# AK on Shipping
## *Monthly*

Issue 2 | April 2024

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**Acknowledgements**
**Thanks to Johan Wong and Melwinder Singh Gill of Penningtons Manches Cooper for reviewing a draft of the write-up on Denver Maritime Limited v Belpareil AS. They were part of the solicitors' team for Belpareil.**

**And thanks to Dayana Batrisya Mohamed Nasir for proofreading this issue of AK on Shipping, Monthly.**

# Southeaster Maritime Ltd v Trafigura Maritime Logistics Pte Ltd (mv "Aquafreedom") [2024] EWHC 255 (Comm)

## 8 February 2024

**Effect of "subs" or "subjects" in charterparty negotiations on formation of contract**

**Distinction between a counter-offer and a mere enquiry**

**Summary judgment upon construction of emails and WhatsApp communications**

*Jacobs J held:*

*·"Subs" or "Subjects" in a charterparty negotiation are, like "subject to contract" agreements, conditions precedent to the formation of a contract. Until they are satisfied or lifted, no contract is formed: The Leonidas and The Newcastle Express.*

*• An arbitration agreement in the agreed parts of the terms does not take effect until the commercial subjects are lifted and a contract is formed.*

*• A mere enquiry by an offeree is not a counter-offer, but asking if the offer would agree to vary the terms of the offer is a counter-offer that would reject the original offer.*

*• A summary judgment should be given when the respondent does not have a realistic, as opposed to a fanciful, prospect of success, which means a case more than merely arguable: Easyair v Opal Telecom.*

*• Court will not refuse summary judgment simply because something may turn up in the trial.*

*• WhatsApp communications are generally businesslike and there is no barrier to use them to convey contractual information.*

*• Emails and WhatsApp communications, like agreements, will be construed objectively from the perspective of a reasonable person with all the background knowledge reasonably available to the parties in the situation at the time of the contract: Lukoil Asia Pacific v Ocean Tankers.*

*• Issues of construction can generally be resolved summarily.*

**Background facts**

Owners and proposed charterers (who will be called "charterers" in this summary for convenience only) negotiated a four-year time charter of the subject vessel in January-February 2023 through their brokers. It was the same firm of brokers that acted for both sides, but different individual brokers in the firm represented each party. It was a common ground that a message from a party to their individual broker, and that goes no further, would not be a message to the other side.

On 25 January 2023, the negotiations commenced. On 26 January 2023, the owners emailed an offer (what they called "offer firm") to the charterers. The offer was for a four-year charter with option to the charterer to extend the charter two times for a year at each instance, that is 4+1+1 years, at certain daily rates of hire.

However, the offer left open a number of matters to be agreed upon, including trading area exclusions in worldwide trade, wording of the normal DPP/crude cargo, previously agreed terms sub review both sides, sub owners' board of directors' (BOD) approval latest one working day after all terms agreed and sub charterers management approval (CMA) latest two working days after all terms agreed. "Sub" meant "subject", or in simpler terms, "subject to". On 27 January 2023, the charters objected to the owners' BOD sub and the owners agreed to remove it. Between 27 and 30 January 2023, parties further negotiated the daily rates and finally, on 30 January 2023, agreed on daily rates of US$33,400 for the first four years, US$34,500 for the fifth year (if extended) and US$35,400 for the sixth year (if extended).

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That was followed by a recap sent by the charterers to the owners on 30 January 2023 ("recap") accurately setting out what has been agreed and the subs up to that point. No "previously agreed terms", referred to in the 26 January 2023 email of the owners and reflected in the 30 January 2023 recap of the charters, were identified until this point.

Subsequently, on the same day, the parties identified the "previously agreed terms" to be reviewed by both sides, which were a full set of terms agreed in respect of a different vessel, the Aqualegend (owned by a different company but in the same management as the subject vessel), some 18 months earlier in June 2021. They continued discussing amendments to the previously agreed terms, including addition of Carbon Intensity Indicator (CII), Energy Efficiency Existing Ship Index (EEXI) and EU Emissions Trading System (ETS) clauses, and amended drydocking clause and cargo clause (to allow Kazak origin oil). Parties were not able to reach an agreement on the amendments. Seemingly, the previously agreed terms contained an arbitration agreement with both parties were willing to maintain.

On 1 February 2023, the owners sent an email, what the parties called "Owners' Last", to the charters, which conveyed the owner's comments on various amendments under discussion. That was followed by two response emails from the charterers on 1 and 2 February 2023. In the first email, they addressed the comments except that, as to the CII clause, they said they were "reverting". In the second email, they said "ref CII please accept the following" which was followed by a proposed amended CII clause. That was followed by WhatsApp messages on the same day between the brokers that indicated that the owners did not wish to proceed.

On 3 February 2023, the charterers chased the owners for a response, which was not forthcoming from the owners save for a proposed Teams meeting for 6 February 2023 which the owners cancelled on 6 February 2023.

Then, on 6 February 2023, the charterers sent an email agreeing to the Owners' Last. As to the CMA sub, they said they would revert soonest. Within a few minutes after that, the charterers sent a second email lifting the CMA sub and saying that the deal was fully fixed. The owners responded by saying that there was no agreement. The charterers unilaterally sent a clean recap that went on CII and ETS clauses to the charterers' version (and not the Owners' Last). The owners repeated that there was no agreement.

