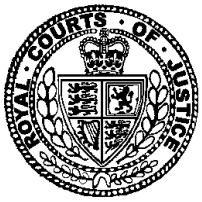

Neutral Citation Number: [2022] EWHC 206 (Admlty)

Case No: AD-2015-000131 AND AD-2016-000017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2022

Before :

SIR NIGEL TEARE Sitting as a Judge of the High Court
With Commodore Walworth and Captain Barker,
Elder Brethren of Trinity House, as Nautical Assessors

- -

Between :

NAUTICAL CHALLENGE LTD	**Claimant**
- and -	
EVERGREEN MARINE (UK) LIMITED	**Defendant**

- -
- -

Vasanti Selvaratnam QC and James Shirley (instructed by **Clyde & Co LLP**) for the **Claimant**
Simon Rainey QC and Nigel Jacobs QC (instructed by **Stann Marine**) for the **Defendant**

Hearing dates: 10 and 11 November 2021; with further written submissions on the Advice of the Assessors received between 8 and 17 December 2021 and on the Further Advice of the Assessors received between 12 and 20 January 2022

- -

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.

.....

SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 08 February 2022 at 10:00 AM."

Sir Nigel Teare :

Introduction

1. This collision case has had a long and unusual history. The collision between ALEXANDRA 1, a laden VLCC, and EVER SMART, a laden container vessel, occurred on 11 February 2015 just outside the dredged channel by which vessels enter and exit the port of Jebel Ali in the United Arab Emirates. Following a trial in the Admiralty Court between 16 and 19 January 2017 I determined the issues of fault and apportioned liability for the collision in a judgment dated 13 March 2017; [2017] EWHC 453 (Admlty). I held that the crossing rule did not apply and apportioned liability for the collision 80/20 in favour of ALEXANDRA 1. On 5 October 2018 the Court of Appeal dismissed an appeal from my decision; [2018] EWCA Civ 2173. On 29 January 2019 Andrew Baker J. assessed the quantum of the respective claims. The recoverable loss of ALEXANDRA 1 was US$9,308,594.71 and the recoverable loss of EVER SMART was US$2,531,373.71. Permission to appeal from the decision of the Court of Appeal was granted by the Supreme Court and by a judgment dated 19 February 2021 delivered by Lord Briggs and Lord Hamblen the Supreme Court allowed the appeal, holding that the crossing rule applied; [2021] UKSC 6. The Supreme Court said that it would be appropriate for me to re-determine all matters of apportionment. Accordingly, on 10 and 11 November 2021 the question of apportionment was argued before me a second time.

2. Whilst I and the Court of Appeal were of the view that the navigation of ALEXANDRA 1 was governed by the requirements of good seamanship and that the navigation of EVER SMART was governed by the narrow channel rule, the Supreme Court held that the navigation of ALEXANDRA 1 was governed by the crossing rule and that the navigation of EVER SMART was governed by both the crossing rule and the narrow channel rule.

3. I must therefore assess the question of the vessels' faults again, but in the light of the guidance now given by the Supreme Court as to the application of the crossing rule. I must then re-apportion liability for the damage caused by the collision. I have no doubt that the light that has been shone on the application of the crossing rule by the Supreme Court will burn brightly in the Admiralty Court for a great many years.

The navigation of ALEXANDRA 1 and EVER SMART

4. I recounted the circumstances of the collision and the navigation of both vessels in paragraphs 6-36 of my first judgment and made findings about the lookout on EVER SMART at paragraphs 75-83 and about the lookout on ALEXANDRA 1 at paragraphs 97-101. No challenge was made to any of those findings in the appeals from my decision. It is therefore unnecessary to repeat my findings in this judgment. In the light of the submissions which I have heard on this re-hearing of the apportionment of liability I would merely emphasise the following features of both vessels' navigation. It will be helpful for the reader to have to hand the agreed plot of the vessels' tracks leading to collision which was attached to my first judgment.

ALEXANDRA 1

5. On 11 February 2015 at about 2200 ALEXANDRA 1, which was inbound to Jebel Ali but at anchor, was instructed by Port Control that a pilot would board at 2315 and that ALEXANDRA 1 should be at buoys no.1 at that time. ALEXANDRA 1 was underway at 2247. At 2254 Port Control advised that the pilot was on board the outbound EVER SMART which was passing buoys no.12 and proceeding to buoys no.1. Port Control advised ALEXANDRA 1 that once EVER SMART was clear she could enter the channel. By 2315 or C-27 ALEXANDRA 1 was within the pilot boarding area and about 1.4 miles west north west of buoys no.1. The master observed EVER SMART by radar when she was at buoys no.8 and continued to monitor her movements by radar but may have failed to acquire her as an ARPA target. At 2318 or C-24 the engines of ALEXANDRA 1 were stopped (and according to the schedule of helm and engine action had been stopped since at least C-26) and her speed over the ground was 2.3 knots and falling. She was, though moving very slowly, waiting for the pilot.

6. It was a clear night. The audio record suggests that the master saw EVER SMART when she was approaching buoys no.6 at about C-24 (see paragraph 97 of my first judgment). It has been noted on this hearing by counsel for EVER SMART that Part 1 of ALEXANDRA 1's Statement of Case contains an admission that the lights of EVER SMART were seen at a distance of about 5.5 miles which would have been at 2320 or C-22 when EVER SMART was passing no.6 buoys. The difference probably does not matter though the audio record is probably the more reliable evidence. As a result of discussions concerning the questions to be put to the Assessors it was agreed by counsel that the vessels were in sight of each other at about 2319 or C-23. It was also common ground that from C-23 the vessels were on bearings that did not appreciably change. (The lack of an appreciable change in bearing is taken from four bearings between C-23 and C-3 in the agreed schedule of engine movements and other data. My understanding is that those bearings were measured by the authors of the schedule from an agreed plot.)

7. By 2327 or C-15 the speed of ALEXANDRA 1 had fallen to 1.3 knots over the ground[1] and her engines were put to dead slow ahead. Though waiting for the pilot, she was proceeding very slowly in a generally East South Easterly direction as indicated in the plot attached to my first judgment. According to ALEXANDRA 1 there was a south west setting current of about a knot. EVER SMART did not note a current.

8. At 2326 or C-14 the master of ALEXANDRA 1 overheard a conversation between a tug, ZAKHEER BRAVO, and Port Control. He mistakenly thought the conversation was between EVER SMART and Port Control. As a result he thought, mistakenly, that EVER SMART was to turn to port at the end of the narrow channel. Although this made no sense to him he did not seek clarification.

9. By 2332 or C-10 the speed of ALEXANDRA 1 was 1.8 knots over the ground and she was about 9 cables west north west of boys no.1. By 2337 or C-5 the speed of ALEXANDRA 1 was 2.1 knots. At 2338 or C-4 her engines were put to slow ahead. At about this time ALEXANDRA 1 would have turned to starboard towards the channel but did not do so because of her master's mistaken understanding of EVER SMART's intentions. Instead she continued to head across the approaches to the channel very slowly.

10. At about 2340 or C-2 her speed over the ground was 2.3 knots. The master of ALEXANDRA 1, who was keeping a good visual lookout, was concerned that EVER SMART was not turning to port as expected and so put the engines of ALEXANDRA 1 full astern. But this did not avoid a collision, some 5 cables west north west of buoys no.1. At collision her speed was 2.4 knots.

EVER SMART

11. EVER SMART was navigating along the narrow channel, outbound from Jebel Ali, having left the container terminal at 2230. The channel was slightly less than 2 cables in width. Her engines had been at full ahead (manoeuvring) but, in preparation for dropping her pilot, were reduced at C-11 to half ahead and at C-10 to slow ahead. At about C-10 EVER SMART was slightly to port of mid-channel and was passing buoys no.3. Her speed at C-9 was 12.2 knots over the ground (and falling). Before leaving the bridge the pilot advised the master that there was a vessel to port and that he should take care. At C-8 her engines were reduced to dead slow ahead. By C-6 the pilot had disembarked and was proceeding towards ALEXANDRA 1. It was or ought to have been obvious to EVER SMART that ALEXANDRA 1 was waiting for the pilot.

12. EVER SMART never regained the starboard side of the channel. At C-5 the speed of EVER SMART was 9.5 knots over the ground and her engines were increased to half ahead. At C-4 her speed was 9.6 knots and her engines were increased to full ahead (manoeuvring).

13. The radar echo of ALEXANDRA 1 was never particularly observed. Although it is more likely than not that ALEXANDRA 1 was observed by the master of EVER SMART shortly after the pilot left the bridge he did not keep her under observation. It

[1] In my first judgment I had referred to this speed as through the water. However, the agreed schedule of engine movements shows that it, like all other speeds for ALEXANDRA 1, was over the ground.

is likely that he assumed that the vessels would pass safely port to port. A good visual or radar lookout would have revealed that his assumption was mistaken.

14. At C-3.5 the speed of EVER SMART was 9.9 knots and her engines were increased to full sea speed.

15. At C-1 the speed of EVER SMART was 11.8 knots over the ground.

16. At about 30 seconds before the collision both Port Control and the pilot advised EVER SMART to go hard starboard. Her helm was put hard starboard but it was too late. At collision her speed was 12.4 knots. The port bow of the EVER SMART struck the starboard of ALEXANDRA 1.

The decision of the Supreme Court

17. There are three aspects of the Supreme Court's decision which I should mention because they require me to take a different view of the crossing rule from that which I took in my first judgment. I shall of course do so. Further, one of those three aspects is the subject of a submission by counsel for ALEXANDRA 1, which makes it particularly necessary for me to mention it.

Crossing

18. The Supreme Court held that in order for two vessels to be crossing so as to involve risk of collision it is sufficient that they are approaching each other on a steady bearing (over time) even though the give-way vessel is not on a steady course but on an erratic course (see paragraph 111 of the judgment of the Supreme Court). The Supreme Court also held that it does not matter that the give-way vessel is waiting for a pilot in order to enter a narrow channel so long as she is moving so as to involve risk of collision (see paragraph 98(vi)). In the present case ALEXANDRA 1 was moving over the ground very slowly in a general East South Easterly direction, she and EVER SMART were approaching each other and their bearing from each other did not appreciably change. There was therefore a risk of collision and the crossing rule applied.

19. When the case was first before me there was no dispute that in order for the crossing rule to apply the give-way vessel had to be on a settled or defined course. I held that ALEXANDRA 1 was not on such a course but was merely waiting to embark a pilot prior to entering the narrow channel. I found it difficult to describe ALEXANDRA 1 as being on a course (see paragraph 70 of my judgment). That was, I considered, a reason for concluding that the crossing rule did not apply. In the Court of Appeal the owners of EVER SMART submitted that there was no requirement that the give-way vessel had to be on a settled or defined course. The Court of Appeal observed, with regard to the position of the stand-on vessel, that there was no doubt that "as a matter of authority and common sense, the stand-on vessel must be on a sufficiently defined course for the crossing rules to apply" (see paragraph 89 of the judgment of Gross LJ). In support of that view reference was made to the dicta of Lord Wright in *The Alcoa Rambler* [1949] AC 236. With regard to the position of the give-way vessel the Court of Appeal noted (i) that in *The Savina* [1976] 2 Lloyd's Reports 123 (the last collision case to reach the House of Lords or Supreme Court before the present case) Lord Simon had referred to the need for both vessels to be on a "steady course" and (ii) that in *The Avance* [1979] 1 Lloyd's Reports 143 Brandon J. had referred to the need for the

putative give-way vessel to be on a "settled course". Both Lord Simon and Brandon J. had referred to the dicta of Lord Wright in *The Alcoa Rambler*. The Court of Appeal agreed with Lord Simon and Brandon J. and concluded that both vessels must be on "sufficiently defined courses" for the crossing rules to apply (see paragraphs 90-92 of the judgment of Gross LJ).

20. That conclusion of the Court of Appeal was challenged in the Supreme Court. The Supreme Court analysed not only *The Alcoa Rambler* but also the authorities before and after that case and concluded that there was no requirement for the give-way vessel to be on a steady course. "If it is reasonably apparent to both vessels that they are approaching each other on a steady bearing (over time) which is other than head-on, then they are indeed both crossing and crossing so as to involve a risk of collision, even if the give-way vessel is on an erratic course " (see paragraph 111 of the judgment of the Supreme Court). Although not strictly in issue the Supreme Court also concluded that the stand-on vessel did not need to be on a "steady course" (see paragraph 112).

21. The Supreme Court acknowledged that *The Avance* was a case in which the crossing rule had been excluded because the give-way vessel was not on a settled course (see paragraph 102). The judge in that case was Brandon J. who tried many collision actions and whose knowledge and understanding of the collision rules was unsurpassed. The need for a settled course had not been debated before me. If it had been it is, I think, unlikely, given the dicta of Lord Simon in *The Savina* and the decision of Brandon J. in *The Avance* (and also in *The Sestriere* [1970] 1 Lloyd's Reports 125 and in *The Savina* at first instance), which were based upon the reasoning of Lord Wright in *The Alcoa Rambler,* that I, sitting at first instance, would have been so bold as to conclude there was no such requirement.

22. However, the Supreme Court has now provided a detailed analysis of the crossing rule and of the authorities both before and after *The Alcoa Rambler;* see paragraphs 80-110. The Supreme Court has held that in a steady bearing case there is no additional requirement that the approaching vessel be on a steady heading or course; see paragraph 95. I shall therefore follow what the Supreme Court has held to be the proper understanding of the crossing rule rather than what might be described as the conventional (but now mistaken) wisdom prior to the decision of the Supreme Court.

