkey and have yet to be delivered.

4. I am asked to resolve two sets of issues concerning disputed elements of the Termination Sum for each vessel.

Relevant Background

5. Given the procedural origins of this further application, and the relative urgency of achieving optimum legal certainty for the parties against the backdrop of international sanctions regimes, I do not set out factual background. I refer to my prior judgment and also the detailed reserved judgment of Foxton J dated 27 January 2023 (neutral citation [2023] EWHC 131 (Comm)) dealing with certain issues between related parties as regards two other vessels.

6. The composition of Termination Sum is governed by clause 28.2 of each charter. It includes "*any relevant Break Costs*" where termination of the charter is due to the occurrence of a Termination Event either pre-delivery (see clause 28.2(b)(iv)) or at/post-delivery (see clause 28.2(c)(iii)).

7. I set out the definition of "*Break Costs*" below. In simple terms, this provides compensation to the Lessor for lost interest where it receives a contractual payment before the end of a current Interest Period. "*Interest Period*" is defined in clause 6.7(b) as a three-month period. I note as an aside that the interest periods differ for each vessel based on when the relevant contractual arrangements were put in place or activated. Nothing turns on this at present.

8. By clause 28.2, "*Termination Sum*" also includes the following:

> "*any fee or other amount due and payable but unpaid by any Relevant Party to the Lessor under any of the Operative Documents*" (clause 28.2(b)(vi) and clause 28.2(c)(vii))*;*
>
> and
>
> "*any out of pocket costs (including legal costs) incurred by the Lessor in connection with the termination"* (clause 28.2(b)(vii) and clause 28.2(c)(viii))

9. It is common ground that the former element includes any amount due under clause 7 of the charters. Clause 7, as material, provides as follows:

> "*COSTS AND EXPENSES*
>
> *The Lessee shall pay to the Lessor on demand … all Losses incurred by the Lessor in connection with:*
>
> *(c) the early termination of the leasing of the Vessel and the sale of the Vessel to the Lessee pursuant to Clause 27 (Voluntary Termination, Purchase Option and Purchase Obligation) or following the occurrence of an Early Termination Event or a Termination Event;*
>
> *(d) investigating the alleged occurrence of an Early Termination Event, a Potential Termination Event or a Termination Event;*
>
> *(e) the enforcement or preservation of any right conferred upon the Lessor by any of the Operative Documents, or in respect of the repossession of the Vessel in accordance with the Operative Documents (or any of them);*
>
> *(f) a breach by the Lessor of its obligations under any of the Finance Documents provided that such breach is caused (whether directly or indirectly) by a breach of any of the Operative Documents by a Relevant Party…*"

10. "*Losses*" are defined broadly as:

> "*each and every documented liability, loss, charge, claim, demand, action, proceeding, damage, judgment, order or other sanction, enforcement, penalty, fine, fee, commission, interest, lien, salvage, general average, cost and expense of whatsoever nature (each a "Liability") suffered or incurred by or imposed on any relevant person…*"

11. I pause to note that the same nexus language "*in connection with*" is used in clause 7 as appears in the out-of-pocket costs component of Termination Sum, i.e. clause 28.2(b)(vii) and 28.2(c)(viii) as quoted above.

12. The definition of "*Break Costs*" reads as follows:

> "*...the amount (if any) by which:*
>
> *(a) the interest (excluding the Pre-delivery Margin (as defined in the Memorandum of Agreement)) and the Margin or interest rate floor which the Lessor should have received for the period from the date of receipt of all or any part of the Prepaid Purchase Price or (as applicable) the Outstanding Charter Hire Principal to the last day of the current Interest Period in respect of Prepaid Purchase Price or (as applicable) the Outstanding Charter Hire Principal, had the Prepaid Purchase Price or (as applicable) the Outstanding Charter Hire Principal received been paid on the last day of that Interest Period; exceeds:*
>
> *(b) the amount which the Lessor would be able to obtain by placing an amount equal to the Prepaid Purchase Price or (as applicable) the Outstanding Charter Hire Principal received by it on deposit with a leading bank for a period starting on the Business Day following receipt or recovery and ending on the last day of the current Interest Period.*"

"*Margin*" is defined as 4.7% per annum.

"*Pre-delivery Margin*" is defined in the relevant memorandum of agreement as 4.7% per annum.

13. It is common ground that Margin and Pre-delivery Margin are mutually exclusive in terms of their applicability. Margin is not due or payable pre-delivery. As such, no Margin is contractually due in respect of 'Polaris' or 'Pollux' if the relevant Termination Event occurs or the Termination Sum is paid prior to delivery of each vessel.

14. The first set of issues concerns Break Costs. The definition of Break Costs involves two limbs, (a) and (b). Break Costs are defined as the amount by which (a) exceeds (b) for the relevant part of the applicable Interest Period. The specific issues here are as follows:

(1) Does limb (a) of the definition require Margin to be included where a vessel has not been delivered at the time of termination or payment? The Lessees say No. The Lessors say Yes. I refer to this as the "Margin Issue".

Irrespective of the answer to that question:

(2) Does limb (b) of the definition involve an objective/hypothetical deposit rate, as contended for by the Lessees, or a subjective/actual deposit rate, as contended for by the Lessors, for the equivalent sum of money during the relevant or remaining part of the Interest Period? I refer to this as the "Deposit Rate Issue".