**Claim, issues and determination**

The owners were the claimant and the charterers were the defendant. The owners' claim was for a declaration that no charterparty was concluded between the parties and the charterers' case was that a charterparty was concluded. The owners applied for a summary judgment.

The first issue was whether a binding contract was concluded on 30 January 2023. This entails the question whether the subs were conditions precedent or conditions subsequent. The significance of this issue or question was that if the subs were conditions subsequent and thereby a contract was concluded on 30 January 2023, then any dispute on the subs/conditions subsequent would be for the arbitrators to decide. The charterers relied on The Pacific Champ [2013] EWHC 470 (Comm) and TopTip Holding v Mercuria [2017] SGCA 64 to argue that the subs were conditions subsequent. The owners relied on The Leonidas [2020] EWHC 1986 and The Newcastle Express [2022] EWCA Civ 1555, in which it was held that subs were more likely conditions precedents.

The judge followed The Leonidas and The Newcastle Express, held that both the CMA sub and the "previously agreed terms sub review both sides" negatived contractual intent until they were lifted and were conditions precedent, which prevented a contract

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(including the arbitration agreement) coming into existence until the terms were reviewed and agreed and the CMA sub was lifted. As the terms were not agreed and the CMA sub was not lifted, no contract came into existence. This meant that, even if all terms were agreed, the owners may call off the deal by communicating the same to the charterers until before the CMA sub is lifted. Only after the terms were agreed, the time for lifting the CMA sub begins.

The judge referred to a passage, with approval, from Carver on Charterparties (referred to in The Leonidas), that said, in charterparty negotiations, 'subjects' refer to conditions precedents and their satisfaction is referred to as 'lifting the subjects'. The judge also referred to a passage, with approval, from Wilford on Time Charterparties, that said, "that to say an agreement is 'on subjects' means that it is not binding until the 'subjects in question have been 'lifted'" and that "only when all subjects are lifted does an agreement become a binding contract". The judge again referred to, with approval, the speech of Males LJ in The Newcastle Express, where Males LJ equated "'subjects' in the context of charterparty negotiations" to "'subject to contract' in other contexts" "as a device to ensure that a binding contract [was] not yet concluded". The judge further referred to, with approval, *Goodwood Investments v Thyssenkrupp Industrial Solutions [2018] EWHC 1056 (Comm),* in which it was held that "the principles applicable to "subject to contract" also applied to a subject of board approval" in a non-charterparty context.

As to The Pacific Champ and TopTip Holding referred to by the charterers, the judge commented that they are not the authorities to support a proposition that "previously agreed terms sub review both sides" created a condition subsequent and that both the authorities pre-dated The Leonidas and The Newcastle Express. As to The Pacific Champ, the judge further commented that the relevant point made by Eder J was only obiter.

The second issue was whether a contract was concluded on 6 February 2023 when the charterer agreed to the Owners' Last and also lifted the CMA sub. The judge again answered this in the negative for a four separate reasons:

i. First, Owner's Last was not an offer capable of acceptance to conclude a contract as it only offered comments on the amendments in discussion and did not contain an offer all terms.
ii. Second, even if the Owners' Last was an offer, it was rejected by the charterers' 2 February 2023 email by which they asked the owners to accept the charterers' version of the CII clause.
iii. Third, on 2 February 2023, it was made known to the charterers that the owners did not wish to proceed, which would have the effect of withdrawing the Owners' Last (if it was an offer).
iv. Fourth, the purported lifting of the CMA sub was ineffective because there were terms not agreed by then, as the CMA sub might be lifted only after all terms were agreed.

As to the charterers' 2 February 2023 email, the judge explained that it was a counter-offer, and not a mere enquiry, and thus it rejected the Owners' Last (if the Owners' Last was an offer). The judge agreed with a passage in Cartwright: Formation and Variation of Contracts which said that, generally, when an offeree asks the offeror whether the offer might be varied, that would be a counter-offer. But if the offeree merely asks for further details or guidance about whether the offer is final, that would not be a counter-offer. The response must be tested from the perspective of a reasonable recipient, that is an objective test. The judge added that this is usual "back and forth between brokers in a chartering context" where parties would "be putting forward counter-proposals rather than making enquiries".