Overriding the crossing rule

23. The second aspect of the Supreme Court's decision which I must mention is that the Supreme Court held that there were circumstances in which the crossing rule could be "overridden" or "disapplied", notwithstanding that the vessels were crossing so as to involve risk of collision. However, the Supreme Court held that those circumstances were limited and did not extend to the facts of the present case. There had to be a "compelling necessity" to disapply the crossing rule and there was not in the present case. It is this aspect of the decision of the Supreme Court which has been the subject of a particular submission by counsel for ALEXANDRA 1.

24. By contrast with the approach of the Supreme Court I had concluded that the crossing rule did not apply in the circumstances of this case. I had followed the approach, in particular, of Lord Clarke in *Kulemesin v HKSAR* [2013] 16 HKCFA 195; see paragraphs 48-49 of my judgment. Lord Clarke was an Admiralty judge who had

appeared in many of the collision cases tried by Brandon J. Lord Clarke stated at paragraph 225 of his judgment that:

> "….vessels approaching a narrow channel and intending to proceed along it are not bound by the crossing rule but must enter the channel and, as they do, keep as near to the starboard side as is safe and practicable in accordance with r.9. It seems to me to follow that a vessel shaping to enter the channel should, as a matter of good seamanship, navigate in such a manner that, when she reaches the channel, she is on the starboard side of the channel in accordance with r.9."

25. Although the facts of *Kulemesin* were not identical to those of the present case I did not see a material distinction between them and the present case; see paragraphs 55-57 of my judgment. I concluded that the duty of ALEXANDRA 1 was, as a matter of good seamanship, to navigate in such a manner that, when she reached the channel, she would be on the starboard side of the channel in accordance with the narrow channel rule; see paragraph 64. The Court of Appeal was also unable to distinguish *Kulemesin*; see paragraphs 72-74 of the judgment of Gross LJ.

26. The Supreme Court disagreed. The Supreme Court was able to distinguish *Kulemesin* on the basis that in that case the relevant vessel was shaping to enter the channel on her final approach, rather than merely approaching the channel with intent to proceed along it. This was a distinction which had not been drawn by Lord Clarke. In any event the relevant vessel was not waiting to enter the narrow channel but was already shaping to enter the channel; see paragraphs 132-133 of the judgment of the Supreme Court.

27. The Supreme Court concluded that there are circumstances in which the crossing rule could be overridden or disapplied, notwithstanding that the two vessels in question were approaching each other so as to involve risk of collision. Such disapplication could occur either by "express stipulation" or where there was a "compelling necessity" to override the crossing rule; see paragraph 137. The Supreme Court did not expressly provide an example of such an "express stipulation" but I infer from the judgment as a whole that where two vessels are navigating in the same narrow channel the narrow channel rule is such an express stipulation; see paragraphs 116-119. The Supreme Court said that an example of a "compelling necessity" to disapply or override the crossing rule was where one vessel is navigating in a narrow channel and another vessel is "preparing and intending to enter it, and already shaping (i.e. adjusting her course and speed to do so), on her final approach"; see paragraph 135. The Supreme Court identified the navigation of the vessel Orinoco in *The Kaiser Wilhem der Grosse* [1907] P.36 and 259, the navigation of the vessel City of Lyons in *The Canberra Star* [1962] 1 Lloyd's Reports 24 and the navigation of the vessel Yao Hai in *Kulemesin* as examples of a "Group 2 vessel". In such a case the necessity to disapply the crossing rule arises because the vessel "is already having her navigation determined by the need to be in compliance with rule 9(a) when she reaches the entrance, that is, to arrive at her starboard side of it, on a course which enables her to continue on her starboard side of the channel"; see paragraph 138.

28. Although the Supreme Court said (in paragraph 135) that "it was common ground, and rightly so, that the narrow channel rules, and not the crossing rules, apply as between

the leaving vessel and a vessel in Group 2", I do not understand the "compelling necessity" to arise from the application of rule 9, the narrow channel rule. The narrow channel does not on its terms apply to a vessel shaping to enter the channel. Rule 9(a) only applies to a "vessel proceeding along the course of a narrow channel" and a vessel shaping to enter a channel is not navigating along the course of the channel. If the rule did apply the crossing rule would be disapplied by "express stipulation" and that was not suggested by the Supreme Court. This is why Lord Clarke identified the source of the duty of the vessel approaching a narrow channel and intending to proceed along it as one of good seamanship. However, paragraphs 66 and 85 of the judgment of the Supreme Court strongly suggest that this view did not find favour with the Supreme Court.

29. In the present case, although ALEXANDRA 1 was waiting for the pilot vessel to approach her so that she could embark the pilot and then enter the narrow channel and although those on board EVER SMART appreciated (or ought to have appreciated) that ALEXANDRA 1 was waiting to embark a pilot for that purpose, ALEXANDRA 1 was not "on her final approach" and was not "shaping to enter the channel". The Supreme Court held that in such circumstances there was no "compelling necessity" to disapply the crossing rule because ALEXANDRA 1 was not yet shaping her course to enter the narrow channel on the starboard side of it and so "could have kept clear of EVER SMART by stopping or by turning to starboard"; see paragraph 138. She was a "Group 3 vessel".

30. This explanation of the circumstances in which the crossing rule is disapplied or overridden may be described, with respect, as novel, in the sense that in none of the previous cases dealing with the application of the crossing rule in the vicinity of a narrow channel had an Admiralty judge spoken of a "compelling necessity" to disapply the crossing rule.

31. In *The Kaiser Wilhelm der Grosse* Gorrel Barnes J. had merely said that " having regard to the locality and the difficulties there are in applying that rule, the probability is that it [the crossing rule] is not applicable" (see p. 44). In argument in that case (see pp.38 and 39) counsel had referred to *The Knaresbro,* an earlier decision of Gorrel Barnes J. *The Knaresbro* had concerned a collision at the entrance to the Suez Canal between a vessel leaving the Canal and a vessel entering the Canal from the Great Bitter Lake. Gorrel Barnes J. had been inclined to the view that the crossing rule did not apply either because the narrow channel rule applied to both vessels or because "if we start with the notion that the vessels were crossing, yet in the circumstances they were not vessels which would continue to cross; but, having regard to the dangers of navigation and of collision with each other, would naturally and necessarily act so as to pass port side to port" (see the note of the case at [1907] P. 36 at p.48 fn.2). It seems likely that Gorrel Barnes J. had that reasoning in mind when in *The Kaiser Wilhelm der Grosse* he referred to the locality and the difficulties of applying the crossing rule.

32. In *The Canberra Star* Hewson J. also had regard to the circumstance that on the facts of the case before him the two vessels would be able to pass safely port to port and so the crossing rule would not apply (see p. 28).

33. In *The Kulemesin* Lord Clarke commented that the observations of Hewson J. seemed to be "good sense" and explained that a vessel "intending to proceed along" a narrow

channel or a vessel "shaping to enter" a narrow channel should, as a matter of good seamanship", navigate in such a manner that when she reached the channel she is on the starboard side of the channel in accordance with rule 9 (see paragraph 218).

34. The sense of the reasoning of the judges in those earlier cases is that the crossing rule did not apply because the vessels would be expected to pass safely port to port. No mention was made of a "compelling necessity" to disapply the crossing rule. Counsel for EVER SMART informed me that in their submissions to the Supreme Court they did not use the language of a "compelling necessity". It appeared to me from the materials which I was shown that counsel used language which reflected the reasoning of the judges in those earlier cases; see paragraphs 35-39 of EVER SMART's Written Case, paragraph 3 of the document entitled "Appellants' Propositions as to the Principles to be derived from the Authorities on the Application of the Crossing Rules in Narrow Channel Situations" and counsel's oral argument on 5 October 2020 at p.92 line 15 – p.97 line 8. Thus counsel's submission in paragraph 35 of the Written Case was that where the outbound vessel was positioned on the starboard side of the channel exit and another vessel was positioned to enter the channel on its starboard side of the channel entrance "there would be no reason to apply the crossing rule because the vessels would not be crossing in a situation involving a risk of collision." Paragraph 3 of the "Appellants' Propositions" was that the narrow channel rule applied by reason of a "limited extension" to the rule on the grounds that the vessel should be "treated as already in the channel". (In this regard reference was made to the Greer LJ's suggestion in *The Treherbert* [1934] P.31 at p.51 that " it may very well be that good seamanship directs that the position is to be treated as if she were already in the channel and not treated as a case of crossing ships.") In oral argument counsel explained that if ALEXANDRA 1 turned to starboard at C-5 or C-4 "there is no crossing situation because the vessel is not going to cross, she is now going to come down on your portside …….a crossing situation applies, but then you may enter a new phase where it no longer applies because the vessel is no longer going to cross" (see p.93 of the transcript at lines 1-11).

35. The reasoning of the judges in the earlier cases enables one to say that the crossing rule does not apply because the vessels are not crossing so as to involve risk of collision. The Supreme Court has now explained that the earlier three cases should be understood as exemplifying a "compelling necessity" to disapply the crossing rule and has drawn a distinction between a vessel approaching a channel and intending to proceed along it and a vessel "on her final approach" and shaping to enter the channel". In the future, where a collision occurs between a vessel approaching a narrow channel, intending to proceed along it, and a vessel exiting the channel, it is inevitable that there will be an enquiry as to whether the former vessel was in fact "on her final approach" and "shaping to enter the channel". If she is, the crossing rule is disapplied. If she is merely approaching the channel and intending to proceed along it, the crossing rule will continue to apply. In such cases the source of the "compelling necessity" to disapply the crossing rule will no doubt be addressed. If the source is neither the narrow channel rule (because it does not apply to such a vessel) nor good seamanship (because that did not find favour with the Supreme Court) it must be some other concept.

36. It may be that what the Supreme Court had in mind by its use of the phrase "compelling necessity" was that, when a vessel was "on her final approach" and "shaping to enter the channel", the crossing rule, which previously applied, no longer applied because

there was no longer a crossing situation which involved a risk of collision. Another explanation of the language used by the Supreme Court is that the Supreme Court had in mind that once a vessel was on her "final approach" she was, in sense, committed to those adjustments of course and speed which were necessary to enable her to arrive at the entrance to the channel and on the starboard side of it so that she no longer had the freedom of action required to keep out of the way of the other vessel.

37. As between these two explanations I favour the first explanation because (a) it is consistent with, and supported by, the sense of the reasoning in the three earlier cases (the decisions in which were not doubted by the Supreme Court, see paragraphs 126-133 of its judgment) and (b) it reflects the argument addressed to the Supreme Court, albeit that the Supreme Court chose to express that argument by reference to the notion of a "compelling necessity" to disapply the crossing rule. On this basis the distinction between a Group 2 vessel and a Group 3 vessel is that in the former case the two vessels are not crossing so as to involve risk of collision and so the crossing rule does not apply whereas in the latter case the two vessels are crossing so as to involve risk of collision so that the crossing rule does apply. Although the Supreme Court (in paragraph 141 of its judgment) contemplated mariners determining by observation of the approaching vessel whether she is "shaping to enter the channel, adjusting her course so as to reach the entrance on the starboard side of it, on her final approach", Rule 15 merely requires mariners to observe whether the approaching vessel is crossing so as to involve risk of collision. My preferred understanding of the Supreme Court's judgment has the distinct advantage that it reflects the language of Rule 15 with which all mariners are familiar and are used to applying. It is consistent with the Supreme Court's approach of interpreting the Collision Regulations "in a practical manner so as to provide clear and readily ascertainable navigational rules capable of application by all mariners" (see paragraph 41 of its judgment).

38. The distinction drawn by the Supreme Court between a Group 2 vessel (where the crossing rule was disapplied) and a Group 3 vessel (where the crossing rule continued to apply) was the subject of a submission by counsel for ALEXANDRA 1 that a Group 3 vessel could, by choosing to shape to enter the channel, bring about the disapplication of the crossing rule. I shall return to that submission later in this judgment.

<u>The crossing and narrow channel rules applying at the same time</u>

39. The third aspect of the Supreme Court's decision which it is necessary to mention is that the Supreme Court was not troubled by any confusion which I thought might be induced in the minds of mariners if both the narrow channel rule and the crossing rule applied to EVER SMART. I was influenced, as I thought Willmer J. in *The Empire Brent* [1948] 81 Lloyd's Law Reports 306 and Lord Clarke in *The Kulemesin* had been, by the consideration that the crossing rule was capable of imposing obligations upon EVER SMART as the stand on vessel which were different from those imposed upon her by the narrow channel rule. That would or might give rise to what Lord Clarke described as "considerable scope for confusion" (see paragraphs 51-53 of my judgment). The Court of Appeal was also of the view that there was scope for confusion (see paragraphs 63(ii) and 74(ii) of the judgment of Gross LJ.)

40. The Supreme Court disagreed with this approach (see paragraphs 69 and 140). The Supreme Court appeared to accept that there is a tension between the obligation of the

stand-on vessel under the crossing rule to keep her course and speed and the obligation of that vessel to comply with the narrow channel rule but considered that such tension is to be resolved by treating the obligation to maintain course and speed as "moulded for the purpose of permitting compliance with" the narrow channel rule (see paragraph 69) or by regarding the duty to keep course and speed as including doing so in compliance with the narrow channel rule (see paragraph 140). Thus, when navigating a narrow channel, mariners will have to bear in mind that understanding of the duty of the stand-on vessel pursuant to Rule 17 to "keep her course and speed". Only if that is done will the "scope for confusion" identified by Lord Clarke be dispelled.

41. Counsel for the EVER SMART did not accept this understanding of the judgment of the Supreme Court and submitted that the crossing rule and narrow channel could both apply (referring to paragraphs 120-123 of the judgment of the Supreme Court and the cases there cited). That is indeed what the Supreme Court held. But the Supreme Court also considered that the duty of the stand on vessel to keep her course and speed in a narrow channel requires the stand on vessel to comply with the narrow channel rule. Otherwise there must be scope for confusion in the mind of the mariner. Does he, if he has strayed onto the port side of the channel and a crossing situation then arises, keep his course on the port side of the channel or does he alter course to starboard to regain the starboard side of the channel? The Supreme Court's judgment has provided an answer to that question. Since it was accepted that in this case EVER SMART was obliged to comply with the narrow channel rule counsel's disagreement with my understanding of the Supreme Court's judgment is not, I think, of any consequence when apportioning liability in this case.