(3) Depending on the answer to issue 2 above, what is the applicable deposit rate for calculating the Break Costs for the Termination Sum in respect of 'Polaris' and 'Pollux'?

15. Unlike 1 and 2, sub-issue 3 is circumstantial or factual. There is nevertheless some common ground between the parties as to the source and range of deposit rates

available in the event that I answer sub-issue 2 in favour of or closer to the position advanced by the Lessees. Conversely, there appears to be no real controversy as to the available deposit rate if I were to answer it in favour of the Lessors, since they control the inquiries and information as the deposit rate *actually* made available to them in current circumstances.

16. A second set of issues concerns the recoverability of legal costs incurred by the Lessors since the imposition of international sanctions last year. These are claimed either as Losses, pursuant to clause 7 of the charters, or simply as "*out of pocket costs*" under the specific sub-paragraphs of clause 28.2 already identified. The nexus language is the same either way, as observed. I refer to these issues together as the "Legal Costs Issues".

17. The context for the Legal Costs Issues, or at any rate the dominant feature of the analysis as to their recoverability, is the costs provision contained in my 16 December Order. At the post-judgment consequentials hearing on 16 December last year, I resolved all issues as to costs relating to the applications that were determined at or which led to the two-day hearing before me the previous week, namely the summary judgment and reverse summary judgment cross-applications (together, the "Cross-Applications"), the claimants' application to extend an interim injunction (the "Injunction Application") and also their prior resolved application for expedition, defined as the "Expedition Application".

18. The defendants' primary position at that hearing was that there should be no order as to costs. Alternatively, they submitted that any costs payable to the claimants should be subject to detailed assessment and any payment on account should be materially reduced to reflect alleged excessive costs incurred by the claimants.

19. I rejected the defendants' primary argument as to allocation of costs. I was satisfied that the claimants were substantial winners before me and were entitled in principle to their costs; but I discounted the proportion of costs payable, i.e. distinct from future detailed assessment, to reflect the fact that the claimants had lost on a significant gateway issue, namely the existence of Termination Events.

20. My order as to costs was therefore that the defendants should pay 80% of the claimants' costs relating to the Cross-Applications and the Expedition Application and 90% of the claimants' costs relating to the Injunction Application. I ordered a payment on account of £230,000 and made provision for deduction from or set-off against the Termination Sums due from the Lessees under the charters.

21. In giving my costs ruling on that occasion, I commented as follows:

> "*However they [the claimants] contested ... on an adversarial and self-contained point, the existence of Termination Events and they lost. I do not regard and I do not need to regard it as unreasonable on their part to have contested that ... But it is simply the case that that was a self-standing fight, that, in a sense, was a gateway into the security issues and the bank account issues, and the claimants lost on it and key parts of their pleaded case accordingly fall away and effectively stand as struck out ...*"

22. I made no findings about whether any position adopted by the defendants on the majority of the substantive applications where they lost was unreasonable on their part. I am satisfied that they did not act unreasonably as litigants. They simply lost on those important and ultimately decisive issues. Hence the overall costs order in favour of the claimants, albeit discounted in the interests of practical justice.

23. There was no attempt to seek permission to appeal against the 16 December Order. The costs order is, therefore, final.

24. Nor, so far as material, was there any reference made on behalf of the defendants at the time to any claim to recover their legal costs under the charter, i.e. as part of the Termination Sums, despite my determination as to their non-recoverability qua costs within my curial discretion. There was no Part 20 or other form of claim or counterclaim by the defendants.

25. I was not, therefore, asked to rule on any such matters of substance. I did not, as a matter of strict analysis, make any findings about such recoverability under the charters. I simply dealt with costs allocation as part of my discretion governed by CPR Part 44.

26. I should add for the record that Mr. Smith KC was not involved in this matter on behalf of the defendants before me last December.

27. Although framed as a series of sub-issues, it seems that the Legal Costs Issues largely concern a single or at any rate composite question of construction. I say "composite" because legal costs are claimed under two provisions. They are not worded exactly the same, but there is no difference between them for present purposes.

28. That key issue is whether legal costs incurred by an unsuccessful litigant, especially where their recoverability as costs has been dealt with by the court already on a final basis, are or were incurred "*in connection with*" the relevant contractual events, and, even if so, fall within the contemplation of contractually recoverable costs.

29. Various examples of legal costs have been identified as independently recoverable, even if the answer to that gateway question is No. I return to those below in light of my primary conclusion and some further articulation of such sub-categories undertaken at my request since the conclusion of the hearing last Thursday.

Analysis

30. I now deal with the two sets of issues identified above. I preface this analysis with the observation that in both contexts the court is being invited, by agreement of the parties, to determine the substantive issues on a final basis. This is not part of the Cross-Applications, save in so far it has arisen out of the court's decision to assist the parties in resolving the quantum of the Termination Sum payable pursuant to its own primary order.

31. Further, the burden of persuasion - if not proof in the factual sense - effectively falls upon the Lessors, in so far as they seek to add components to the Termination Sum payable to them by the respective Lessee or each vessel, namely (i) including Margin in the comparative ledger for calculating Break Costs and (ii) adding legal costs,

including litigation costs already dealt with by this court, to the amounts due and payable as Termination Sums.