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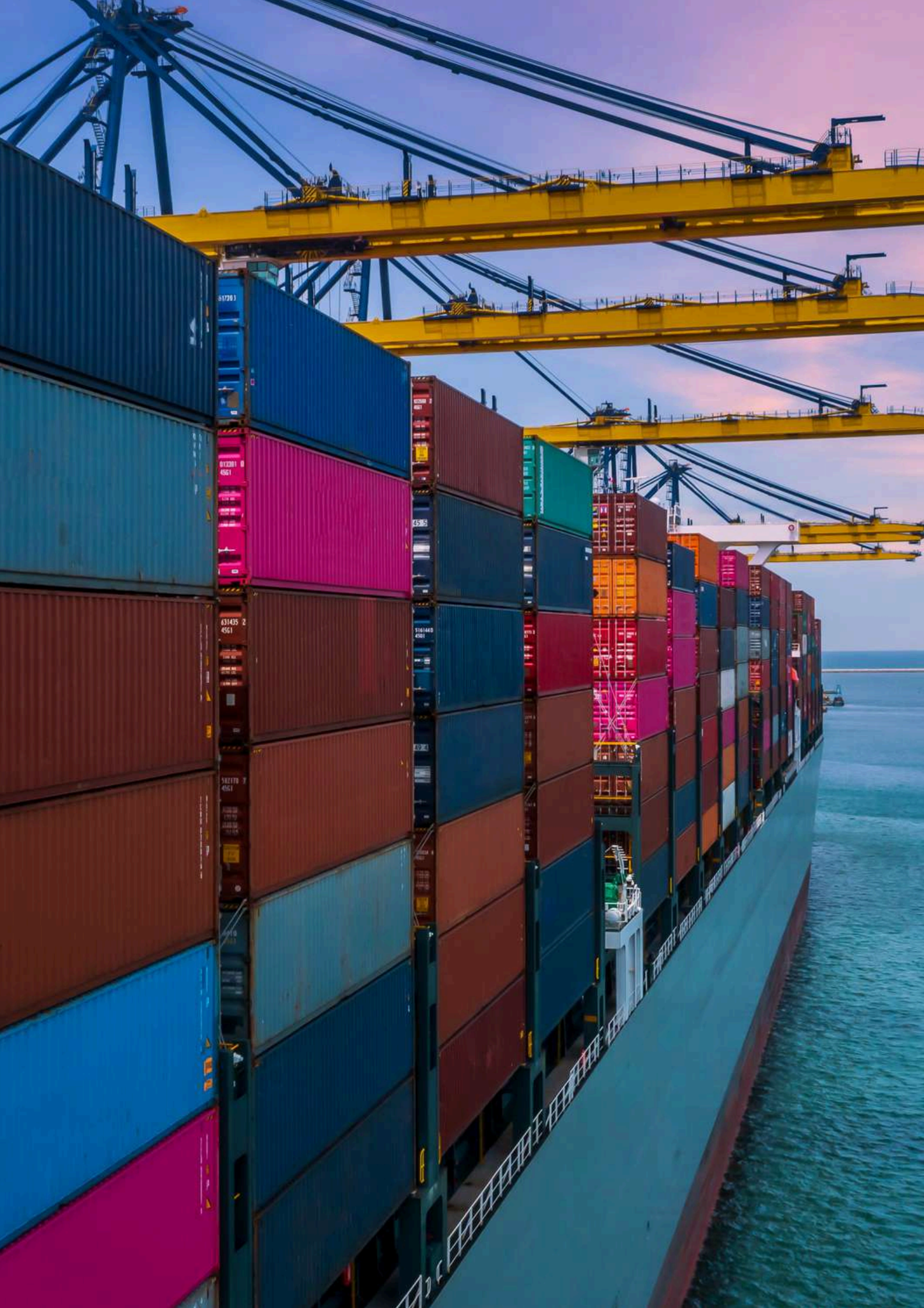
The third issue was whether this was a case suitable for summary judgment. For the principles of summary judgment, the judge referred to the well-known case of Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch), where Lewison J stated the principles essentially as follows:

i. An application for a summary judgment would be granted when the respondent does not have a realistic, as opposed to a fanciful, prospect of success, which means a case more than merely arguable.
ii. The court would take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.
iii. A factual assertation, contradicted by contemporaneous documents, may have no real substance.
iv. If the court has before it all the evidence necessary for a proper determination, then it should "grasp the nettle and decide it".
v. If a party's case is "bad in law, the sooner that is determined, the better."
vi. It is "not enough simply to argue that the case should be allowed to go to trial because something may turn up
vii. Where the circumstances in which a document came to be written are relevant to its construction, respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.

The issues involved in the case were issues of construction of the emails and WhatsApp messages. The judge observed that WhatsApp messages are generally businesslike and there was no barrier to using them to convey relevant contractual information.

Court construes documents "objectively". The objective test was conveniently summarised by Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd [2018] EWHC 163 (Comm), which the judge here followed. The summary was a synthesis of the principles enunciated in the trilogy of the Supreme Court decisions in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; Arnold v Britton [2015] UKSC 36; and Wood v Capita Insurance Services Ltd [2017] UKSC 24.
iThe objective test involves ascertaining what a reasonable person with all the background knowledge reasonably available to the parties in the situation at the time of the contract would have understood the parties to have meant. The court must consider the contract as a whole and take into account the quality of drafting. If there are two possible constructions, the court may prefer the one consistent with business common sense. It is a unitary exercise involving an iterative process.

The judge did not find any reason why the issues of objective construction of the emails and WhatsApp messages in this case could not be resolved summarily and found no factual issue that could only be resolved in a trial. Accordingly, the judge gave summary judgment for the owners, declaring that there was no charterparty between the parties.



# Denver Maritime Limited v Belpareil AS (mv "Kiran Australia" and mv "Belpareil") [2024] EWHC 362 (Admlty)

## 26 February 2024

**Anchor dragging culminating in collision**

**Finding out effective causes of collision**

**"But for" test and "last opportunity" rule**

**Apportionment of liability for collision**

**Admiralty court process and Elder Brethren's assistance**

Andrew Baker J held:

• Dragging anchor, right at the outset, is prima facie evidence of negligence – open to the party to rebut it.