The faults of ALEXANDRA 1

42. For the reasons given by the Supreme Court the crossing rule applied and ALEXANDRA 1 was the give-way vessel. It is therefore sensible to start with an assessment of her faults.

General points

43. The duty of the give-way vessel, pursuant to Rules 15 and 16, is to take early and substantial action to keep well clear of the other vessel. Rule 8(a) requires action to avoid collision to be taken in ample time. *Marsden and Gault on Collisions at Sea* 15th ed paragraph 7.338 describes Rule 16 as "overlapping with r.8(c) which provides for any action to be taken in ample time". (The reference to "ample time" is in fact in Rule 8(a), though Rule 8(c) refers to action being taken in "good time".) There was some debate before me as to how to read these obligations together. Counsel for EVER SMART submitted that in a crossing case it is the particular words of Rules 15 and 16 which should govern the conduct of the give-way vessel rather than the general words of Rule 8. However, I note that the Supreme Court stated at paragraph 60 of its judgment that "Rule 8 contains detailed guidance" as to the conduct of the give-way vessel. Effect must therefore be given both to Rule 16 and Rule 8. I consider that the concept of "ample time" (or "good time") cannot be used to detract from the obligation to take early and substantial action to keep clear of the other vessel. The action taken must be both early and in ample time (or good time). If it is early it is very likely to be in ample time (or good time).

44. The object of the crossing rule is to prevent the development of a close quarters situation which involves a risk of collision. This is reflected more generally in Rule 8(c), in *The Majola II* [1993] 1 Lloyd's Reports 48 at pp.50-51 per Sheen J. and in *The Sanwa* [1998] 1 Lloyd's Reports 283 at p.299 per Clarke J. The requirement for "substantial" action has been memorably described by Willmer J. in *The Billings Victory* (1949) 82 Lloyd's Law Reports 877 at 881 (and by advocates in the Admiralty Court ever since) as an obligation to act "handsomely, so as to leave the stand on vessel in no possible doubt as to what the give way vessel is doing".

The competing submissions

45. Counsel on behalf of EVER SMART submitted in writing that ALEXANDRA 1 should have taken all her way off and waited about a mile from the no.1 buoys by putting her engines dead slow astern by C-15 at the latest, as illustrated in plot 2 of the counter-factual plots prepared on behalf of EVER SMART in which plot the vessels would pass at a distance of 1.4 cables. However, it was clear from counsel's oral submissions that the case of EVER SMART was not limited to such a case but that a combination of engine and starboard helm movements might be the appropriate action. Thus plot 3 of the counter-factual plots prepared on behalf of EVER SMART models ALEXANDRA 1 putting her engines to dead slow ahead at C-15 and altering course to starboard using 15 degrees of starboard helm, resulting in the vessels passing each other at a distance of 2.8 cables. Plot 4 models the same engine action but 35 degrees of starboard helm at C-15 and results in a passing distance of 3.8 cables. Although counsel's written submissions referred to engine and helm action as late as C-5 or C-4 it was clear from counsel's oral submissions (and indeed had been clearly stated in paragraphs 4(iii), 31(ii) and 34 of counsel's written submissions) that action at C-5 or C-4 was regarded as too late.

46. Counsel on behalf of ALEXANDRA 1 submitted that ALEXANDRA 1 would have discharged her duty by turning to starboard at C-5 or C-4 towards the channel. It was further submitted that pursuant to the decision of the Supreme Court "it would have been perfectly seamanlike and compliant with the Collision Regulations for ALEXANDRA 1 to shape to enter the channel at C-5 or C-4, and adjust her course so as to enter the channel on her starboard side, converting herself from a Group 3 vessel into a Group 2 vessel, at which point the Crossing Rules would have been overridden."

47. In my first judgment I had found that ALEXANDRA 1, as a result of a faulty aural lookout, had failed to turn to starboard at C-5 or C-4. It was thus the submission of counsel for ALEXANDRA 1 that the application of the crossing rule to ALEXANDRA 1 added nothing to her navigational fault and that there was in reality no need for any re-apportionment (see paragraphs 94 and 111 of counsel's skeleton argument).

The submission of law

48. Before considering what questions were put to the Assessors it is necessary to deal with the submission of counsel which was based upon the judgment of the Supreme Court.

49. Counsel for ALEXANDRA 1 submitted that "it follows from the Supreme Court's decision" that it would have been seamanlike and compliant with the Collision Regulations for ALEXANDRA 1 to shape to enter the narrow channel at C-5 or C-4 and to adjust her course so as to enter the narrow channel on her starboard side, thereby

"converting herself from a Group 3 vessel into a Group 2 vessel, at which point the Crossing Rules would have been overridden".

50. If this submission is intended to mean no more than that ALEXANDRA 1, having shaped to enter the narrow channel at C-5 or C-4, would thereafter not be subject to the crossing rule then it may well be right, depending upon the circumstances. But if it is intended to mean that ALEXANDRA 1, having shaped to enter the narrow channel at C-5 or C-4, would be regarded as never having been subject to the crossing rule that would be a surprising conclusion. The Supreme Court has held that from about C-23 the vessels were on crossing courses. Assuming that early and substantial action should have been taken by, say, C-15, a conclusion that a failure to take that action could be ignored in the event that ALEXANDRA 1 at C-5 or C-4 shaped to enter the channel on her final approach would undermine the reasoning of the Supreme Court.

51. It may be that counsel was not in fact making this suggestion but was simply saying that an alteration of course to starboard would have been sufficient compliance with the crossing rule. But counsel did not make that clear. Indeed, during counsel's oral submissions it appears that both points were being taken: "We have two main strands. One, you can convert by altering course to starboard at C-5 to take yourself out of the regime, but we also say that that would have been action permitted under Rule 16 for the give way vessel". Counsel's written submissions provided after receipt of the Assessors' advice appeared to be to the same effect, see paragraphs 4-5 and 16-17. In particular counsel submitted in paragraph 17 that it "is not an issue of seamanship, it is a question of law, and of construction of the Supreme Court's judgment. It is a key question at this stage of the dispute."

52. I therefore think that I must deal with the apparent suggestion that by altering course towards the channel at C-5 or C-4 the crossing rule was disapplied with retrospective effect.

53. I shall consider, first, the reasoning of the Supreme Court. The relevant paragraphs are paragraphs 134-145. I have read those paragraphs several times. In my judgment they give no support for the suggestion that a Group 3 vessel, to which the crossing rule applied, may, by deciding thereafter to shape a course to the channel on her final approach to the channel, convert herself from a Group 3 vessel to a Group 2 vessel and thereby disapply the crossing rule with retrospective effect. The Supreme Court did not address any such question. The Supreme Court merely envisaged three "broad" Groups of vessels who may be found in the area just outside the entrance to the channel; see paragraph 134. The Supreme Court concluded that the crossing rule was only "overridden" or "disapplied" in the case of Group 2 vessels; see paragraphs 137-139, 141-142 and 145. The Supreme Court did not address the question raised by counsel's submission. In my judgment it would not be a sensible inference to draw from the Supreme Court's three broad Groups of vessels which might be met in the area just outside the channel that a vessel could choose to convert herself from a Group 3 vessel to a Group 2 and thereby retrospectively disapply or override the crossing rule. Obviously, vessels will in fact move from being a Group 3 vessel (a vessel waiting outside the channel and so not on her final approach to the channel) to being a Group 2 vessel (by commencing her final approach to the channel and shaping to be on the starboard side of it when it is reached). Such a manoeuvre may or may not be in accordance with the crossing rule (if it applies) or good seamanship (if it does not).

Whether or not it is in accordance with the applicable rule will depend upon an analysis of all the circumstances of the particular case. If there was a prior breach of the crossing rule (or of good seamanship), there does not appear to me to be any warrant for the suggestion that the crossing rule is disapplied retrospectively. Counsel suggested that any prior breach would not in the circumstances be causative of a later collision. But causation is a question of fact to be answered by reference to all the circumstances of the particular case.

54. Counsel sought to derive support for their submission from the submissions made by counsel for EVER SMART to the Supreme Court. In their Written Case at paragraph 39 counsel had submitted that in a case such as the present "…the crossing rules will apply to both vessels until such time as the vessel entering the channel has legitimately taken up a channel course in accordance with a rule of good seamanship. At that stage the vessels would then have definitely entered a "new phase" so the crossing rules no longer apply: see *The Orduna* [1921] 1 AC 250 at pp.255-6 and 259-260." I do not read this submission as contemplating a retrospective disapplication of the crossing rule. Rather, it is saying that after the "channel course" has been taken up the crossing rule does not thereafter apply. Reliance was placed on counsel's oral submissions on 5 October 2020 at p.92 line 15 to p.97 line 8. Those submissions were to the effect that if ALEXANDRA 1 turns to starboard at C-5 or C-4 "there is no crossing situation because the vessel is not going to cross, she is now going to come down your port side" (p.93 lines 1-4), "you may enter into a new phase when it no longer applies because the vessel is no longer going to cross (p.93 lines 10-11), and "Rule 15 continues to be engaged until Rule 15 ceases to be engaged. C-5, the vessel turns sharply to starboard to put herself down her side of the channel. The crossing rule ceases to apply" (p.94 line 25 – p.95 line 3). Again, I do not understand any of these submissions to say that if and when the vessel alters course to starboard at C-5 or C-4 the crossing rule is to be regarded as not having applied before that alteration of course. Counsel was merely saying that after such an alteration the vessels would no longer be crossing and so the crossing rule would no longer apply. As explained earlier in this judgment (see paragraph 37 above) that is my preferred understanding of how the Supreme Court used the phrase "a compelling necessity" to disapply the crossing rule. The basis of the "disapplication" of the crossing rule was, I think, that once the inbound vessel was on a "channel course" (to use counsel's phrase) the crossing rule no longer applied because the vessels were no longer crossing so as to involve a risk of collision.

55. For these reasons I must reject the submission of law made by counsel for ALEXANDRA 1 based upon the judgment of the Supreme Court.

56. In the context of making this submission counsel also relied upon passages in my first judgment. Reliance was placed on paragraphs 93-95 where I found, having taken advice from the Assessors, that there was no obligation upon ALEXANDRA 1 to keep a minimum distance from buoys no.1. Reliance was also placed on my finding at paragraph 100 that, but for the master's misunderstanding as to what EVER SMART intended to do, he would, at C-5 or C-4, have altered course to starboard in order to approach the channel in such a way as to enter it on a down channel course and on the starboard side of it which would entail the two vessels passing port to port in the approaches to the channel. It was therefore submitted that it was safe to proceed towards buoys no.1 and that an alteration of course to starboard at C-5 would be seamanlike. Furthermore, based upon a report by the master of EVER SMART (dated 17 March

2015), it was submitted such a turn was what the master of EVER SMART expected. These further arguments, which are derived from my first judgment and from the report made by the master of EVER SMART, can more appropriately be dealt with when considering the advice of the Assessors in this case as to what action ought to have been taken by ALEXANDRA 1 as the give-way vessel.

The questions for the Assessors

57. I therefore turn to the questions put to the Assessors.

58. There is a range of times which can fairly be described as "early" upon the assumption that ALEXANDRA 1 ought to have realised that the vessels were on bearings which were not changing appreciably a short time after the vessels came in sight of each other at 2319 or C-23.

59. I consider that the question of what action Rules 15 and 16 required of ALEXANDRA 1 therefore raises two questions of seamanship; the first relating to the time when ALEXANDRA 1 ought to have appreciated that the vessels were on crossing courses and the second relating to the time when early and substantial action ought to have been taken and what that action ought to have been. Having been invited to comment upon the proposed questions (in accordance with the now established procedure) counsel for ALEXANDRA 1 requested that a question specifically concerned with C-5 or C-4 be put to the Assessors. I agreed to do so having regard to the importance of that question to the case of ALEXANDRA 1. I therefore put the following questions to the Assessors.

Question 1:

Upon the assumption that the vessels were in sight of one another at about 2319 or C-23 and upon the assumption (as has since been determined) that from C-23 the vessels were in fact on bearings that did not appreciably change, by what time would those on board ALEXANDRA 1 have been reasonably able to appreciate that the vessels were on bearings that did not appreciably change ?

Question 2:

Upon the assumption that those on board ALEXANDRA 1 appreciated that the bearing of EVER SMART from ALEXANDRA 1 was not changing appreciably by the time identified in answer to Question 1,

(a) at what time ought action to have been taken by ALEXANDRA 1 in accordance with Rules 8,15 and 16 and what action ought that to have been?;

(b) would it have been in accordance with Rules 8,15 and 16 for ALEXANDRA 1 to have altered course to starboard and shape to line up with her own starboard side of the approaches to the channel at C-5 or C-4?

60. The Assessors prefaced their answers with the following comment

> "The collision between ALEXANDER 1 and EVER SMART occurred within the port limits of Jebel Ali port in the Pilot Boarding Area, where ships may be manoeuvring at minimum

> or slow speed and on a course optimized to embark or disembark a pilot safely. All vessels in the port limits should be taking special care to minimize danger to each other and pilots. We consider Rule 2 is particularly pertinent here, in recognition of the special circumstances in the approaches to a port."

61. Their answer to Question 1 was:

> "We consider five minutes sufficient in this case to correlate the ARPA contact with the visual sighting of EVER SMART. This would allow assessment of a sequence of bearings and electronic data, which would indicate a developing close quarters situation, at or about C-18 or 2324.
>
> In the normal course of events, three minutes would be sufficient to make that appreciation. Given the number of flashing lights from buoys and beacons, the background light from shore lights of Jebel Ali and Dubai, and the range apart of the vessels, we consider five minutes appropriate."