32. The Deposit Rate Issue is less easy to characterise in this way. It involves determining an applicable deposit rate within limb (b) of the definition of Break Costs, as to which there is no meaningful dispute about rates so much as a difference as to *how* such rate is selected.

33. The figures in each case are not insignificant; but their quantum or impact is not relevant to the determination of the issues.

(1) Break Costs

34. To recap in simple terms, Break Costs are defined as the product of limb (a) minus the product of limb (b) for the same time period, i.e. the remaining part of any Interest Period. In other words, Break Costs equals A minus B.

Limb (a) - Margin Issue

35. Despite the skilful submissions of Mr. Smith KC to the contrary, I am comfortably satisfied that limb (a) of the definition of Break Costs does not include Margin which was not otherwise payable under the charter at the time of termination, i.e. where this occurs pre-delivery.

36. Limb (a) avowedly contemplates alternative and mutually exclusive scenarios: where the relevant payment is made pre-delivery, namely pre-Paid Purchase Price, on the one hand; and where it occurs upon or post-delivery, namely Outstanding Charter Hire Principal, on the other hand. The phrase "*or (as applicable)*" appears in between these concepts on all three occurrences within limb (a). The same effect could have been achieved by a simple "*or*" between them and the addition of the words "*(as the case may be)*" afterwards. It is nevertheless clear beyond doubt that it creates or presupposes an either/or basis.

37. However, there is no Margin due pre-delivery. Only Pre-delivery Margin is due in that scenario and it has been expressly excluded from "*interest*" which is the primary component within limb (a) itself. That express exclusion is rendered nugatory in effect if Margin is nevertheless added in all situations, including payments received pre-delivery which do not themselves carry Margin.

38. The words "*which the Lessor should have received*" are normative shorthand for that which is payable by the Lessee to the Lessor under the charter and which would otherwise have been paid later but for early payment, including by earlier redemption. This would or may include "*interest*" - subject to the "*interest rate floor*" in the event of negative applicable or derived interest rates - but would not include Margin where the vessel remains undelivered.

39. The fact that Margin is defined simply and factually as 4.7% per annum does not alter this interpretation. Swapping that wording into limb (a) in place of the word "*Margin*" itself does not help circumvent the key phrase "*which the Lessor should have received*". This does not disturb the fundamental position that Margin is not due pre-delivery.

40. Limb (a) might have been *even* clearer in this regard if the parenthetical phrase "*as applicable*" had also been inserted after "*Margin*", but such contingency did not need spelling out beyond doubt where the contractual scheme itself provides that Margin is only payable at or post-delivery. The use of the same linguistic device elsewhere in the same sentence might be said to be surplus clarification, but so be it.

41. At any rate, the absence of "*as applicable*" or equivalent language after "*Margin*" is not a sufficiently powerful contra-indication to the interpretation of limb (a) set out above. At the end of the day, Margin is not payable pre-delivery so in no sense can it be said that the Lessor "*should have received*" it in the posited scenario. That is the key point.

42. In the pre-delivery payment scenario, i.e. receipt during the Interest Period of "*all or any part of*" the Prepaid Purchase Price, the only positive component supplied by limb (a) of this definition is "*interest*", subject always to the "*interest rate floor*". The express exclusion of Pre-delivery Margin puts the matter beyond serious doubt. Whilst the relevant subparagraph could have been even clearer with hindsight, it is tolerably clear to my mind.

43. The answer to the Margin Issue is, therefore, No.

Limb (b) - Deposit Rate Issue

44. This issue turns largely, if not entirely, on the phrase "*which the Lessor would be able to obtain ... with a leading bank*" in limb (b) of the definition.

45. The Lessees contend that this imposes an objective standard and looks to a hypothetical or objectively reasonable deposit rate that is available to the Lessor at the relevant time for the remaining part of the applicable Interest Period. It refers to "*a leading bank*" rather than the Lessors' own existing bank or banks, for example.

46. Pausing there, and rounding things for simplicity, the period in question is at most three months minus a day (assuming payment is actually received on the first day of the Interest Period) and could be as short as one day (if payment were made on the penultimate day). The average would be the halfway point between these extremes, roughly six weeks.

47. Given the compensatory purpose of the Break Costs regime, it is tempting to see limb (b) as focusing on what the Lessor *actually* obtains by way of deposit rate for the relevant period described above.

48. But accepting that approach, without any objective benchmark or restraint, would allow the Lessor to *choose* to suffer a loss by way of lower deposit rates than it could otherwise obtain at the time in order to fix its counterparty with a liability for that increased shortfall. This need not be unreasonably or maliciously done; there may be tax or other rational motives for making a decision in this way after all. Whatever the motive, it is capable of inflicting injustice upon the counterparty.

49. Sensible businessfolk are unlikely to have intended to allow this to happen. The applicable deposit rate for the purpose of limb (b), therefore, needs some form of objective circumscription to prevent that kind of injustice arising from an asymmetry

of control over events. The wording does not say "*could reasonably*" or equivalent language imposing an explicit objective standard of behaviour or outcome. It just says "*would be able to obtain ... from a leading bank*". This nevertheless suggests some form of objective discipline or circumscription, in my judgment.