• Failure to arrest the drag, by timely dropping the second anchor, is another negligence.

• Failure to manage the dangerous situation by timely warning the other ships around is yet another negligence.

• When in danger, taking an action or making an omission that is not calculated to avoid a collision is negligence. The wrong action of the other ship is not an excuse for not taking an action to avoid a collision even in the situation of the wrong action of the other ship.

• "But for" test alone does not establish causation, but this does not mean a reincarnation of the "last opportunity" rule. When a set of events starting from the negligence of a ship culminates in a collision, the whole set is one episode, that may be a lengthy one, on which the liability will be found and, if necessary, apportioned. Guidance from The Miraflores and The Abadesa adopted.

• Liability attaches only to negligent actions/omissions within the episode that are causative of the collision.

• The "agony of moment" and "horns of dilemma" defences are not available to one by whose fault the perilous situation was caused in the first place.

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• The three possible outcomes of a simple two-ship collision case are that (i) neither is at fault, (ii) one only is at fault, (ii) both are at fault so liability must be apportioned.

• Procedure for handling the assistance of the Elder Brethren is as set out in The Global Mariner and the Atlantic Crusader. A judge may or may not accept any of the advice of the Elder Brethren.

• A decision will not be based on a disputed allegation that was not tested during the trial, even if the Elder Brethren supports the allegation.

• Inventing an untrue version of the collision events will be a wasted effort as VDR records will tell the truth, it can be evidence of the contrary, and will offer a gift to the opponent for cross-examining. However, subsequently admitting the mistake will go to the credit of the witness.

• A ship that does not offer her VDR records will be subjected to criticism for that.
• It could be useless for the master to merely tell what he could see from VDR records as that is not his evidence of witnessing the collision. But the master may tell his version and refer to the VDR records to give probable times for the events that he recalls.

• A party wishing to tender additional submissions must first discuss it with the opponent and seek the permission of the court to tender it. But a judge may resolve it by giving appropriate directions, in his discretion, as to such additional submissions.

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Observation:

• The decision in this case was made on the general principles of negligence rather than by reference to any COLREGs rules.

**Summary**

Introduction
This case arises out of a collision between the m.v. Kiran Australia (KA) and the m.v. Belpareil (BP) at the Chattogram Anchorage, Bangladesh at 0110 hours on 9 November 2021 (local time). The events that contributed to the collision cumulated since about 2300 hours (C-130) on 8 November 2021 (local time). Broadly, the collision happened when both ships were at anchor and the collision was largely the result of BP dragging out of control towards KA.A. The anchorage known for poor holding ground and difficult conditions (including shallow water and the need for frequent use of engine). KA was at anchor since 1 November 2021 on her starboard anchor down with 8 shackles in the water. BP was at anchor since 7 November 2021 on her port anchor with 9 shackles in the water. At that time, the distance between the two vessels was about 0.5 nm, A being behind BP, that is BP's aft towards KA's bow, approximately

KA

BP

Both vessels were bulk carriers of about 200 m length overall (LOA) and about 36,000 gross tonnage (GT). KA had a draft of circa 6 metres forward and 10 metres aft. BP had a draft of circa 11 metres, even keel, giving her limited under-keel clearance. Both vessels had two anchors each with 12 shackles of chain.

On 8 November 2021, BP's master's night orders to the duty officers rightly were to be on anchor watch and not to carry out any other work. Since about 2053 hours until a few minutes after 2300 hours (C-130), BP largely kept her main engine at Stop.

Timeline

• By 2300 hours (C-130) – probably a minute or two before that, BP started to drag her anchor towards KA at a speed over ground (SOG) of about 1 kn (occasionally up to 2 kn).
• At about 2300 hours (C-130), the crew on board BP first realised the drag. Separately from the entire episode involved in the present case, another vessel, the Tomini Unity in the anchorage also seemed to drag at this time for about 15 minutes.
• At 2306 hours (C-124), to mitigate the drag, BP set her telegraph to Dead Slow Ahead – that was at least five minutes after the drag started.
• Between 2309 hours (C-121) and 2336 hours (C-94), BP switched the telegraph between Dead Slow Ahead, Slow Ahead, Half Ahead and Full Ahead. BP was able to achieve the required revolutions per minute (RPM) for Dead Slow Ahead and Show Ahead, but not for Half Ahead (that would require 62 RPM) or Full Ahead (that would require 71 RPM). The maximum that she could achieve did not exceed 55 RPM.
• By 2316 hours (C-114), it must have been known to BP that the engine had issues and failed to generate the RPM demanded.
• At 2320 hours (C-110), this was the position:

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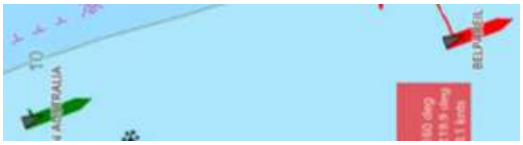
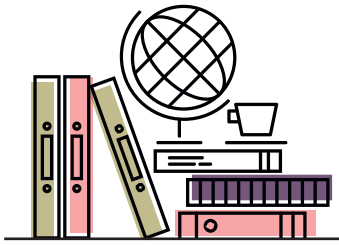
• From 2336 hours (C-94) to 2346 hours (C-84), her telegraph was set to Full Ahead, when she achieved RPM of only 47-52. Full Ahead telegraph setting was almost maintained until after the collision, though RPM was not achieved beyond 55 until 01:07 hours (C-3) on 9 November 2021.
• At 2340 hours (C-90), there was a conversation in the bridge of BP that "the engine will not be enough ... vessel will move backwards. RPM is decreasing again to 49, 50 ... problem ... vessel is going to the backwards, she is dragging ..., need some more ... RPM".
At this point, it must have been obvious to BP not only that she experienced main engine difficulty but also that she was a potential danger to other ships in the anchorage, particularly KA.
• At 0000 hours (C-70) on 9 November 2021, this was the position



• Between 0003 hours (C-67) and 0005 hours (C-65), there was a conversation in the bridge that acknowledged that the RPM was stuck to 50 - 55, that the vessel was going backwards and that the vessel was out of control.
• By 0007 hours (C-63), BP's master asked a barge, that was moored to BP for lightering operation, to cast off as he could not control BP.
• At 0010 hours (C-60), suspecting the drag of BP, KA called BP on VHF. The calls were repeated twice at about 0011 hours and 0012 hours, but BP ignored and did not answer them.
• At about 0015 hours (C-55), BP called KA back. BP acknowledged that she was dragging and had issues with her engine. This is when KA became aware of BP's true difficulty. At this time, BP was only 3 cables (0.3 nm) away from KA.

Then, KA called Port Control but the call was not answered.
• At about 0019 hours (C-51), KA and BP again conversed. BP said that they could not control the vessel. KA said they already sent their crew to forward to heave up the anchor, but it was too late for KA to move forward (towards BP) to heave up the anchor as BP was dragging backwards towards KA. It would take more than 20 minutes for KA to take in 8 shackles of the anchor chain ahead in the water, for which the master would have to ease KA forward towards the oncoming BP. Despite that KA said they would try. BP asked KA not to heave up the anchor but to drag to stern (to increase the distance between vessels). KA again said they would try. According to KA's master, there was not much room for her to drag astern because she already had eight shackles in the water, there was another vessel behind her and the water was shallow behind her.
• Between 0019 hours (C-51) and 0021 hours (C-49), both vessels called Port Control, but no response received.
• At about 0021 hours (C-49), BP broadcast her first general warning to all ships around, that is a Securite message.
• At 0022 hours (C-49), BP broadcast her second Securite message.
• At about 0025 hours (C-45), the closest point of approach (CPA) between the two vessels was only 0.027 mm (50 metres). BP requested KA to move away as BP was closing in towards the starboard of KA. KA said they were turning to port to keep clear of BP.



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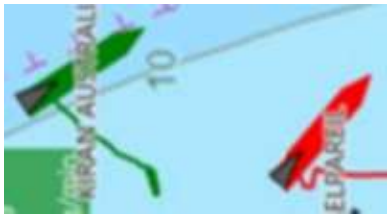
• At 0029 hours (C-41), BP broadcast her third Securite message. BP was almost at the place where KA originally was, but by then KA had moved away from there with Full Ahead engine and share rudder manoeuvres. This was the position:



• At about 0032 hours (C-38), BP requested tug assistance from Port Control, but no response was received.
• By 0037 hours (C-33), KA had moved to port and BP reached almost the place where KA was before that. Both vessels were almost parallel to one another with a gap of only about 30-50 metres.
• At 0039 hours (C-31), BP told KA that BP got the engine and that KA should maintain her course. KA asked BP to keep clear of KA.
• At 0042 hours (C-28), BP called Port Control again for immediate tug assistance, but no response was received.
 Just after that BP confirmed to KA that BP got the engine.
• Between 0042 hours (C-28) and 0051 hours (C-19), BP started to pull away from KA, and KA was falling back, whereby BP achieved a distance of about 100 metres ahead and clear of KA.
 Just after that, BP told KA that the engine was back to abnormal. KA told BP that KA could heave up the anchor when BP clears enough from KA.
• From 0052 hours (C-18), BP started to fall astern to KA again.
• At 0054 hours (C-16), BP told KA that BP's engine was out of order again and asked KA to heave up the anchor. KA said they would start heaving up the anchor.

At about 0055 hours (C-15), KA started to heave up the anchor, which task she continued for the next eleven minutes (until 0106 hours (C-4)).
·At 0056 hours (C-14), BP's stern was at a right angle to KA's starboard bow with a gap of 100 metres only approximately.