62. Their answer to Question 2(a) was:

> "We consider they should have taken action at C-18 at 2324 after they had assessed the danger.
>
> The action to take was a substantial alteration of course to starboard to a heading of at least 180 degrees.
>
> In essence, to comply with Rules 8, 15, and 16 action should be early, substantial, and apparent to the other ship. In the interests of good seamanship they should not navigate any closer to the entrance to the channel or cross an extension of the southern boundary of the channel, when EVER SMART was approaching the end of the channel and the pilotage boarding area.
>
> With this action EVER SMART would see the red port side light of ALEXANDER 1 and know ALEXANDER 1 had taken action in accordance with Rule 15. This would open the closest point of approach to three cables or more and she would keep clear of the entrance to the channel.
>
> ALEXANDER 1 is likely to need to continue the starboard turn for more than 360 degrees to remain within the Pilot Boarding Area, navigationally safe and clear of other traffic. In doing so they would have to take care not to impede EVERSMART as they came out of the turn.
>
> From C-15 ALEXANDER 1 had her engines at Dead Slow Ahead or Slow Ahead with her helm at Hard to Starboard, maintaining minimum way into the wind and current while holding a heading between 089 degrees and 101 degrees. To

> conduct the "substantial" alteration of course she would likely have needed to increase the engine revolutions."

63. Their answer to question 2(b) was:

> "An alteration of course to shape up to the channel at C-4 or C-5 would have required only a small alteration of course taking into account the effect of wind and current on the vessels course made good (set and drift). It would not, therefore, have met the test of being early, substantial, and readily apparent on the bridge of EVERSMART visually or by radar (Rule 8b). It would also have required an increase in engine revolutions for the rudder to take effect, to turn the ship to starboard and then maintain steerage. This would continue to bring the vessel closer to the head of the channel and would not remove the developing close quarters-situation and risk of collision."

64. After receiving the advice of the Assessors counsel for ALEXANDRA 1 submitted that the court should not accept the advice in answer to question 2 because it was said to have been based upon certain flawed assumptions. In response counsel for EVER SMART said that the advice had not been based upon any flawed assumptions and that it should be accepted.

65. Counsel for ALEXANDRA 1 requested a further hearing.

66. The procedure to be followed with regard to advice from assessors in the Admiralty Court was described by Gross J. (with the approval of Steel J., the Admiralty Judge) in *The Global Mariner* [2005] EWHC 380 (Admlty) at paragraphs 14-16 as follows:

> "14. As it seems to me, in the light of The Manzanillo II, the correct course to adopt is as follows:
>
> i) The range of topics on which advice might be sought from the Assessors should be canvassed with counsel by, latest, the stage of final submissions.
>
> ii) Ordinarily, the questions asked of the Assessors by the Judge should not stray outside the range previously discussed with counsel; should they do so, however, there are safeguards contained in iii) and iv) below.
>
> iii) The questions ultimately put by the Judge, together with the answers given by the Assessors, should be disclosed to counsel before any draft judgment is handed down.
>
> iv) Counsel should thereafter be given the opportunity to make submissions to the Judge, as to whether the advice given by the Assessors should be followed. Ordinarily, any such submissions should be in writing; but if there is good reason for doing so, an application could be made for an oral hearing. The Judge will consider any such submissions before finalising his judgment.

> v) Generally speaking, the interests of proportionality and finality will make it unnecessary to repeat the procedure after the Judge and the Assessors have had the opportunity of considering the parties' submissions and any suggested further or revised questions. Accordingly, unless the Judge in his discretion thinks it appropriate to disclose them to counsel before the judgment is finalised, any further or revised answers will simply be recorded in the judgment, together with the Judge's decision as to whether or not to accept the Assessors' advice and his reasons for doing so.
>
> 15. Pausing there, I have had the benefit of discussing this proposed procedure with David Steel J, who authorises me to say that he agrees with it. It should accordingly be treated as the proper practice in all collision cases.
>
> 16. The aim is to strike the right (and proportionate) balance between the desirable goal of transparency on the one hand and the need to curb the cost and delay inherent in the "ping pong" of post-hearing exchanges on the other. No doubt both the practice and the balance will be refined by experience in due course."

67. It is to be noted that Gross J. contemplated both the possibility of a further oral hearing and also the possibility of further or revised Questions to the Assessors. Ordinarily a further hearing will cause more delay and expense than further questions to the Assessors. I therefore consider that a further hearing will only be appropriate where a further hearing is necessary to dispose fairly of the issues between the parties.

68. The first suggested flawed assumption was that Rules 8, 15 and 16 require action at "the earliest time". That the Assessors made this assumption was suggested because the Assessors had advised in answer to Question 1 that C-18 was the time when those on board ALEXANDRA 1 could reasonably have appreciated that the vessels were on bearings which did not appreciably change and had then advised in answer to Question 2(1) that action ought to have been taken pursuant to Rules 8,15 and 16 by C-18. Counsel for EVER SMART did not accept this suggestion. They said that, "reading the Assessors' Answers to Questions 1 & 2 together, the Assessors have not stated that this was the "earliest time" that A1 should have appreciated that there was a developing close quarter situation. In the normal course of events three minutes would be sufficient but the Assessors have allowed a further two additional minutes." I am not sure that the Assessors approached the matter in that way and so considered it appropriate to ask a further question of the Assessors (see below). I did not consider that a further oral hearing was required to dispose fairly of this issue.

69. The second and third suggested flawed assumptions were that the Assessors had overlooked the proximity of ZAKHEER BRAVO (the tug and tow) and the presence of other vessels in the Pilot Boarding Area. It was suggested that the starboard helm action advised by the Assessors would have risked a close quarters situation with ZAKHEER BRAVO and the other vessels. This was not accepted by counsel for EVER SMART who provided plots (3a and 4a) showing where ZAKHERR BRAVO and the other vessels were. I again formed the view that a further oral hearing was not necessary

to dispose fairly of this issue. The better course was to ask the Assessors about these matters (see below).

70. The fourth suggested flawed assumption related to the last paragraph of the Assessors' answer to Question 2(1). It was pointed out that the reference to the helm of ALEXANDRA 1 being at hard to starboard from C-15 was inconsistent with my finding in my first judgment and that this may have had a bearing on the Assessors' answer to Question 2(2). I again formed the view that the better course was to ask the Assessors a further question.

71. In their comments on the Assessors' Advice counsel for ALEXANDRA 1 relied upon other matters of fact and of law. Whilst those are matters for the court to bear in mind when determining issues of fault I was not persuaded that they were matters which either required a further oral hearing (they had already been debated at the main hearing) or required further questions to be put specifically to the Assessors. Findings of fault are made by reference to not only the expert advice of the Assessors but also to other matters of fact or law which are relevant to the determination of fault. The role of the Assessors is not to determine issues of fault on the basis of all circumstances of the case but to provide expert opinion to the court on questions of seamanship.

72. In the interests of transparency I informed counsel that I proposed to put further questions to the Assessors and provided a draft of the proposed questions. Counsel for EVER SMART had no objection to that course of action. Counsel for ALEXANDRA 1 also had no objection save that it was suggested that the further questions refer to plot 21 (for C-18) provided by ALEXANDRA 1 in place of plots 3a and 4a (for C-15) provided by EVER SMART. I decided to refer to both parties' plots.

73. In the light of my intention to put further questions to the Assessors counsel for ALEXANDRA 1 did not maintain their request for an oral hearing so long as they had the opportunity to comment on the further answers.

74. The further questions put to the Assessors were therefore as follows:

> "In relation to your Answer to Question 2(1):
>
> (i) Was C-18 the latest time at which in your opinion "early and substantial action" to keep out of the way of EVER SMART could have been taken by ALEXANDRA 1 ? If not, when was the latest time in your opinion at which "early and substantial action" could have been taken ?
>
> (ii) Did you overlook the proximity of ZAKHEER BRAVO (the tug and tow) ? Would the manoeuvre which you have advised bring about a close quarters situation with either the tug and tow or the anchored vessels ? If so, does that have any bearing on your advice to the court ? Please note that the position of the tug and tow and the anchored vessels have been marked on plot 21 provided by ALEXANDRA 1 (prepared by Mr Ledger who also produced all of the counterfactual plots relied upon by the Alexandra 1 interests in Bundle I tab 6 – equivalent to tab 3 of the Assessors' Bundle) and on plots 3(b) and 4(b) provided by EVER

> SMART (prepared by TMC who provided the counterfactual plots relied upon by EVER SMART). Plot 21 models the helm action suggested by you at C-18. Plots 3b and 4b model 15 degree and 35 degree starboard helm action at C-15.
>
> In relation to your Answer to Question 2(2):
>
> In the final paragraph of your answer to Question 2(1) you state that the helm of ALEXANDRA 1 was at hard to starboard from C-15. This is indeed stated in the Schedule of Engine and Helm orders. However, in my judgment at paragraph 16 I found that the helm of ALEXANDRA 1 was probably put amidships sometime after C-22 but that it was difficult to draw a reliable conclusion as to when that order was given. Does my finding have any effect on your advice to the court ?"

75. The Assessors prefaced their answers with this comment:

> "We would like to point out that delays to pilots and pilots transferring from an outgoing ship to an incoming ship are not uncommon, hence loitering in a Pilotage Boarding Area (PBA) awaiting a pilot is not unusual. The outward bound ship should be aware of movements in the PBA especially if their pilot is transferring to a ship ready in the PBA. As we identified in our first questions, we consider Rule 2 is particularly pertinent in these circumstances."

76. The Assessors' answer to further question (i) in relation to Question 2(1) was as follows:

> "We consider the latest time C-15.
>
> In an earlier draft of our response, we had considered a range C-18 to C-10, but by interpolating the various plots and counterfactuals, decided C-10 would not leave an adequate CPA, which we considered should be at least three cables. In addition, A1 would by C-10 be too close to the channel entrance given the uncertainty of the time the pilot would board. In conclusion, we reduced the range to C-18 to C-15. The question specified a time, so we selected what we considered the optimal time, C-18, to meet the various criteria for action in the Rules.
>
> We considered A1 should pass EVER SMART by a minimum CPA of no less than 3 cables. With reference to the CPA of less than one cable had they passed in the channel, we consider in this circumstance they would have been on reciprocal headings, in communication, probably conned by experienced pilots. The CPA considered appropriate in a narrow channel in controlled conditions would not, in the assessors' opinion, be sufficient in open water.

> With regard to a late alteration of course, when moving ahead the ship pivots around a point one-third of the ship's length. It is possible the engine room and accommodation or the cargo tanks may have been the point of impact with far more dire consequences."

77. The Assessor's answer to further question (ii) in relation to Question 2(1) was as follows:

> "We did not overlook the proximity of ZAKHEER BRAVO
>
> After considering the location and movement of the tug and tow we did not consider there was a risk of a close quarter situation, as our intention was a tight turn to the east of them. In accordance with good seamanship, the effects of any manoeuvre should be continuously monitored with regard to the position and location of other vessels. In the event of a potential close quarters developing, A1 had other options, including continuing the tight turn, stopping, or anchoring, and as she was making little speed could have anchored at very short notice. We are grateful for sight of Plots 21, 3b and 4b which appear to illustrate there was no risk of collision with the tug and tow or the anchored ships.
>
> The position and movement of the tug and tow, the position of the anchored vessels and the location of the channel entrance all had a bearing on our advice to Court. Importantly, A1 should have constantly monitored the outcome of the manoeuvre regarding navigation and prevention of collisions. We would have expected A1 to inform Port Control and the pilot on EVER SMART of the intention to turn to starboard and any subsequent action. He would have communicated with the tug and tow, via Port Control if necessary. If there was any doubt, JAPC told the tug at C-14 to cross behind A1 a mile clear. Plots 21 and 3b model the outcome of a 360 degree turn, which we identified as a potential outcome, but not the initial intention, which was to turn to a course of at least 180 degrees to comply with Rule 8b, readily apparent to the EVER SMART and illustrated in Plot 4b. By the time the ship was on a southerly heading, 1 & 2 buoys were approximately six - seven cables to the south east, and the southern edge of the PBA four to five cables south. Beyond the edge of the PBA water depth started to reduce. Recognizing that engine power would have been needed to make the turn, at dead slow ahead that distance would have been covered in approximately five minutes, before this time A1 would have had to act on one of the options identified earlier."

78. The Assessors' answer to the further question in relation to Question 2(2) was as follows:

> "We apologise for failing to note this detail of your judgement Paragraph 16. However, it had no effect on our answers. The point we were making was that A1 was making minimum way, counteracting the current and wind, trying to remain within the PBA and clear of the channel entrance, while waiting for the pilot. To do this we consider the helm would have been at hard to starboard for a substantial period to counteract the wind. To turn to starboard from this situation of status quo, he is likely to have needed more engine power to turn. Thereafter, with the wind broad on the port beam they may have needed more engine power to maintain their southerly course, with subsequent increase in speed over the ground. In considering the potential outcomes of this increase in speed, we suggested the turn may have to be continued or they could have taken one of the other options, anchor or stop, recognizing their proximity to the edge of the PBA and the channel entrance."

79. The Assessors' answer ended with this clarification of their responses to Questions 2(1) and 2(2):

> "The questions specifically referred to actions in accordance with Rules 8, 15 and 16."

Discussion

80. I accept the advice of the Assessors in relation to Question 1. Neither party disputed the advice. I therefore find that ALEXANDRA 1 ought to have appreciated by C-18 (or 2324) that the vessels were crossing so as to involve risk of collision.

81. The Assessors have further advised that, whilst the "optimal time" for ALEXANDRA 1 to have taken action was at C-18 (or 2324), the "latest time" at which early and substantial time could have been taken was C-15 (or C-2327). Such action was a substantial alteration of course to starboard to a heading of at least 180 degrees.