50. No decided case was cited to me that helped to resolve this construction issue, even by analogy. I have concluded that the deposit rate which applies under limb (b) of this definition is the highest one which the Lessor could obtain by taking reasonable steps to investigate its options with leading banks for the relevant deposit period. Even though that would imply an average period of six weeks or so, as described, this inquiry is in fact contextual. It all depends on what period is in play for the purpose of calculating Break Costs. It could be as little as one day or as good as three months.

Applicable Deposit Rate?

51. In light of my conclusion on the Deposit Rate Issue above, I am not in a position to make a finding as to what the deposit rate is for the purpose of limb (b) in current circumstances. I do not know the payment date or, therefore, the applicable deposit period.

52. The Lessors have recently obtained a quoted rate of 0.45% from Barclays Bank for overnight deposits. However, they have not provided information or evidence to show that this is the highest deposit rate which they themselves could obtain by taking reasonable steps to investigate all options with leading banks for the range of applicable deposit periods. As noted, I have no reason to assume that an overnight rate is appropriate without knowing the deposit period involved.

53. The parties have effectively agreed that if limb (b) looks to an objective hypothetical deposit rate, then that can be provided by the Euro Area Statistics database for deposit accounts in Europe. The overnight rate was said to be 1.76% as compared with a one year rate of 2.63%. At the conclusion of the hearing I asked if enquiries could be made as to the existence of a comparable deposit rate for three months or a lesser period, i.e. more than the overnight rate. I received no news from this inquiry.

54. Given the state of information and the fact that this sub-issue involves more than resolution of issues of construction or principle, I will say no more at this stage - save to observe that if no three-month or lesser period deposit rate is available through any equivalent market database, then the more appropriate objective benchmark or waterline would be the overnight rate rather than the one year rate. This is closer to the sort of period involved in the comparative inquiry involved in ascertaining Break Costs under the charters.

55. The fact that the Lessors are themselves sanctioned or subsidiaries of sanctioned entities, meaning that they are likely to need deposit rates for longer periods due to freezing of banks accounts, is not material to this inquiry in my judgment. That approach would bring the subjective idiosyncrasies of the Lessor back into play despite the objective or quasi-objective objective approach to the ascertainment of the deposit rate in principle. It would also ignore the purpose of the inquiry which is strictly time limited to less than three months by reference to payments received before the end of an Interest Period.

56. That concludes my analysis of the Break Costs. I hope the parties' legal teams are able to resolve the remaining point in light of my judgment.

(2) Legal Costs Issues

57. To recap, the key issue here is whether legal costs incurred by an unsuccessful litigant, where their recoverability *as costs* has been dealt with by the court already on a final basis, are recoverable under clause 7 or can be added to Termination Sums under clause 28.2.

58. The Lessees say the answer is No. They further say that there are no categories of legal costs other than those which have been the subject of my final costs determination in the 16 December Order, hence no independent sub-categories. I return to that premise and its implications in paragraphs 109 to 111 below.

Costs determined by the 16 December Order

59. As regards the relevant litigation costs themselves, i.e. those costs dealt with in my 16 December Order, the Lessees run three alternative arguments on the point of principle:

(1) First, they say that any such claim is precluded as a matter of law by reason of the final costs order made in respect of such litigation costs. This is framed in terms of the doctrine of merger, alternatively *res judicata*, alternatively issue estoppel; or, come what may, as *Henderson v. Henderson* abuse, because no such claim was intimated or reserved at the hearing on 16 December 2022.

(2) Secondly, assuming there is no preclusive doctrine that bars such claim, they contend that the relevant clauses do not envisage recovery, including via addition to the Termination Sum, of legal costs incurred by the Lessor as an unsuccessful litigant, at any rate where the court has already determined in its curial discretion that such costs are not recoverable or awardable. This is a pure construction analysis.

(3) Thirdly and finally, if such claim exists as a matter of contract and is not barred by any preclusive doctrine, the Lessees invite the court in its discretion under CPR 44.5 to *assess* such legal costs as nil, consistent with its own prior determination as to the fate of such legal costs as recorded or reflected in the 16 December Order.

60. It is fair to say that this hierarchy underwent some shuffling during the course of argument, at least as regards the first two points. It might well be said that the pure construction analysis should come first in sequence: if there is no viable substantive claim in the first place, there is nothing to be barred.

61. It is the resolution of these issues which moved me to reserve my judgment last Thursday. Having done so, I chose also to deal with the Break Costs issues in the same way rather than ruling on them in the hearing.

62. I start by recording my intuitive reaction. A claim is now advanced by the Lessors for recovery via addition to the respective Termination Sum of their legal costs which

have been dealt with in the 16 December Order. I am bound to say that this feels wrong to me on an instinctive level.

63. The idea that a contracting party - here a mortgagee - should be able to recover from its counterparty, including by adding it on to the redemption balance of the mortgage upon early termination, legal costs which it (the mortgagee) incurred as an *unsuccessful* litigant in the dispute about termination and the status of the security itself feels contrary to good sense. This is especially so where the fate of such costs as costs has already been finally determined by the relevant court, as has occurred here.

64. At first blush, it seems unlikely that prudent and prescient businessfolk would have agreed to that pre-allocation of cost arising from a future adversarial process between them contrary to the effect of a final court determination of the appropriate costs allocation in such process. Litigation is, by definition, antagonistic to the consensual foundation and operation of any contract. It is the antithesis of a bargain. It involves the parting of minds, not their meeting. The idea that contracting parties should agree to pre-allocate liability for one side's costs in future litigation between them seems unlikely, especially where sufficient meaning can be given to the relevant provisions without such consequence. That said, such liability has been expressly allocated by these parties for *some* adversarial situations arising in relation to, for example, disputed early termination or its legal consequences.