• At 0102 hours (C-8), Port Control finally responded to BP's calls. Port Control advised BP (that was dragging her port anchor) to drop her second (ie. starboard) anchor, which BP refused saying that it would result in twisting of the two anchors. BP repeated her request for tug assistance but Port Control said they were making the arrangements but that would take time – ultimately a tug did not arrive at all.
• At 0103 hours (C-7), Port Control asked KA to keep clear of BP. KA said they were heaving up the anchor and pointed out the difficulty in completing the task as BP was going astern very fast. At this time, KA had brought in shackles of her anchor chain whilst five shackles were still in the water.
• At 0104 hours (C-6), BP almost passed astern and gone behind KA on KA's starboard. BP repeated her request to Port Control for tug assistance and Port Control requested BP to fix her anchor and position. KA was pushing herself forward to get clear of BP (which course she continued for the next two minutes until 0106 hours (C-4)), that rendered her anchor chain leading aftward and tight.

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At 0106 hours (C-4), KA stopped heaving up her anchor, by when she had brought in 3 shackles of her anchor chain leaving 5 shackles still in the water. BP's engine response has improved from 47 RPM at 0101 hours (C-9) to 54.5 RPM at 0106 hours (C-4) and was continuing to improve.

•Collision course

• At 0107 hours (C-3), this was the position. The distance between the two vessels was about 115 m only. The vessels commenced the manoeuvres that became the collision course.

 By then, KA had moved forward from its original position causing tension on its anchor chain and decided to ease the tension (by taking way of the engine).

 BP was already in deeper water and said she got her engine back. KA asked BP to drag behind a little clear from KA as KA was wanted to go astern to complete heaving up her anchor. BP asked KA to stop that course as BP wanted to go starboard to clear from KA and also avoid shallow water/grounding. KA asked BP to stop BP's engine.

• Between 0107 hours (C-3) and 0110 hours (time of the collision), KA's speed through water dropped from 5.6 kn to 2.4 kn. KA diagonally fell backwards to starboard (that is towards BP). BP was already in deeper water and her engine response, in Full Ahead almost maintained since 2336 hours (C-94), picked up to 60-63 RPM (still short of 71 RPM that Full Ahead would require). The speed through water steadily increased to 4.5 kn.

The masters were not in constant communication, nor did they attempt to enter into an agreement (as opposed to statements and requests) on the course of action each should take.

• At 0109 hours (C-1), KA's rudder was caught on BP's anchor chain.

• That was followed by the collision at 0110 hours. KA's starboard quarter came into contact with BP's port bow, closely followed by hull-to-hull contact. This was the position:

**Court proceedings**

As is normal, the Admiralty Registrar allocated the case to the Admiralty Judge for liability trial and directed that any assessment of damages, subsequently, will be caried out by the Admiralty Registrar.

The judge sat with two Elder Brethren of Trinity House as nautical assessors, who were a Commodore and a Captain. The judge followed the guideline set out by Gross J (as he then was) in The Global Mariner and the Atlantic Crusader [2005] EWHC 380 (Admlty) as to process of obtaining the advice of the Elder Brethren, namely:

• In the closing submissions, counsel may make submissions as to the questions that might be put to the Elder Brethren.

• The judge takes that into account in settling the questions, in writing, for the Elder Brethren.

• The Elder Brethren answers the questions, in writing, and the judge's Clerk sends a copy of that to counsel.

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Counsel may submit their observations of the Elder Brethren.
• Taking into account the observations, the judge may seek clarification from the Elder Brethren.

•Outside the guideline, KA sent a written submission in reply to BA's observations. The judge commented that the proper procedure would have been for KA to seek BA's agreement for this. If an agreement could not be reached, then to raise it with the court. In any event, the submissions should have been tendered with an accompanying request for permission to submit further argument. The judge did not read it and avoided a proliferation of additional post-trial submissions. Instead, the judge directed as follows to orderly give the opportunity to the parties for further submission:
• KA might provide a written submission on the Elder Brethren's supplementary advice (the clarification) and comments in reply to BP's observations on the Elder Brethren's main advice.
• BP might similarly provide their written submission on the supplementary advice and response to KA's submission.
• Finally, KA might reply to BP's submission.
The parties did so. The judge did not re-list the matter for additional oral argument as neither party asked for that.

Numerous questions posed to the Elder Brethren included questions of what a "competent master" in the place of each vessel's master would have done at various situations that the masters were in on the entire episode. The judge did not accept all parts of the Elder Brethren's advice, and on certain matters, the judge was able to come to the same conclusion as the Elder Brethren's advice even in the absence of the advice or relying on the reasons preferred by the Elder Brethren

In arriving at his factual findings, the judge considered, among others, the agreed MADAS reconstruction produced by Avenca, which included BP's VDR audio recordings from the bridge. The masters' narrative of the incident written on the day of the collision significantly contradicted the MADAS reconstruction and the judge criticised the masters for making the wasted efforts to invent untrue version whilst the true story would largely be told by the VDR records (MADAS reconstruction – the main tool). Instead, the judge pointed out that the attempt to cover up the truth shows that they felt responsible for certain of their actions/omissions – their fault.

For instance, BP's master gave inconsistent statements as to dropping of the second (starboard) anchor, saying he did not drop it for fear of "twist" with the port anchor, and also saying contrary to that, he dropped it but that did not assist. The judge considered this as evidence of the fact that dropping the second anchor was an option that he should have considered. The judge called such untrue versions by one party as "gifts" to the other party for cross-examination. BP's master admitted, in the trial, that he invented an untrue version of events in his written narrative, for which admission the judge gave him a "credit".