82. Before deciding whether to accept the advice of the Assessors in relation to Question 2(a) and (b) I shall first mention the reliance placed by counsel on my first judgment, on the report of the master of EVER SMART and on certain matters set out by counsel for ALEXANDRA 1 in their opening written submissions.

83. With regard to the reliance placed by counsel on my first judgment I shall first deal with the reliance placed on my finding at paragraphs 93-95, based upon the advice of the Assessors, that there was no obligation upon ALEXANDRA 1 to keep a minimum distance (5 cables had been suggested) from buoys no.1.

84. I think that reliance on this finding is misplaced. Before addressing questions of fault I had determined the dispute as to whether the crossing rule applied; see paragraphs 37, 38-70 and 71. I concluded that it did not. Thus the Elder Brethren were not asked a question specifically about the crossing rule. My finding was therefore made in the context of the crossing rule not applying. For that reason reliance on my finding is misplaced.

85. Reliance was also placed on the Assessors' advice in the first trial that it would have been "reasonable and good seamanship for the master of ALEXANDRA 1 to have approached the first pair of buoys keeping close to her own side of the entrance channel." It is the case that assessors in an appellate court speak with no greater authority than assessors at first instance; see *The Australia* [1927] AC 145 per Lord Birkenhead, *The Fina Canada* [1962] 2 Lloyd's Reports 445 per Willmer LJ and *The Savina* [1976] 2 Lloyd's Reports 123 per Lord Simon at p.131. By parity of reasoning it must also be the case that the assessors advising me on this occasion speak with no greater authority than the assessors who advised me at the first trial. However, the question put to the Assessors in the first trial was whether good seamanship required ALEXANDRA 1 to keep a certain minimum distance from buoys no.1. The question made no specific reference to the crossing rule. As the Assessors on this hearing have observed, the question asked of them related to the action required by Rules 8,15 and 16. I accept that there is a tension between the advice tended by the assessors at the first trial that there was no obligation upon ALEXANDRA 1 to keep a certain minimum distance from buoys no.1 and the advice tended by the assessors on this re-hearing that ALEXANDRA 1 should not get too close to the channel entrance given the uncertainty of the time the pilot would board. But, given that no question was asked of the assessors in the first trial with specific regard to the crossing rule, it would, I think, be unsafe to regard the advice given in the first trial as indicating that the Assessors considered that it would be compliant with the crossing rule for ALEXANDRA 1 to approach the first pair of buoys keeping close to her own side of the channel. Now that the Supreme Court has ruled that the crossing rule applied the advice tendered by the Assessors advising the court on this re-hearing should be preferred.

86. Reliance was also placed on my finding in paragraph 100 of my first judgment that, but for the master's misunderstanding as to what EVER SMART intended to, he would, at C-5 or C-4, have altered course to starboard in order to approach the channel in such a way as to enter it on a down channel course and on the starboard side of it which would entail the two vessels passing port to port in the approaches to the channel. I also do not consider that the finding in that paragraph assists counsel for ALEXANDRA 1 with regard to the crossing rule. A turn to starboard at C-5 or C-4 by ALEXANDRA 1 may have avoided the collision by enabling the two vessels to pass port to port but it does not follow that such action was the action required of ALEXANDRA 1 as the give-way vessel under the crossing rule. The action required of ALEXANDRA 1 pursuant to the crossing rule was to take early and substantial action so as to avoid a close quarters situation and to enable the vessels to pass at a safe distance. The limits of a close quarters situation or a safe passing distance will depend upon the characteristics of the vessels in question, their location and all the circumstances of the case. In the present case the counterfactual plot prepared by the Owners of ALEXANDRA 1 indicated a passing distance in the event that ALEXANDRA 1 had turned to starboard at C-5 of about half a cable (assuming EVER SMART was navigated as she was in fact navigated) or about 1.25 cables (assuming that EVER SMART had regained the starboard side of the channel) in the approaches to the channel. Whilst vessels navigating along the course of the channel (or, if a Group 2 vessel, in the approaches to a channel) might pass safely at between a half and 1.25 cables it does not follow that a give way vessel whose duty it is to avoid a close quarters situation can say that half a cable or 1.25 cables is not a close quarters situation. It manifestly is. In this regard it is to be noted that the Assessors, in their further answers, have advised that the passing

distance of less than one cable appropriate in a narrow channel would not be sufficient in open water.

87. Finally, counsel relied upon the report of the master of EVER SMART dated 12 February 2015 in which he informed his Owners that he relied upon the pilot advising that the vessels would pass port to port but that ALEXANDRA 1 "did not alter course to starboard". It was submitted by counsel that "EVER SMART was expecting ALEXANDRA 1 to alter course to starboard so as to line up, we would say, with the starboard approaches to the channel." In my first judgment at paragraph 81 I noted that there was no evidence in the audio record that the pilot advised the master that the vessels would pass to port and that it was likely that this was his own assumption. Further, there is no indication in his report that he was addressing the question of what action was required of ALEXANDRA 1 as the give way vessel under the crossing rule. (I have noted that he said that ALEXANDRA 1 "must keep clear and give me enough room to clear the channel" but in the context of the report he was contemplating ALEXANDRA 1 doing so at a late stage so as to enable a port to port passing in the approaches to the channel just after EVER SMART had cleared the channel.) I therefore do not find any cogent support in this report for counsel's submission as to what was required of ALEXANDRA 1 as the give way vessel.

88. Counsel for ALEXANDRA 1 identified 11 factors which, it was submitted, justified the conclusion that ALEXANDRA 1 would have discharged her duty under Rule 16 by turning to starboard at C-5 or C-4; see paragraph 78 of counsel's skeleton argument. These included the circumstance that Port Control advised ALEXANDRA 1 to be at buoys no.1 at 2315 or C-27, that ALEXANDRA 1 was waiting to pick up the pilot who had disembarked EVER SMART, that the pilot did not disembark until 2336 or C-6 and that it was in accordance with good seamanship for ALEXANDRA 1 to approach buoys no.1.

89. There are at least three difficulties with this submission. First, given that the Supreme Court has held that a vessel waiting to pick up a pilot will be subject to the crossing rule if she is nevertheless moving so as to involve risk of collision and that ALEXANDRA 1 was on the facts subject to the crossing rule as the give-way vessel from C-23 or shortly thereafter, the submission does not explain why action at C-5 or C-4 was "early" Whilst Rule 16 does not require the give-way vessel to act at the "earliest" time I find it difficult to accept that C-5 or C-4 can be described as an "early" time. Rather, it is almost the latest possible time. Second, the instructions or advice of Port Control cannot override Rule 16. Reliance was placed on *The Mystery* [1902] P. 115 but that was a case where there was a statute which obliged the ship to obey the directions of a dock master. It is not comparable to the present case. Third, the submission that it was in accordance with good seamanship to approach buoys no.1 relies upon the advice I received from the Assessors in the first trial; see paragraphs 93-95 of my first judgment. But, as already noted, the question to which that advice was the answer was asked with reference to the requirements of good seamanship. The question was not asked with specific reference to the crossing rule.

90. Since it was not until C-18 that those on board ALEXANDRA 1 ought to have appreciated that EVER SMART was on a bearing that was not changing appreciably C-18 was the earliest time at which action to keep out of the way of EVER SMART could have been taken. But the obligation is not to take action at the earliest time. The

further advice of the Assessors is that C-15 was the latest time at which early and substantial action could have been taken. Such action was, in the opinion of the Assessors, a substantial alteration of course to starboard.

91. Counsel for ALEXANDRA 1 had submitted, as already noted, that the advice of the Assessors was based upon flawed assumptions. In the light of the further questions and answers I do not consider that this criticism can be maintained. The Assessors have clarified that that in their view the latest time for early action was C-15. The Assessors have confirmed that they did not overlook the proximity of ZAKHEER BRAVO and that they consider, on the basis of the further plots provided by counsel, that there was no risk of collision with either the tug or the anchored ships. The Assessors have accepted that they had failed to note my finding that the helm of ALEXANDRA 1 was probably put amidships sometime after C-22 but that it was difficult to say when. However, they have explained that it had no effect on their advice.

92. Counsel for ALEXANDRA 1 next submitted, with the benefit of the additional plot 21 provided in response to the Assessors' initial advice, that a substantial alteration of course to starboard at C-18 (or, I infer, C-15) would have "risked causing confusion" and would have been "excessively cautious". It is true that in circumstances where ALEXANDRA 1 was waiting to embark the pilot such an alteration of course might not have been expected by either EVER SMART or Port Control. But I do not follow why it would have caused confusion such that it would have been un-seamanlike to make the bold alteration of course advised by the Assessors as being required by the crossing rule. I accept that to require a substantial turn at C-18 would have been cautious, because it would have led to a passing distance of 5.5 cables (on plot 21) whereas the required passing distance in the opinion of the Assessors was at least 3 cables. But a substantial turn at C-15 would have led to a passing distance, according to the plots prepared by EVER SMART, of 2.8 cables (on plot 3) or 3.8 cables (on plot 4). Such action would not have been cautious.

93. This argument was developed by counsel in their final submissions (commenting upon the further advice of the Assessors). It was submitted that the minimum distance of 3 cables was a "counsel of perfection." It was said that 3 cables is "far greater" than the distances in many of the plots relied upon by EVER SMART as evidence of "safe and permissible action" pursuant to Rule 16.

94. It is correct that the course of action advocated in paragraphs 24-26 of EVER SMART's Skeleton Argument, namely dead slow astern at C-15 (see plot 2) would produce a passing distance of 1.4 cables. However, counsel for EVER SMART recognised that the question of the appropriate course of action was a matter for the Nautical Assessors and accepted that there was a range of actions available to ALEXANDRA 1 (see paragraph 28 of their Skeleton Argument). Plots 3 and 4 modelled a starboard turn at C-15, which would have given rise to passing distances of 2.8 cables (15 degrees of starboard helm) and 3.8 cables (35 degrees of starboard helm).

95. The independent expert advice of the Assessors is that in open water the passing distance ought to have been at least 3 cables. Those advising EVER SMART have modelled manoeuvres which resulted in a passing distance of less than 3 cables (see, for example, plots 5, 6, 10 and 12 – action at C-10 – and plots 7, 11, and 13 - action at C-5). It is not clear that these were all put forward as safe passing distances. Indeed,

counsel for EVER SMART have said that they were "intended to demonstrate that if early and substantial action had not been taken (at or before C-15) there would have been a close quarters situation in various scenarios". This explanation does not fit well with plot 2 (see the previous paragraph) which models one of the actions advocated by counsel for EVER SMART. But even if the passing distance in plot 2 of 1.4 cables was put forward as a safe passing distance that is not, in my judgment, a good reason for not accepting the independent expert advice of the Assessors. I therefore accept the advice of the Assessors that the give-way vessel ought to have planned for a passing distance of at least 3 cables.

96. Counsel for ALEXANDRA 1 next submitted, relying upon three new plots (not seen by the Assessors), that the Assessors' opinion that action was required by C-15 was wrong. The Assessors advised a substantial turn to starboard at C-15. Plot 22 models a hard starboard turn by ALEXANDRA 1 at C-15 with engines at dead slow ahead and EVER SMART turning 17.5 degrees to starboard at C-4 to regain the starboard side of the channel, followed by hard starboard helm action after passing buoys no.1, with engines at manoeuvring full ahead. That produces a passing distance of 4.8 cables. Plot 22a models the same action by ALEXANDRA 1 but with EVER SMART manoeuvring as she in fact did. That produces a passing distance of 3.6 cables. Plot 23 models the same action by ALEXANDRA 1 at C-9 with EVER SMART regaining the starboard side of the channel and turning hard starboard on passing buoys no. 1 as in plot 22. That produces a passing distance of 3 cables.

97. Plots 22a and EVER SMART's plot 4 model the same action for both vessels at C-15 and produce similar results (passing distances of 3.6 and 3.8 cables). However, those plots have EVER SMART on the port side of the channel (as in fact happened). But EVER SMART did not depart from the starboard side of the channel until C-10 and so, at C-15, a vessel in the position of ALEXANDRA 1 could have expected EVER SMART to remain on the starboard side of the channel. For that reason the most appropriate plot for C-15 appears to be plot 22 which has EVER SMART on her starboard side of the channel. That plot indicates a passing distance of 4.8 cables. It also models a hard starboard turn once buoys no.1 are passed which appears to have increased the passing distance a little. If that were not allowed for the passing distance would not appear to have been less than, say, 4.5 cables had EVER SMART navigated on the starboard side of the channel throughout. This passing distance is significantly greater than EVER SMART's plot 4 (3.8 cables) but that plot has EVER SMART on the portside of the channel.

98. Thus plot 22 suggests that the give-way vessel, if planning to pass at a distance of at least 3 cables, could reasonably have taken action later than C-15.

99. Plot 23 shows that action at C-9 would have resulted in a passing distance of 3 cables, or a little less if one does not take into account the late hard starboard action on passing buoys no.1. Since at least 3 cables was required I think that plot 23 indicates that action at C-9 would be too late; the margins were too tight to be sure of having a passing distance of at least 3 cables.

100. EVER SMART's plot 6 models hard starboard helm action by ALEXANDRA 1 at C-10 with engines at dead slow ahead and produces a passing distance of 2.6 cables. However, that plot has EVER SMART on the portside of the channel as in fact

happened. If EVER SMART had navigated on her starboard side of the channel the passing distance would have been greater, perhaps about 3 cables. But again the margins would be tight and I consider that action at C-10 would be too late to achieve, reliably, a passing distance of at least 3 cables. The Assessors reached the same conclusion about C-10.

101. With the benefit of the new plots (which were not before the Assessors) I am persuaded that the latest time at which early and substantial action (to achieve a passing distance of at least 3 cables) could have been taken by ALEXANDRA 1 was a little later than C-15, about C-13.