65. The inherent position is fortified, if anything, by the parties' express prorogation of exclusive jurisdiction in favour the courts of England and Wales: see clause 44 of the charters. By this agreement they contemplated that the fate of any costs incurred in future litigation between themselves would be dealt with by the High Court pursuant to its powers enshrined in section 51 of the Senior Courts Act 1981 and CPR Part 44 as mandatory *lex fori*.

66. By their agreement in such terms and with such foreseeable curial consequences, it might well be said that the parties thereby carved out from the relevant indemnities any costs incurred in future litigation between themselves *irrespective of* who won or lost or what consequent cost order was made by the High Court. In other words, those costs, even though "*legal costs*" with sufficient subject-matter connectivity could be seen as of a different kind to other such "*legal costs*" so long as ascertainable without problems of uncertainty.

67. However, the parties are free in principle to make such provision by clear words, subject to questions of enforceability of such provisions as a matter of public policy in this jurisdiction. The fact that a court would have jurisdiction to determine the allocation of legal costs is not fatal to the existence of an agreement as to their recovery. CPR 44.5 itself creates or acknowledges such fusion.

68. I deal first with the preclusion arguments. I am not satisfied that any otherwise viable claim for relevant litigation cost is precluded by any of the doctrines identified by the Lessees. As explained above, the relevant issue for my determination at the costs hearing last December, and the only one on which this court's jurisdiction was engaged, was the allocation of costs qua costs pursuant to CPR Part 44. I made a final determination of that issue. As part of such final determination, I necessarily disallowed the recovery of any of the defendants' costs in relation to any of the

applications in play. That was a procedural decision by nature. It involved an exercise of circumscribed discretion.

69. I did not decide anything else. I did not determine the distinct substantive question of whether any of those same costs fall or fell within either clause 7 or clause 28.2(b)(vii) or clause 28.2(c)(viii) of the relevant charters for 'Polaris' or 'Pollux' or any other vessel. I was not asked to do so. The Lessors did not raise such point or seek recovery as a matter of contract at that stage. As I have said, they had no Part 20 or other kind of claim or counterclaim.

70. This elemental position negates the applicability of any doctrine of preclusion in the present context, in my judgment. That must include merger: neither element of the juridical alloy is present.

71. I will say a little more about the availability of preclusive doctrines in this sort of situation. It seems to me, though, that this is an issue which might benefit from closer scrutiny, including at appellate level in future.

72. Both sides referred me to a decision of the Court of Appeal in *Chaplair Limited v. Kumari* [2015] EWCA Civ 798. That case involved a dispute between a landlord, Chaplair, and its tenant, Mrs. Kumari. There were parallel proceedings before the Leasehold Valuation Tribunal (LVT for short) and in the County Court. The County Court proceedings were allocated to the small claims track, pursuant to which the court has no power to order payment of any costs, save for the issuing of the claim form, said to be £260 at the time. Chaplair sought recovery of its legal costs in both sets of proceedings, as additional liabilities under the terms of the lease.

73. HHJ Wulwik, sitting in the Romford County Court, awarded the landlord both sets of its legal costs as part of the claim for unpaid rent and service charges under the lease. Mrs. Kumari obtained permission to appeal the award of the landlord's legal costs incurred in the LVT proceedings. This is described as 'Issue 1' in the Court of Appeal. That appeal was heard in conjunction with Mrs. Kumari's further application for permission to appeal the award of the landlord's legal costs of the County Court proceedings, referred to as 'Issue 2'.

74. The appeal was dismissed on 'Issue 1' and permission was refused in respect of 'Issue 2'. Arden LJ (as she then was) gave the leading judgment. Patten LJ gave a short following judgment by way of what he described as a "footnote". Christopher Clarke LJ agreed with both judgments.

75. As regards 'Issue 1', recovery of the LVT costs, the appeal was advanced on the basis of preclusion by *res judicata* or issue estoppel, but not merger. This was rejected emphatically by Arden LJ at [24]-[26] and Patten LJ at [43]. In short, the LVT as a statutory tribunal had a limited jurisdiction only as regards disputes about service charges. By definition, it had no jurisdiction over any claim under the lease. It was, therefore, impossible to say that the tribunal had determined the issue in question, namely whether the landlord could claim its legal costs of such tribunal process as a liability under the lease itself. Preclusion could not arise where there was no jurisdiction in the original decision-maker to deal with the relevant substantive issue.

76. In the present case, the claimants sought to benefit from the obvious point of contrast with the situation addressed in *Chaplair* - that is to say: here, unlike there, the original decision-maker is the same as the current decision-maker and, by definition, did have relevant substantive jurisdiction. It is, in fact, the same judge on both occasions; but that is a coincidence for the purposes of this analysis, even if not a procedural coincidence.

77. All that said, it does not follow from the existence of relevant substantive jurisdiction that such jurisdiction was in fact engaged or exercised in the original decision as to costs. As I have already said, the claim for legal costs under the bareboat charters, whether as a component of the Termination Sums or otherwise, was not put in issue before me at the December hearings and was not therefore addressed, necessarily or logically, when determining costs as part of the 16 December Order. This court dealt with those legal costs qua costs within its curial discretion, as already explained.