The judge criticised the witness statement of KA's master as "useless" and as probably written for the master by the solicitors and agreed by him to be accurate. The master's version was seemingly what "he could now see in the MADAS reconstruction" which the judge critisised as "not his testimony of witnessing the collision at all".

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In contrast to that, the judge did not criticise when the BP's master's claimed to have recalled the events when he was interviewed about them and made a few cross-references to the VDR data to give probable times for the events that he, as per him, recalled.

The judge was assisted by the parties' agreed factual narrative (which the Commercial Court Guide encourages the parties to submit). There was no VDR data or telegraph logger printout from KA in evidence, nor an explanation for that, which the judge criticised as "unusual".
KA and BP had rival cases. Both KA and BP claimed that the collision was the result of the other's fault, alternatively the other bears the greater portion of responsibility for the incident. KA blamed BP for the whole episode from after 2300 hours. BP blamed KA only for the conduct in the last three minutes before collision (0107 hours – 0110 hours).

The Elder Brethren cast some criticism of KA for not weighing her anchor upon coming to know of BP dragging. The judge refused to consider this advice as questions pointing to KA's master's fault prior to C-3 was not explored with him although the master was asked questions pertaining to events before C-3 only to set the background and his answers in respect of them were not challenged. For the same reason, the judge disagreed with BP's submission that KA should have weighed the anchor before C-55 (when BP first told KA of BP's engine problem and dragging), though BP's skeleton argument for trial included allegations of KA's negligence prior to C-3.
The judge's approach to the possible outcomes was that there were three possible outcomes in a simple two-ship collision case such as this, namely:
• Neither ship is at fault.
• One ship, but not the other, is at fault.
• Both ships are at fault, in which case the liability must be apportioned pursuant to s 187 Merchant Shipping Act 1995 by an assessment of the blameworthiness and causative potency of each ship's fault *(NYK Orpheus c/w Panamax Alexander [2022] EWHC 2828 (Admlty) and Alexandra 1 and Ever Smart (No. 2) [2022] EWHC 206 (Admlty)).*

**Deliberation**

Dragging was prima facie evidence of negligence
The judge agreed with a proposition in Marsden and Gault on Collisions at Sea that dragging anchor was "prima facie evidence of negligence, [which] may be displaced by evidence of severity of weather or that other vessels also dragged." In support of the first portion of the proposition, the judge referred to *The Exeter City and Sea Serpent (1922) 12 Ll L Rep 423; The Brabant (1938) 60 Ll L Rep 323 and The Velox [1955] 1 Lloyd's Rep 376.*

In The Exeter City and Sea Serpent, Sea Serpent dragged in the Barry Roads, a place known for "so many dragging collisions". The Exeter City sued Sea Serpent for dragging. Sea Serpent did not plead or establish that it was due to an inevitable accident or that the exercise of reasonable care and skill would not have prevented the dragging. Sea Serpent was held solely liable as she failed to account for dragging (ie. rebut the presumption).
In The Brabant, Sir Boyd Merriman said "If she had put her anchor down in such a way that when she swung to the flood it did not hold, that would prima facie be negligent. It must be negligence if the vessel is so anchored that, without any other possible explanation ..., she begins to drag her anchor shortly after she has swung to the flood tide." The Velox was a case of a different type. The Velox, which dragged, was found liable because Velox did not respond adequately to dragging, hence navigated negligently.

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For the second portion of the proposition, the judge referred to The Boltenhof (1939) 62 Ll L rep 235. In that case, Bucknill J did not doubt that dragging was prima facie evidence of negligence following The Exeter City and Sea Serpent. However, he considered the presumption rebutted on the facts of that case by the proved severity of weather and the fact that all the ships at anchor (save for The Boltenhof) had dragged that night.
The judge agreed with Marsden's proposition and the cases referred to. The judge pointed out that The Boltenhof is not the authority to say that severe weather or other ships dragging is automatically a rebuttal of the presumption. Equally, The Boltenhof is not the authority to say that the presumption could not be rebutted with facts other than the two mentioned.

Returning to the present case, BP did not plead or establish that the dragging happened without fault on her part. The judge considered that BP's pleading that she dragged under the influence of a strong tidal current and that her main engine issue prevented her from controlling the vessel or preventing the arrest was not a pleading of no-fault. The judge also pointed out that main engine issue observed subsequent to the dragging did not answer the presumption that dragging, when it commences, was prima facie evidence of negligence. The judge considered that the known poor holding ground of Chattogram was not evidence of any conditions that were especially or unusually severe. Similarly, the dragging of the Tomini Unity for 15 minutes from 2300 hours was not evidence of any "general difficulty" in holding at that night such that "reasonable skill and care of competent mariners could not overcome". The judge concluded that BP did not rebut the presumption and hence found her at fault for dragging.