102. Turning to starboard at C-5 towards the channel would not have been "early". It would have been late. For that reason action at C-5 as submitted by counsel for ALEXANDRA 1 would not have complied with the crossing rule. There may be further reasons for rejecting that submission. On the basis of the Assessors' advice that the give-way vessel ought to have planned for a passing distance of at least 3 cables when deciding when to take early and substantial action to keep clear, action at C-5 would not suffice. Counsel for ALEXANDRA 1 in their final submissions relied upon plot 19A which models ALEXANDRA 1 shaping to line up with the channel at C-5 and EVER SMART regaining her starboard side of the channel and then applying hard starboard helm on passing buoys no.1. That plot shows a passing distance of only 2 cables. That is too little for open water outside the channel. Counsel for ALEXANDRA 1 would doubtless say that Plot 19A models ALEXANDRA 1 becoming a Group 2 vessel to which the crossing did not apply. However, Plot 19A suggests, as one would expect, given ALEXANDRA 1's slow speed, that the vessels would not be on reciprocal headings, and so no longer crossing, for at least 2-3 minutes, perhaps longer. (It is difficult to be precise because the plot does not contain timings after C-5.) That does not indicate "early" action to keep out of the way. The Assessors also advised that such action would not be substantial or readily apparent to EVER SMART. This is not accepted by counsel for ALEXANDRA 1; see paragraph 13 of their submissions dated 12 January 2022. But in circumstances where action at C-5 would clearly not have been "early" there is no need to make findings on these further disputes.

103. I therefore find that the latest time at which early and substantial action, in the form of a substantial turn to starboard, could reasonably have been taken by ALEXANDRA 1 with a view to achieving a passing distance of at least 3 cables, was about C-13. No such action was taken before that time by ALEXANDRA 1. A substantial turn to starboard would certainly be "handsome" action visible to EVER SMART. Engine action alone would not suffice in that regard because ALEXANDRA 1 was already making way at only a very slow speed (1.3 knots at C-13) with her engines at dead slow ahead. Stopping her engines or putting them astern would also risk loss of steerage way.

104. ALEXANDRA 1 was also at fault by reason of a poor aural lookout between C-14 and C-12; see paragraphs 17 and 99 of my first judgment. That fault was causative for the reasons stated in paragraph 100 of my judgment. The master's misunderstanding caused him not to alter course to starboard at C-5 or C-4 towards the channel. That remains a fault. It is not affected by the application of the crossing rule.

105. On this hearing it was submitted that in circumstances where the crossing rule applied ALEXANDRA's course across the approaches to the channel was a breach of Rule 15

in that ALEXANDRA 1 sought to cross ahead of EVER SMART. I agree that she did seek to cross ahead of EVER SMART (though the master's subjective intention was that he was seeking to give EVER SMART more room to turn to port). But this fault was the product of a poor aural lookout. In circumstances where ALEXANDRA 1's poor aural lookout led to a failure to turn to starboard at C-5 this is not, in reality, a further fault.

106. Counsel for EVER SMART submitted that ALEXANDRA 1's increase of engine speed to dead slow ahead at C-15 and C-10 and to slow ahead at C-4 were further faults because they aggravated ALEXANDRA 1's attempt to cross ahead of EVER SMART. However, I remain of the view (as expressed in paragraph 102 of my first judgment) that in circumstances where ALEXANDRA 1's speed was increased from a little over 1 knot to a little over 2 knots it is difficult to say that her speed as such was unsafe. She was doing little more than maintaining steerage way. It was that minimal forward way which caused her to cross the approaches to the channel. Her speed is already encompassed within the finding that she was at fault for seeking to cross the approach to the channel.

The fault of EVER SMART

107. In my first judgment at paragraphs 73-74 I found that EVER SMART was in breach of the narrow channel rule from C-10 when she was passing buoys no.3. From that time EVER SMART was not navigating on her starboard side of the channel.

108. I also found that EVER SMART's lookout by radar and sight was seriously defective. The echo of ALEXANDRA was never particularly observed and was never acquired as an ARPA target; see paragraph 76. ALEXANDRA1 ought to have been acquired as a radar target several minutes before the pilot disembarked; see paragraph 79. Whilst it is more likely than not that the master of EVER SMART saw ALEXANDRA 1 shortly after the pilot left the bridge he did not keep ALEXANDRA 1 under observation thereafter. Thus at C-4 EVER SMART did not appreciate that ALEXANDRA 1 was heading across her bows; see paragraphs 81-82.

109. Neither of the above faults is affected by the decision of the Supreme Court that the crossing rule applied. They remain faults of EVER SMART's navigation.

110. However, when one comes to consider the question of helm and engine action it is necessary to consider the matter afresh in the light of the crossing rule.

111. Rule 17(a)(i) provides that:

> "Where one of two vessels is to keep out of the way the other shall keep her course and speed."

112. Rule 17(a)(ii) provides that:

> "The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules."

113. Rule 17(b) provides that:

> "When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision."

114. The Supreme Court has explained that EVER SMART's obligation to keep her course and speed includes doing so "in compliance with any other applicable rule" (see paragraph 140). In this case at least one other applicable rule was the narrow channel rule (see also paragraph 64). The obligation to keep course and speed was to be "moulded for the purpose of permitting compliance with the other rule" (see paragraph 69).

115. Thus EVER SMART's duty to keep her course in the circumstances of this case obliged her to return to the starboard side of the channel. Having strayed from her starboard side at C-10 she never returned to her starboard side. She ought to have applied sufficient starboard helm to return promptly to her starboard side. She never did so.

116. Before dealing with the question of speed and Rules 17 (a)(ii) and (b) it is necessary to mention a point of law raised by counsel for EVER SMART. There is authority for the proposition that although Rule 17 (a)(ii) is expressed in permissive rather than mandatory terms the circumstances can be such that good seamanship requires the stand-on vessel to take action to avoid collision; see for example *The Iran Torab* [1988] 2 Lloyd's Reports 38, *The Lok Vivek* [1995] 2 Lloyd's Reports 230, *The Koscierznya*]1996] 2 Lloyd's Reports 124 and *The Topaz* [2003] 2 Lloyd's Reports 19.

117. Counsel for EVER SMART have researched the *travaux preparatoires* leading to the international convention which introduced the Collision Regulations in their current form and have learnt that whilst IMCO had proposed a draft of Rule 17(a)(ii) which imposed a mandatory duty on the stand-on vessel that draft was opposed by the Dutch delegation who produced a draft with Rule 17(a)(ii) in its current form; see the "Note of the Government of the Netherlands" dated 6 October 1972. Both drafts were discussed at the Ninth Meeting on 11 October 1972. The USSR supported the Dutch proposal. On a show of hands the Dutch text received 21 votes and the IMCO text received 7 votes. Counsel submitted that the *travaux preparatoires* were directly in point, should be taken into account when construing the Collision Regulations and show that the courts' previous understanding of Rule 17(a)(ii) is in error.

118. In *The Koscierzna* Sir Thomas Bingham MR referred to the previous authorities which had been relied upon by counsel in that case and then said at p.129:

> "From these two authorities, one of them a decision of Mr. Justice Clarke himself, it seems clear that although r.17(a)(ii) is expressed in permissive terms, situations may arise in which the requirements of good seamanship require a vessel being overtaken to take avoiding action before the stage at which r.17(b) applies. This point need not be laboured, since Mr. Russell QC for the overtaken vessel accepted it. He did however urge that on the facts of this case it was not incumbent on the overtaken vessel to take avoiding action under r.17(a)(ii)."

119. Thus the point was conceded by Mr. Russell QC. However, it is accepted by counsel for EVER SMART that where scrutiny of the judgment of the Court of Appeal indicates that the court's acceptance of the point went beyond mere assumption the decision of the Court of Appeal is binding upon the High Court. The relevant principles are summarised in *The Queen on the application of KTT v The Secretary of State for the Home Department* [2021] EWHC 2722 (Admin) at paragraphs 53-57.

120. I need not examine the reasoning and decision of Sir Thomas Bingham any further in the light of those principles because counsel for EVER SMART accepted that the Court of Appeal's treatment of the point went beyond mere assumption and that I should follow the decision of Sir Thomas Bingham. I would only add that the decision was followed by the Court of Appeal itself in *The Mineral Dampier* [2001] 2 Lloyds Reports 419 at paragraphs 48-50 per Lord Phillips MR and Clarke LJ. Counsel of course reserved the right to advance the new argument in the Court of Appeal.

121. I therefore asked the Assessors the following questions:

Question 3:

Upon the assumption that the vessels were in sight of one another at about 2319 or C-23 and upon the assumption that those on board EVER SMART ought to have acquired ALEXANDRA 1 as an ARPA target several minutes before the pilot disembarked, at what time ought it to have been reasonably apparent to those on board EVER SMART that ALEXANDRA 1 was not taking appropriate action in accordance with Rules 8,15 and 16 ?

Question 4:

Upon the assumption that those on board EVER SMART appreciated that ALEXANDRA 1 was not taking appropriate action in accordance with Rules 8,15 and 16 by the time identified in answer to Question 3, what action ought to have been taken by EVER SMART as a matter of good seamanship to avoid collision pursuant to Rule 17(a)(ii) and when ?

122. I received the following answer to Question 3:

> "It would have been reasonably apparent ALEXANDER 1 was not taking appropriate action by 2330 (C-11), while EVER SMART was preparing to disembark the pilot and subsequently exit from the channel. At that point, the ships were approximately 2.5 miles apart and 12 minutes from CPA if both maintained their speeds."

123. I received the following answer in relation to Question 4:

> "When it was reasonably apparent ALEXANDER 1 was not taking appropriate action, EVER SMART was in the channel. As a result, her potential actions in accordance with Rule 17 (a) (ii) were limited. If they had altered course to starboard, out of the channel, depths of water would have left insufficient under-keel

> clearance to navigate safely. We consider the seamanlike course of action available to EVER SMART before they reached the end of the channel, would be to proceed at a Safe Speed IAW Rule 6. Recognising the developing close quarter situation, we consider this would have been a substantial reduction in speed, followed by a broad alteration of course to starboard when they reached the end of the channel. At the same time, they could have used their VHF radio, Port Control, and other aids to identify and contact ALEXANDER 1. It is acknowledged that radio contact can exacerbate a collision situation, but in the coordinated waters of a port authority, with both ships at a speed at which they could take all way off, risk of collision would have been avoided.
>
> If EVER SMART had been closely monitoring the passage of the ALEXANDER 1 before the Pilot left the bridge at 2333, and with the Pilot clearly aware of the inward vessel as per his advice before leaving the bridge, the Pilot could have assisted with communications via Port Control to confirm the intentions of the inwards vessel.
>
> Full Away on Passage (FAOP) was ordered by the Master of EVERSMART at 2338. FAOP is ordered when the vessel is safe to proceed at full sea speed and no further engine movements are expected. After this engine power is increased beyond engine manoeuvring parameters. In this case the increase in speed led to reducing the time to the impending close quarters situation."

124. It is to be noted that the advice of the Assessors covers the navigation of EVER SMART from about C-11 to her exit from the channel. The advice therefore covers not only Rule 17 (a)(ii) but also, in effect, Rule 17 (b).

125. The Assessors have advised that EVER SMART ought to have appreciated that ALEXANDRA 1 was not taking early and substantial action to keep clear by about C-11, that is, just before EVER SMART began to navigate on the port side of the narrow channel. That advice was given in the same response in which the Assessors advised that early and substantial action by ALEXANDRA 1 ought to have been taken by C-18. The latter advice has now been clarified by the Assessors who have said that the latest time at which early and substantial action could reasonably have been taken by ALEXANDRA 1 was C-15. Counsel for EVER SMART have suggested that the time at which those on board EVER SMART ought to have appreciated that ALEXANDRA 1 was not taking the required action should accordingly be altered by 3 minutes to C-8. This was not accepted by counsel for ALEXANDRA 1 who said that "if ES had been keeping a proper look out, it would still have been reasonably apparent to ES by C-11 that A1 was not taking action at C-15". However, the Assessors thought that about 7 minutes ought to be allowed for making that assessment and there is no reason for me not to accept that advice. I have found that the latest time at which early and substantial action could reasonably have been taken by ALEXANDRA 1 was probably (having regard to further plots not before the Assessors) a little later than C-15, at about C-13. Accordingly, allowing for the 7 minutes advised by the Assessors it was at about C-6 that it ought to have been apparent to those on board EVER SMART that

ALEXANDRA 1 was not taking early and substantial pursuant to the crossing rule. It is possibly the case that as the vessels got closer the time required to make the assessment reduced so that it might have been a little earlier than C-6 that the assessment should have been made. However, the precise time is unlikely to affect that matter in the final analysis. Long before this time it would or ought to have been obvious to EVER SMART that ALEXANDRA 1 was waiting to embark the pilot (see paragraph 70 of my first judgment) and from C-10 EVER SMART was already in breach of the narrow channel rule. Moreover, EVER SMART was already reducing her speed in preparation for the departure of the pilot.

126. The advice of the Assessors with regard to speed is that EVER SMART ought to have made a substantial reduction in speed. In circumstances where EVER SMART was preparing to drop her pilot the question of precisely when good seamanship required a substantial reduction of speed requires further analysis.

127. In preparation for dropping the pilot EVER SMART reduced her engines to half ahead at C-11, to slow ahead at C-10 and to dead slow ahead at C-8. This caused her speed over the ground to fall from 12.9 knots at C-11 to 10 knots at C-6. The pilot was dropped and her speed continued to fall to 9.5 knots at C-5 when her engines were increased to half ahead, to full ahead at C-4 and to full sea speed at C-3.5. This caused her speed over the ground to increase so that at collision she was making 12.4 knots over the ground.