78. Put simply, the court decided on a final basis that it was just in all the circumstances that the defendants should not recover any part of their relevant legal costs; or, put the other way round, I decided that it would be unjust to require the claimants to pay any part of the defendants' legal costs. The discount applied to the claimants' own costs met demands of practical justice.

79. Whilst the *ratio* of the *Chaplair* decision on this issue, i.e. on the appeal itself in that case, inevitably focused on the absence of substantive jurisdiction, that was simply because it was a killer point against any preclusive doctrine biting in that context. It leaves open and untouched the question as to the availability of *res judicata* or issue estoppel by reference to an earlier final costs determination of the High Court.

80. There is clearly some scope for preclusion in such contexts. A successful litigant who is awarded a proportion of their costs of a hearing or action (and who is paid that sum) could not then claim the same again or even the unrecovered balance from their counterparty as damages for breach. A costs order of an English Court is treated as a full indemnity for all the costs concerned as a matter of English law. There can be no double-recovery or second bite of the cherry in the eyes of the law. The deemed full indemnity precludes this as a matter of public policy: see *Berry v. British Transport Commission* [1962] 1 QB 306; see also *Union Discount Company v. Zoller* [2002] 1 WLR 1517.

81. This principle of finality underpins the reasoning of Colman J in *A v. B (No. 2)* [2007] EWHC 54 (Com); [2007] 1 Lloyd's Rep. 358 at [9]-[11] to the effect that a party who obtains an anti-suit injunction to prevent pursuit of proceedings in breach an arbitration agreement (which is governed by English law, but irrespective of the chosen seat of arbitration) should ordinarily have their costs assessed on the indemnity basis. The purpose of such costs is to put the successful claimant in as close a position as possible to the damages award it could expect for its counterparty's breach of the arbitration agreement in so far as such loss (i.e. through reasonable mitigation) takes the form of legal costs incurred in seeking anti-suit relief to enforce the arbitral bargain. A costs order is a deemed full indemnity and bars a damages claim for the unrecovered element of such legal costs. That is the preclusion premise at work. Hence the justification for indemnity costs as a proxy or substitute for damages. There is one bite at this cherry.

82. Colman J applied the same reasoning to the assessment of costs incurred by a defendant who obtained a stay of proceedings brought in breach of a so-called 'anti-suit' agreement or promise in the case of *National Westminster Bank v. Radobank Nederland (No. 3)* [2007] EWHC 1742 (Comm): see at [31]-[36]. This approach to costs in cases involving breaches of exclusive jurisdictional promises is now well-established, in no small part thanks to the jurisprudential acumen of the late Sir Anthony David Colman (1937 - 2017).

83. Thus, if a successful party incurs £1000 in legal costs but is awarded (and presumably paid) £700 on the indemnity basis of assessment, it may not seek any part of the remaining £300 in damages for breach of contract. It is difficult to see how the same party could be any better placed if claiming under a standard-worded indemnity for legal costs as distinct from damages. I accept, however, that the latter proposition involves understanding the precise ambit of the public policy rationale itself.

84. Taking this one stage further on the above premise: if a successful party is precluded by law from seeking to top-up its recoverable legal costs in this way, it is hard to see why an unsuccessful party should be free to recover any of its own, i.e. otherwise self-absorbed, legal costs by an action on the contract. However, this depends on the precise role of public policy and recognised preclusion doctrines, and indeed the precise wording of the contractual provisions being invoked.

85. Whilst it is correct that preclusive doctrines of this kind operate on the substance of the claim or issue already determined, rather than form or remedy (as to which, see the discussion of merger in *Clark v. In Focus Asset Management and Tax Solutions* [2014] 1 WLR 2502) that is not enough to engage such doctrines in the present case. This court was not seised of any substantive claim to recover the relevant litigation costs pursuant to the terms of the bareboat charters. That substantive claim or issue has not already been decided against the Lessors or (by definition) merged into any judgment of the court.

86. As jarring as it may be to learn that an unsuccessful litigant before the court, having chosen not to appeal an adverse costs order, then later seeks to advance a contractual claim for the same costs, I am not satisfied that such party is legally or procedurally precluded from doing so as a matter of principle. This view may, however, be unduly lenient. The precise ambit of public policy in this context would benefit from full and clear analysis at some point.

87. The closest one gets to preclusion here, in my judgment, is the fall-back line of defence articulated by the Lessees, namely *Henderson v. Henderson* abuse of process. I can see some force in this point. The defendants were represented by experienced solicitors and senior counsel in the December hearings before me. The court as well as the claimants before it could be forgiven for assuming that the fate of the defendants' legal costs had been decided for all time and for all purposes in light of the 16 December Order in the absence of any attempt to appeal it.

88. As an aside, it may be said, at least forensically, that the point did not occur to the defendants' legal team, because the claim is manifestly weak and improbable. There is some suggestion that it was alighted upon after the event as evidenced by a proposed application to vary my prior order.