Other negligence of BP
BP did not raise any alarm at that time when it was observed at the bridge at about 2300 hours that she started to drag. Given that the holding difficulties of the anchorage was known and it was not expected at that time that she could not arrest the dragging by using her engine, the judge found no negligence in BP not raising any alarm at that time.
By 2340 hours, it was obvious to BP that the engine was failing and the vessel was dragging to backwards, and hence that she was at the risk of becoming a dead ship at the mercy of the weather and thus had become a potential danger to other ships. At this point, she must have broadcast a clear warning to the other ships in the vicinity. The judge did not find a need to make an enquiry of the Elder Brethren to conclude this. Failure to do so, and waiting until 0021 hours (that is 41 minutes delay) was negligence and causative of the collision – hence BP was liable for this negligence.
KA did not allege, and the judge did not find, any negligence in respect of the engine difficulties faced by BP. This was so despite some suggestion by the Elder Brethren that BP's engine would have a problem in performing when the water was shallow given her limited under-keel clearance in the anchorage – which a competent master should know. They also pointed out that the engine performance improved when she moved to deeper water.
The judge agreed with KA that it was too late to engage in weighing her anchor when KA came to know of BP's difficulties at 0015 hours and that had timely warning been given, the master of KA would have followed his first instinct to weigh the anchor and get out of the way.

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With a timely warning, this is what a competent master in that situation would have done, as per the Elder Brethren's advice which the judge accepted.

BP failed to call for tug assistance until 0032 hours. This was negligent as they should have called for it by 2340 hours. However, it was not causative of the collision as no tug would have arrived even if BP timely asked for one – and indeed no tug arrived even after the collision. Hence, no liability was attached for this negligence.

The judge accepted the Elder Brethren's advice that a competent master in the place of BP's master would have dropped the second anchor at an early time of the episode. As the master did not do so, he was negligent. The judge found that had the master dropped the second anchor when he realised that he could not control the drag with the engine, KA would have had time and room to act on his first correct instinct to weigh the anchor and get out of the way. Accordingly, BP's master's failure was causative of the collision, for which BP was liable. The Elder Brethren advised how any twisting should be handled when dropping the second anchor, which the judge did not go into.

**Last 3 minutes – the collision course**

In the last three minutes, the judge accepted the Elder Brethren's advice that that the masters should have been in constant communication with each other, working out how best to resolve the situation and exchanging information on progress. Both masters failed to do so, which the judge found negligent.

The judge did not accept the Elder Brethren's advice that a competent master would have proceeded to fall astern to BP as did KA. The judge found that there was no reason for KA to fall back dangerously towards BP. KA's desire to ease the tension on the anchor chain was not a good reason after BP reported an improved main engine response and desire to clear away from KA to starboard. KA's decision to fall astern were one without proper thought to BP's situation and was not calculated to avoid a collision. The judge found that KA should instead have increased the RPM to avoid the imminent risk of the collision.

The judge refused KA's argument that the decision to fall astern was taken in the agony of the moment or that he acted on the horns of a dilemma which, if true, would relief KA from negligence. KA's manoeuvres from C-3 were negligent and causative of the collision, and hence KA was liable for that.

The judge commented that the defences of agony of moment and horns of a dilemma, had BP raised them (which they did not), would not have been available to them as it was BP that caused the perilous situation by her fault in the first place. The judge found that BP acted reasonably, at C-3, in steaming to starboard to get clear of KA. However, it was not reasonable for BP to maintain that course, from C-2, knowing KA was falling astern in that path. All that BP should have done, from C-2 onwards, was to halt further progress to starboard by reducing the RPM to avoid the imminent risk of the collision. BP's manoeuvres from C-2 were negligent and causative of the collision, and hence BP was liable for that.

**The whole episode was one**

The next question was whether BP was liable in respect of the entire episode earlier than C-2. "But for" all the events from BP's dragging in the first place, the collision would not have happened. But the "but for" test alone was not enough to establish causation. That does not mean that the "last opportunity" rule is reincarnated. Finding out effective causation is not a simple matter of chronology, treating later events as more significant than the earlier ones. The judge found that the entire set of events was one continuous, but lengthy, episode, and not mere background to the incident.

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All the faults of BP from dragging in the first place, failure to give early warning of her difficulties, failing to drop her second anchor to finally insisting on the course of steaming forward to starboard in the last two minutes before the collision contributed together to the collision and were effective causes.The judge guided himself by the principles of fault, excuse and apportionment enumerated by Lord Pearce in The Miraflores and The Abadesa [1967] 1 AC 826, namely:

- One "who embarks on a deliberate act of negligence should, in general, bear a greater degree of fault than the one who fails to cope adequately with the resulting crisis which is thus thrust upon him.
- "However, it may be that the initial act was so slight or easily avoidable and the subsequent failure to take avoiding action so gross that the blame for the accident falls more largely or even ... wholly upon the person who failed to avoid the consequences of another's negligence."
- One may be "wholly excused for a foolish act done in the agony of the moment as a result of another's negligence".
- |It may be that one "is wholly to blame because he had plenty of opportunity to avoid [the accident]."
- "In between the above said two extremes lies the "wide area where [one's] proportion of fault in failing to react properly to a crisis thrust upon him by another must be assessed as a matter of degree."

**Decision**

Accordingly, both ships were to blame for the collision. Throughout the episode of 130 minutes, it was only the fault of the BP save for the last three minutes before collision when the fault of KA joined. In the last three minutes, KA was more blameworthy. For overall episode, BP was more blameworthy. The judge apportioned the liability at 70:30 in favour of KA. 70% liability on BP and 30% on KA.


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