128. I do not consider that EVER SMART was at fault for not reducing speed further than she did prior to dropping the pilot. It may also be that having dropped the pilot it was appropriate to increase her engine speed to half ahead. But at C-4, if she had been keeping a good lookout, EVER SMART would have observed ALEXANDRA 1 fine on her port bow distant about a mile and heading (albeit very slowly) so as to cross the approaches to the channel. I consider that instead of increasing her engines to full ahead and then to full ahead sea speed she ought to have substantially reduced her speed pursuant to Rule 17(a)(ii). That conclusion is consistent with and supported by the advice of the Assessors and is the same view that I formed in my first judgment at paragraph 87. Substantially reducing at C-4 may or may not have avoided a collision (this scenario does not appear to have been modelled) but the force of the collision and hence the resulting damage would have been less. Counsel suggested that speed was not an issue because a higher speed would enable starboard helm action to be more effective. But that cannot be relied upon by EVER SMART in circumstances where she did not apply starboard helm until C-30 seconds.

129. If counsel are correct in submitting, on the basis of the *travaux preparatoires*, that Rule 17(a)(ii) and good seamanship cannot impose a duty on the stand-on ship to take action, I would nevertheless reach the same conclusion as to the need to reduce speed substantially for at least two reasons. First, C-4 was about the time when it was no longer possible for ALEXANDRA 1 to avoid collision by her action alone. Counsel for ALEXANDRA 1 submitted that "after C-3" collision could not be avoided by the action of the give way vessel alone. This was not disputed although counsel for EVER SMART described the time as "C-2". Plot 2 of the plots prepared on behalf of ALEXANDRA 1 indicates a passing distance of only 0.25 of a cable (that is, about the beam of either vessel) if Alexandra 1 shaped to line up with the channel at C-3. Plot 15 of those prepared on behalf of EVER SMART indicates a passing distance of 0.1 of a

cable (just 60 feet) if ALEXANDRA 1 had gone full astern and applied starboard helm at C-3. These very small passing distances suggest to me that the time at which those on board EVER SMART, if keeping a good lookout, ought to have concluded that a collision could not be avoided by ALEXANDRA 1 alone was earlier than C-3, that is, about C-4. Those on board EVER SMART, if keeping a good lookout, would see the green sidelight of ALEXANDRA 1 fine on their port bow distant about a mile and, in circumstances where her heading was falling off to port at this time, the aspect of her masthead lights would not have indicated an alteration to starboard. At the same time EVER SMART knew or ought to have known that ALEXANDRA 1 was waiting for the pilot vessel. I consider that in those circumstances a collision could not have been avoided by the action of ALEXANDRA 1 alone at about C-4. On that basis EVER SMART would have been obliged by Rule 17(b) to reduce her speed substantially. Second, if the Rule 17(b) time had not been reached at C-4 (contrary to the view I have just expressed) the position at C-4, with ALEXANDRA 1 fine on the port bow of EVER SMART and heading (very slowly) across the approaches to the channel with EVER SMART (importantly) still on the port side of the channel, would have been an immediate danger within Rule 2(b) thus making a departure from the duty of EVER SMART to keep her speed necessary; see paragraph 67 of the judgment of the Supreme Court where the ambit of Rule 2(b) is discussed. Thus even if Rule 17(a)(ii) cannot, as a matter of law, have imposed a duty to reduce speed there would still have been such a duty pursuant to Rule 17(b) or Rule 2. (I note that the Assessors have emphasised that Rule 2 is particularly pertinent in the circumstances of this case.) In any event EVER SMART ought not to have increased her engines to full ahead sea speed at C-3.5 and ought to have substantially reduced speed at the latest at C-3.

130. The Assessors' advice was that EVER SMART ought to have made a broad alteration of course to starboard when she reached the end of the channel. They clarified their advice when answering the further questions as follows:

> "We considered that EVER SMART would not have turned to starboard while in the channel. We consider it unlikely that EVER SMART's operating instructions allowed them to proceed into water with this UKC. In any event it would have been un-seamanlike because, irrespective of the risk of grounding, squat would have reduced the UKC by a substantial amount and heel on turning would have reduced it further, with the potential serious impact on directional stability of the ship due to proximity to the seabed."

131. This advice was challenged by counsel for ALEXANDRA 1 (who contended that EVER SMART could turn whilst in the channel but having passed buoys no. 2). Counsel have said that the Assessors have engaged in "impermissible speculation, as they raise entirely new and previously unexplored issues, namely the contents of EVER SMART's operating instructions, and the effect of squat". However, such matters and especially squat and heel affecting directional stability are matters which a mariner would take into account when deciding upon the appropriate action to avoid collision and therefore the Assessors can hardly be criticised for mentioning them and taking them into account. In any event counsel does not challenge the advice that a broad alteration of course should have been made. The only challenge is as to when such an alteration could safely have been made by EVER SMART. I see no reason not to accept

the Assessors' advice in this regard. At C-3 EVER SMART was approaching buoys no.1 (and so almost at the end of the channel) and still on the port side of the channel. EVER SMART could have avoided collision by applying starboard helm. An alteration of helm was required on passing buoys no.1 either by Rule 17(a)(ii), Rule 17(b) or Rule 2(b). But the master of EVER SMART, oblivious to the immediate danger, did not apply hard starboard helm until after he had been advised by the pilot and ALEXANDRA 1 to go hard to starboard less than 30 seconds before the collision. That was too late and was the consequence of the absence of lookout.

Apportionment

132. There was no dispute as to the principles which should guide the court when apportioning liability for the collision. However, this hearing is all about the re-apportionment of liability for the damage caused by the collision in the light of the decision of the Supreme Court that the crossing rule applied. I have heard detailed submissions on the question and, unusually (because apportionment almost always depends upon the facts of the particular case), reference has been made to the apportionment of liability in other crossing cases. In those circumstances I think it helpful (at any rate for me) to set out what I said on the subject in *The Nordlake and Sea Eagle* [2015] EWHC 3605 (Admlty) at paragraphs 148-151:

> "148. In *The Samco Europe and MSC Prestige* [2011] 2 Lloyd's Rep 579 the court summarised the task of apportionment of liability in this way:
>
> 81.Apportionment of responsibility for a collision depends upon an assessment of the blameworthiness and causative potency of both vessels: see *The British Aviator* [1965] 1 Lloyd's Rep 271 at page 277 per Willmer LJ. The assessment is of the *relative* degree of responsibility of each vessel: see *The Mineral Dampier* [2001] 2 Lloyd's Rep 419 at para 39. For that reason Admiralty judges often consider, where one ship is more to blame than the other, how many more times to blame one vessel is than the other: see, for example, *The Angelic Spirit* [1994] 2 Lloyd's Rep 595 at page 608 per Clarke J and *The Mineral Dampier* at para 52 per Lord Phillips MR"
>
> 149. Sir Henry Brandon's extra-judicial exposition of the law and practice of apportionment of liability in his article in the Tulane Law Review should be better known than it is. It will assist all who have to consider such matters. His understanding and knowledge of how liability for damages in collision cases was in practice assessed was gained at a time when almost every week there was a collision action in the Admiralty Court, unlike the present time when, perhaps because voyage data recorders and other electronic devices have almost eliminated the need for a trial, there are few such trials. In his article Sir Henry Brandon described the proposition that both culpability and causative potency must be taken into account as "the true principle of law applicable" (see pp.1031-2). Whilst there were no universal rules

with regard to the assessment of culpability or causative potency he identified ("on the basis of practical experience of apportionment in numerous cases over many years") certain broad lines of approach which can be used when apportioning liability (see pp.1037-1041). They may be summarised as follows:

i) The number of faults on one side or the other is not decisive. It is the nature and quality of a ship's faults, rather than their number, that matter.

ii) Breaches of the obligations imposed on ships in certain defined situations by the Collision Regulations will usually be regarded as seriously culpable. One such rule is the narrow channel rule.

iii) Causative potency has two aspects. The first is the extent to which the fault contributed to the fact that the collision occurred. The second is the extent to which the fault contributed to the damage resulting from the casualty.

iv) In most cases though not all it will be right to treat the fault of a ship that creates a situation of difficulty or danger as greater than that of the ship that fails to react properly to such situation after it has been created.

v) The fact that a fault consists of a deliberate act or omission may in certain circumstances justify the court in treating it as more culpable than a fault which consists of omission only.

150. The court deals with questions of apportionment in a fairly broad way (or as it was put in *The Volute* [1922] 1 AC 129 at p. 144 "somewhat broadly and on common sense principles"). Sir Henry Brandon said that it may be helpful (as indeed subsequent Admiralty judges have found, see the extract from *The Samco Europe and MSC Prestige*) to consider, in cases where a clear preponderance of fault has been established, whether the degree of fault of the ship more to blame is one and half times as great, or three, four, five or even more times as great as the degree of the fault of the ship less to blame. "There is however no single correct approach to the problem."

151. Apportionment pursuant to section 187 of the Merchant Shipping Act 1995 requires an apportionment of liability in proportion to the degree in which each ship was at fault. This requires an assessment of relative liability, as was made clear in a case involving damage caused by the fault of three ships, *The Miraflores and the Abadesa* [1967] AC 826. The underlying principle was explained by Sir Henry Brandon thus: "The correct approach was to consider and weigh the faults of each ship separately and individually and then to arrive at an

> apportionment of liability that justly reflected the relative degree of fault as between all three."

133. I do not understand the Court of Appeal in the present case to have suggested that there were any errors or omissions in this account of the manner in which the court apportions liability pursuant to section 187 of the Merchant Shipping Act 1995. However, in the light of the arguments addressed to me in the present case there are two additional matters worthy of mention.

134. First, Sir Henry Brandon observed in his Tulane Law Review article at p.1032 that the assessment of the relative degrees of fault "involves a number of interrelated value judgments" and that the assessment must be carried out judicially, that is, on the basis of "sound and logical reasoning", rather than on the basis of instinct, sympathy or conjecture. In this context Sir Henry referred to the judgment of Lord Sumner in *The Peter Benoit* (1915) 13 Asp. Maritime Law Cases 203 at p.208:

> "The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do: a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity by deciding who was the last. The Act says "having regard to all the circumstances of the case." Attention must be paid not only to the actual time of the collision and the manoeuvres of the ships when about to collide, but to their prior movements and opportunities, their acts and omission. Matter which are only introductory, even though they preceded the collision by but a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result."

135. Thus apportionment requires a reasoned judgment based upon all the circumstances of the case. That in turn requires the various factors in the case to be weighed in the balance. In *The Miraflores and The Abadesa* [1967] AC 826 Lord Morris said at p.842 that "the process necessarily involved comparisons and it required an assessment of the inter-relation of the respective faults of the three vessels as contributing causes of the damage or loss". The nature of the exercise was described by Lord Wright in *The MacGregor* [1943] AC 197 at p.200 (in a passage followed in *The Koningin Juliana* [1975] 2 Lloyd's Reports by Lord Simon at p.115) as follows:

> "a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."

136. Second, Counsel for EVER SMART placed reliance, unsurprisingly, upon the fourth "broad line of approach" which I noted in *The Nordlake*, namely, that in most cases though not all it will be right to treat the fault of a ship that creates a situation of difficulty or danger as greater than that of the ship that fails to react properly to such situation after it has been created. Indeed, Wilmer J. stated in a crossing case, *The Billings Victory* (1948) 82 Lloyd's Law Reports 877 at p.883 that "the most important thing to give effect to in considering degrees of blame is the question which of the two vessels created the position of difficulty."

137. Counsel for EVER SMART also referred to six cases from 1994 to 2011 where the stand-on vessel's share of fault ranged from 20% (*The Mineral Dampier* [2001] 2 Lloyd's Reports 419 and *The Topaz* [2003] 2 Lloyd's Reports 19) to 40% (*The Samco Europe* [2011] 2 Lloyd's Reports 579). By contrast counsel for ALEXANDRA 1 referred to *The Savina* [1976] 2 Lloyd's Reports 123 where the stand-on vessel was held to be 60% to blame for the damage caused by the collision. She had increased her speed in breach of her duty as the stand-on vessel to keep her speed. The other vessel was guilty of a prior failure to stop her engines to prevent a close quarters situation developing (not in breach of the crossing rule, which did not at the time apply, but in breach of her duty to act in accordance with good seamanship). Her omission was described as an omission "to take early action of a precautionary character to prevent a situation which was not yet dangerous from developing into one that was" (see the judgment of Brandon J. at [1974] 2 Lloyd's Reports 317 at pp. 326-327 which was restored by the House of Lords). Other cases were referred to by counsel for ALEXANDRA 1 where the stand on vessel bore a greater share of blame than 60%.

138. However, apportionment is heavily dependent upon the facts of the particular case. As Sir Henry Brandon said at p.1037 of his article: "The variety of circumstances leading to maritime casualties involving two or more ships is infinite, and the assessment of degrees of fault in relation to any one such casualty must depend on all its own particular circumstances ……". Comparing one collision case with another is therefore of doubtful benefit. The facts are always different. It is significant, and I think instructive, that such comparisons are rarely seen in the law reports.

139. The truth is that in any case, including those cases where one ship has to respond to a situation of difficulty or danger created by another ship, there is a range of possible apportionments dependent upon the facts of the individual case. This is illustrated by a passage from the judgment of Lord Pearce in *The Miraflores and The Abadesa* [1967] 1 AC 826 at pp.847-8, quoted by Sir Henry Brandon in his Tulane Law Review article at p.1039:

> "It is axiomatic that a person who embarks on a deliberate act of negligence should, in general, bear a greater degree of fault than one who fails to cope adequately with the resulting crisis which is thus thrust upon him. The generality is subject, of course, to the particular facts. And 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 (if the interval and opportunity for avoidance are sufficiently great) wholly upon the person who failed to avoid the consequences of another's negligence. Between the extremes

> in which a man is either wholly excused for a foolish act done in the agony of the moment as the result of another's negligence or is wholly to blame because he had plenty of opportunity to avoid it, lies a wide area where his proportion of fault in failing to react properly to a crisis thrust upon him by another must be assessed as a question of degree."