89. I do not, however, base my decision on abuse of process. I do not need to do so, as explained below. Arguments may exist about the scope of the liberty to apply in the 16 December Order and whether that somehow preserved, albeit obliquely, the defendants' ability to seek the legal costs in this way as part of the Termination Sums. Further, as regards the separate costs orders made last Thursday in respect of the 'Capella' action and the 'Castor' action, as approved and sealed earlier today, no such abuse argument could arise as Mr. Smith KC expressly flagged the point and reserved his position during the course of submissions.

90. That disposes of the preclusion defences. I turn next to the pure construction analysis.

91. No authorities were cited on this at the hearing, even as analogues. However, in response to my request after the hearing for further assistance on the deemed full indemnity principle (cf. paragraphs 80 to 83 above) one first instance case has been identified by the Lessees, namely the costs decision of Blair J in *Autoridad del Canal de Panama v. Sacyr S.A. and others* [2017] EWHC 2337 (Comm) - which I refer to as the 'ACP decision'.

92. As a matter of proper construction, the relevant legal costs can be said, without more, to have been incurred by the Lessors "*in connection with*" the various contractual circumstances set out in clause 7 sub-paragraphs (c) and/or (d) and/or (e) and/or (f). Thus they would also on the face of things appear to be incurred "*in connection with the early termination hereunder*" per clause 28.2(b)(vii) and/or 28.2(c)(viii). They just happen to be litigation costs. That is to say, costs incurred by the Lessor as an unsuccessful party in litigation against the contractual counterparty and which the court ordered should not be recovered. But that does not destroy their essential or substantive characteristic. It does not remove the nexus if otherwise existing to early termination or its consequences.

93. I therefore ask: did the parties contemplate that legal costs of this kind would be recovered under clause 7 or by addition to Termination Sums in the event of early termination? They did not, in my judgment.

94. The relevant indemnification language is framed in terms of nexus, but there must be limits to the type of legal costs, i.e. those subject to separate and specific treatment by the court, which can be claimed even if falling within that nexus. What if the Lessor were to commence an action against the Lessee which it then discontinued, only then to bring one or more further actions for the same or equivalent relief thereafter, which was or were struck out as an abuse of process? Or what if the Lessor commenced proceedings elsewhere in breach of its exclusive jurisdictional promise in the charter, unsuccessfully resisted a local jurisdiction challenge or unsuccessfully resisted an anti-suit injunction in this jurisdiction? In each case let us assume the Lessor has to absorb its own costs and pay those costs, those incurred by its successful adversary/ counterparty.

95. Could a Lessor claim such legal costs under clause 7 or as a component of the Termination Sum in these circumstances? I would find that a surprise; as, may I suggest, would the hypothetical officious bystander witnessing the signature of the charters if asked about it at the relevant time.

96. Although these procedural examples were not put to counsel at the hearing, they engage the battle lines drawn between them on construction as regards costs 'in' and 'out' of the contractual recoverability regime. Mr. Smith KC submitted that the dividing line was whether legal costs are incurred by the Lessor unreasonably or negligently, such as to attract an order for wasted costs. It could well be said that in the scenarios I have just posited the Lessors' legal costs were unreasonably incurred, although it is not clear whether that would be so in the case of the first action that is discontinued.

97. Another potential delimiter might therefore be where an order for costs assessed on the indemnity basis were made by a court against the Lessor as unsuccessful litigant and hence its own costs are unrecoverable, by definition. There is no need to show in that context that a litigant has behaved unreasonably as such; but some conduct out of the norm is required. Why should the Lessor recover its own legal costs under these provisions if incurred in a court process it lost and where it was ordered to pay indemnity costs to the Lessee?

98. In my judgment, the parties to the charter did not objectively countenance recoverability of any legal costs incurred by the Lessor in future litigation between the parties themselves where a court of competent jurisdiction determines and rejects the recoverability of such costs on a final basis. As stated above, that kind of formal adversarial scenario is anathema to the consensual foundation and operation of the agreement, even if recoverability of some legal costs is contemplated where there is a dispute about termination.

99. This construction provides sufficient certainty. The parties know where they are when they conclude wording like this. The narrower carve-out proposed by Mr. Smith KC is an *a fortiori* sub-set of this category of precluded or excluded legal costs. In so far as there may be issues about the precise boundaries of the carve-out which I have concluded exists, the same might be said about the precise boundaries of that narrower carve-out or, picking up the example given in paragraph 97 above, one based upon an adverse costs order awarded on the indemnity basis mentioned above.

100. Blair J had no trouble reaching the same conclusion in the APC decision. The claimant there sought contractual recovery of costs incurred in its own unsuccessful application for summary judgment. The contractual right was an indemnity contained in an advanced payment guarantee. The judge said at [48]: "… *[T]his is wrong. The indemnity cannot be stretched to include the costs of unsuccessfully attempting to enforce the guarantees*." For this proposition, he cited the decision of Einstein J in *Precious Metals Australia Limited v. Xstrata (Schweiz AG)* [2005] NSWSC 141. I share the same strong instinctive reaction and conclusion as Blair J, albeit without having interrogated the precise wording of the clauses engaged in that case. I do not think that sensible businessfolk would react differently.

101. Here, the parties contracted into the English court's mandatory costs regime through the exclusive choice of jurisdiction. It is inherently unlikely that they thereby agreed to subject the *same* legal costs to two potentially contradictory determinations by the *same* court, namely: recovery disallowed as costs pursuant to CPR 44.2 *and yet* assessment of such costs as a contract claim under what is now CPR 44.5. It makes more sense of their bargain and gives more sense to their bargain if legal costs dealt

with on a final basis by the court, i.e. found to be unrecoverable by the Lessor, could not be claimed pursuant to the terms of the charter.

102. It is settled as a matter of English law that a successful party, i.e. one who receives costs, cannot top up their recovery through damages: : see paragraphs 80 to 84 above. It, therefore, seems improbable that sophisticated parties with professional advice and assistance who choose such legal systems to govern and decide their disputes and associated litigation costs would have intended to allow an unsuccessful party, i.e. one who bears their own costs and pays the other side's costs, to be made good or be made whole in this way. I am satisfied that these parties did not intend such consequence, irrespective of whether such bargain would be enforceable as a matter of English law.

103. I conclude, therefore, that as a matter of proper construction clause 7 and clauses 28.2(b)(vii) and 28.2(c)(viii) do not cover legal costs incurred by the Lessor in litigation against the Lessee where the Lessor is unsuccessful and the court makes a final order disallowing recovery of such legal costs. There is therefore no claim which could be the subject of any doctrine of preclusion on proper analysis.

104. In light of that conclusion, the third and final defence of the Lessee does not arise for consideration. This would only arise if the court were now tasked with assessing legal costs recoverable by contract pursuant to its special power under CPR 44.5: see also paragraph 7 of the Part 44 Practice Direction and special rules applicable to legal costs relating to a mortgage, where the court's power is derived in part from its equitable jurisdiction to fix the terms of redemption.

105. The Lessees submitted that, if I were to have undertaken this further assessment exercise of contractual legal costs, then consistent with my first assessment, reflected in the 16 December Order, I should exercise my discretion to award zero to the Lessors. That feels an awful lot like preclusion by the back door - although strictly speaking I did not *assess* the Lessor's legal costs originally, I disallowed their recovery in principle.

106. As it happens, the situation does not arise. The somewhat otherworldly feel of the submissions as to how a court should have conducted this kind of unprecedented hypothetical second-tier assessment exercise serves to illustrate the intrinsic sense of my prior conclusions, if anything.

107. Some interesting questions may have arisen if the court had been asked to determine the quantum of recoverable legal costs claimed as a matter of contract *instead of* making a costs order in the procedural sense, assuming that the contract was interpreted as covering such legal costs. The Court of Appeal in *Chaplair* when addressing 'Issue 2' cited extensively from the Court of Appeal decision in *Church Commissioners v Ibrahim* [1997] 1 EGLR 13, which itself adopted and cited what was said by the Court of Appeal in *Gomba Holdings UK Limited v. Minories Finance No. 2* [1992] 3 WLR 723. As described above, this distinct point arose in *Chaplair* because the County Court had no power to make costs orders on the small claims track, save for the costs of issuing the claim itself. The judge was nevertheless correct to have awarded the landlord a substantial proportion of its legal costs of the County Court proceedings by way of contractual entitlement under the lease. Permission to appeal was refused on this point.

108. That deals with the main issue as to recoverability of the Lessor's legal costs.

Other Legal Costs?

109. There is a further dispute between the parties as to whether there are *other* legal costs incurred by the Lessors which nevertheless fall within the relevant charter provisions, notwithstanding my conclusion above. The precise scope of this residual dispute and its value remains inchoate at this stage. I am not in a position to determine all such disputes on present material.

110. It is, of course, for the Lessor to prove that any incurred costs fall within at least one contractual gateway in light of my judgment as to the scope of recoverability. If such residual disputes cannot be resolved by the parties, they can be determined by me pursuant to the original liberty to apply and its invocation which led to the restoration of the issues in the Hulls Action considered in this judgment. I expect maximum co-operation from the parties on such matters so as to achieve legal certainty without further delay.

111. As regards the points raised by the defendants' solicitors in their letter sent on Friday evening, I agree with them as a matter of bare principle that costs of the action, as distinct from costs relating to the relevant applications, could be recoverable. Likewise, costs of seeking legal advice as to the impact of sanctions, subject to proof of nexus and the usual requirements that costs were reasonably incurred and reasonable in amount, as reflected in CPR 44.5.

Disposal

112. By way of summary of my conclusions:

(1) Break Costs

(i) Margin is not added under limb (a) of the definition where the relevant payment is or is to be received prior to delivery of the vessel;

(ii) the deposit rate applicable under limb (b) is the highest rate which the Lessor could obtain by taking reasonable steps to investigate its options with leading banks for the relevant deposit period; and

(iii) any residual dispute as to the appropriate rate in light of that conclusion can be resolved by me on paper pursuant to the extant application pursuant to the express liberty in the 16 December Order.

(2) Legal Costs

(i) The parties to the charter did not objectively countenance recoverability (including as part of the Termination Sum) of any legal costs incurred by the Lessor in future litigation between the parties themselves in respect of which a court of competent jurisdiction determines on a final basis, as has happened here, that such costs are not recoverable as costs;

(ii) any residual dispute as to the recoverability of other legal costs can also be resolved by me on paper pursuant to the extant application pursuant to the express liberty in the 16 December Order.

113. That concludes my judgment. It was handed down between about 3.10pm and 4.10pm on Monday 27 February then edited and approved on Wednesday 1 March 2023.

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