140. Whilst the opening sentence of this passage supports the observation of Willmer J. in *The Billings Victory* (as does the example which immediately follows the quoted passage) the passage as a whole supports the submission made by counsel for ALEXANDRA 1 that "there is no principle which precludes a stand on ship from bearing a greater degree of responsibility for a collision". I effectively made this point in *The Samco Europe* [2011] 2 Lloyd's Reports 579 at paragraph 85. "However, the fair and just apportionment in any case will ultimately depend upon an assessment of the relative causative potency and blameworthiness of the faults of each vessel taking into account all the circumstances of the case. In some cases the stand-on vessel may properly be held to bear a greater responsibility for a collision than the give-way vessel; see for example *The Estrella* [1977] 1 Lloyd's Rep 525." Counsel for EVER SMART did not challenge this point: "We of course recognise it is not in every case that the give-way vessel takes the preponderant share of the blame, but it is usual and common that it does". In the present case the Supreme Court, having allowed the appeal of EVER SMART on the grounds that the crossing rule applied, observed that "it by no means necessarily follows that this should result in some different apportionment of liability for the damage, or even responsibility for the collision having occurred" (see paragraph 147 of the judgment of the Supreme Court). The guidance of Lord Pearce explains why that observation is, if I may be permitted to say, correct.

141. It is therefore with the benefit of that guidance that I must now seek to assess in a reasoned manner and having regard to the particular facts of this case the relative causative potency and blameworthiness of the two vessel's faults.

Causative potency

142. It is necessary to consider, first, the contribution which each vessel made to the fact that a collision occurred.

(a) ALEXANDRA 1

143. ALEXANDRA 1, by failing to make a substantial turn to starboard by C-13 to keep well clear of EVER SMART in breach of rule 16, permitted a close quarters situation to develop close to the entrance to the channel. That fault occurred when the vessels were about 3 miles apart and in circumstances where ALEXANDRA 1 was proceeding at a very slow speed and was waiting to embark a pilot as was or ought to have been obvious to EVER SMART. The report of the master of EVER SMART to his owners suggests that in his view the vessels could be expected to pass safely port to port in the approaches to the channel. The advice of Port Control to ALEXANDRA 1 to proceed to buoys no.1 and enter the channel after EVER SMART had cleared it suggests that it was Port Control's view also. Vessels doing so would be within the Supreme Court's Group 2 vessels. Such vessels would be required to exercise care, just as vessels passing at less than a cable in a narrow channel would be required to exercise care as explained by the Assessors advising the court on this hearing.

144. There was a suggestion that ALEXANDRA 1's breach of the crossing rule was non-causative but that suggestion was not developed. The suggestion would have to be that in the circumstances just described the fault was not causative of the collision but was merely part of the antecedent history or what Lord Sumner described as "only introductory". But when one has regard to the importance of the crossing rule in avoiding close quarters situations, as stressed by the Supreme Court (see paragraphs 43,44 and 68 of its judgment), it would not be sensible to conclude that the fault was not causative of the collision. It was causative because it permitted a close quarters situation to develop close to the entrance to the channel. It is not saved from being a causative fault by reason of the circumstance that there remained the possibility that the vessels might pass safely at a distance of less than a cable in the approaches to the channel after ALEXANDRA 1 had altered course to starboard to become a Group 2 vessel.

145. Further, by failing to keep a good aural lookout the master of ALEXANDRA 1 mistakenly thought that EVER SMART was intending to turn to port at the seaward end of the channel (see paragraph 99 of my first judgment) and in consequence he failed to alter course to starboard at C-5 or C-4 towards the channel. Instead, ALEXANDRA 1 crossed the approaches to the channel and the actual path of EVER SMART. This fault clearly contributed to the collision.

(b) EVER SMART

146. EVER SMART, by failing to keep to the starboard side of the channel from C-10, was in breach of rule 9. Counsel for EVER SMART accepted that EVER SMART was at fault in this regard but sought to diminish its significance. It was submitted that the fault was not causative, "a non-causative side-show", because the cause of the collision was ALEXANDRA 1 being near EVER SMART in a close quarters situation which was a result of her breach of the crossing rule. However, just as there is no "last opportunity rule", so there is no rule that the first wrongdoer must be regarded as the only cause of the collision; see the passage from Lord Sumner's judgment in *The Peter Benoit* quoted above. In the present case it was or ought to have been obvious to EVER SMART that ALEXANDRA 1 was in the pilot boarding area waiting to embark a pilot. Yet, from C-10, for reasons unconnected with the failure of ALEXANDRA 1 to comply with her duty under the crossing rule, EVER SMART failed to keep to the starboard side of the channel. By failing to keep to the starboard side of the channel the developing close quarters situation was going to be closer than it would otherwise have been. This is therefore a case where, in my judgment, both ALEXANDRA 1's breach of the crossing rule and EVER SMART's breach of the narrow channel were causative of the collision.

147. As a result of failing to keep any lookout after C-6 EVER SMART did not put her helm hard to starboard until told to do so by Port Control and the pilot and by then it was too late. Had she regained her starboard side of the channel, kept a good lookout and applied hard starboard helm by C-2 after passing no.1 buoys the vessels would have passed at a greater distance. Thus both of EVER SMART's faults contributed to the collision.

Relative contribution to the fact of a collision

148. It can be argued that in the circumstances of this particular crossing case there was no marked difference in quality between the contribution which each vessel made to the

fact that a collision took place. Each failed to comply with an obligation imposed on her by reason of being in a defined situation by the Collision Regulations. ALEXANDRA 1 failed to take early and substantial action to keep clear of a crossing vessel on her starboard bow. EVER SMART failed to keep to the starboard side of the channel. Neither vessel can say that her fault occurred by reason of a situation of difficulty or danger having been created by the other vessel. Each vessel then committed a further fault in the minutes before the collision. Both vessels failed to turn to starboard.

149. Whilst that argument has some force, ALEXANDRA 1's failure to take early and substantial action to keep clear of EVER SMART by about C-13 was the earlier fault which allowed the close quarters situation to develop. Particular account must, I think, be taken of that. Having done so, it seems to me appropriate to conclude that in relative terms ALEXANDRA 1's contribution to the fact that a collision occurred was the greater of the two.

Relative contribution to the damage caused

150. But causative potency also requires account to be taken of the relative contribution which the fault of each vessel made to the damage caused by the collision. The speed of EVER SMART at collision was 12.4 knots (having been 9.6 knots at C-4). In consequence of the fact that she kept no lookout from C-6 she increased her engines from dead slow ahead to full ahead sea speed. Instead, she ought to have substantially reduced her speed at about C-4. By contrast ALEXANDRA 1 was proceeding very slowly, effectively doing little more than maintaining steerage way. At collision her speed was 2.4 knots (having increased from 2.1 knots at C-5). The port bow of EVER SMART struck the starboard bow of ALEXANDRA 1 at an angle of about 40 degrees leading aft on EVER SMART (see paragraph 13 of my first judgment). The damage caused to ALEXANDRA 1 (including loss of use) has now been assessed in the sum of US$9.3 million and the damage caused to EVER SMART has been assessed in the sum of US$2.5 million. The speed of EVER SMART at collision is likely to have made a far greater contribution to the damage caused by the collision than the speed of ALEXANDRA 1.

Relative causative potency

151. Notwithstanding that ALEXANDRA 1 made the greater contribution to the fact that a collision took place, EVER SMART's contribution to the extent of the damage caused by the collision was by far the greater. When both elements are taken into account I consider that the causative potency of EVER SMART's faults exceeded the causative potency of ALEXANDRA 1's faults. The extent to which EVER SMART's contribution to the damage exceeded ALEXANDRA 1's contribution to the damage was greater than the extent to which ALEXANDRA 1's contribution to the fact of the collision exceeded EVER SMART's contribution to the fact of the collision. This is one of those "inter-related value judgments" referred to by Sir Henry Brandon which I have sought to make on a reasoned basis and with regard to the particular facts of this case.

Blameworthiness

(a) ALEXANDRA 1

152. With regard to ALEXANDRA 1's failure to take early and substantial action by about C-13 to keep clear of EVER SMART counsel for ALEXANDRA 1 submitted that the master of that vessel "would have been supported in a conclusion that the crossing rules did not apply by the Admiralty Judge and a unanimous Court of Appeal." Counsel also relied upon a statement by Brett MR in *The Beryl* (1884) 9 PD 137 at 139 that "the consideration must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable."

153. I do not consider that these are cogent submissions.

154. First, the circumstance that neither I nor the Court of Appeal considered that the crossing rule applied cannot, I think, assist ALEXANDRA 1. The Supreme Court has held that the lower courts were in error and that the crossing rule did apply. The Supreme Court reached this conclusion by interpreting the Collision Regulations in "a practical manner so as to provide clear and readily ascertainable navigational rules capable of application by all mariners" (see paragraph 41). It would, I think, be unprincipled for me to say that the master's degree of culpability must be regarded as limited because his mistake (assuming that he considered that the crossing rule did not apply) was shared by the lower courts.

155. Second, the observation of Brett MR in *The Beryl* was made in a very different context. Brett MR had in mind cases where a vessel could not see the other vessel because it was night (and no light was exhibited) or because the other vessel was shielded by a headland. In such cases the first vessel could not know that there was a risk of collision with the second vessel. Nothing of that nature applies to the present case.

156. However, what can be said by way of mitigation of ALEXANDRA 1's failure to take early and substantial action by C-13 is that she had been requested by Port Control to proceed to buoys no.1 and there embark at 2315 the pilot who was on board EVER SMART, that at 2315 (C-27) she had arrived about 1.4 miles to the west north west of buoys no.1, but EVER SMART was proceeding along the channel in the vicinity of buoys no.6 with the pilot still on board. In such circumstances it was natural for ALEXANDRA 1 to wait. That is what she did (see paragraph 70 of my first judgment) from C-27. Her engines were stopped and her speed was falling to 1.3 knots, which cannot have been much more than steerage way (and was probably less than steerage way because her engines were put to dead slow ahead at C-15). Prior to C-13 this was not in breach of the crossing rule; the vessels were not in sight of each other until C-23, it was not until C-18 that the master should reasonably have concluded that the vessels were approaching each other on bearings which did not appreciably alter, and about C-13 was the latest time at which early and substantial action could have been taken. Thus the duty to act under the crossing rule was not breached until about C-13; see *The Savina* [1976] 2 Lloyd's Reports 123 at p.123 per Lord Simon and paragraphs 100-101 of the judgment of the Supreme Court in the present case. Prior to the engagement of the crossing rule the vessels were required to act in accordance with good seamanship and no breach of that duty has been alleged. Of course, those circumstances do not, for the reasons given by the Supreme Court, excuse her failure to take early and substantial action to keep clear of EVER SMART by C-13 on the basis that she had been from C-18 the give-way vessel pursuant to the crossing rule. But they do serve to mitigate the degree of her culpability. From C-27 until C-13 she was doing what Port Control is

more likely than not to have expected her to do and, importantly, was proceeding at a very slow speed, effectively doing little more than maintain steerage way. Then, in breach of the crossing rule, she failed to make a substantial turn to starboard but continued to wait whist proceeding at a very slow speed. For these reasons there was force in the alternative submission made by counsel for ALEXANDRA 1 in their written submissions on the advice of the Assessors that the approach of Port Control was "relevant to culpability" (see paragraph 15 of counsel's submissions dated 17 December 2021).

157. Although this is not the first case in which a waiting vessel has been held to be subject to the crossing rule (see the cases mentioned by the Supreme Court at paragraphs 86-88 and 98(vi) of its judgment) it may well be the first in which it has been necessary to assess whether the circumstances in which the vessel came to be waiting mitigated the degree of her fault. The cases mentioned by the Supreme Court, in particular *The Broomfield* [1906] Asp. MLC 194 and *The Albano* [1907] AC 193, pre-dated the Maritime Conventions Act 1911, the passing of which Act first enabled liability to be apportioned in proportion to the degree in which each vessel was at fault. Before that Act, if both vessels were at fault, each could recover from the other a moiety or one-half of its loss; see for example *The Owners of the Cargo on board SS Tongariro v The Owners of SS Drumlanrig* [1911] AC 16 and also the judgment of Gross LJ in the present case at paragraph 111. In the much later case of *The Avance* [1979] 1 Lloyd's Reports 143 the only vessel found to have been negligent, BAMBARA, had been waiting outside Dakar harbour to embark the pilot on board AVANCE which was leaving Dakar. But since she was the only vessel at fault she was necessarily 100% to blame and so no apportionment was necessary. In any event on the facts of the present case, and for the reasons I have given, the fault of ALEXANDRA 1 in failing to take early and substantial action to keep clear of EVER SMART was mitigated by the circumstances in which that fault occurred.

158. Between C-14 and C-12 the master of ALEXANDRA 1 committed his second fault. He misheard or misunderstood a VHF conversation between Port Control and ZAKHEER BRAVO, thinking that it was a conversation between Port Control and EVER SMART. Although the master rightly appreciated that it made no sense if the conversation was with EVER SMART he made no attempt to clarify the matter with either Port Control or EVER SMART (see paragraph 99 of my first judgment). This was an error in his aural lookout and led to his failure to alter course to starboard at C-5 or C-4 (see paragraphs 100 of my first judgment).

159. It was submitted by counsel on behalf of ALEXANDRA 1 that the fact that EVER SMART was continuing at speed on the port side of the channel is likely to have reinforced the master's misunderstanding. EVER SMART was in breach of the narrow channel rule from C-10. Thus her conduct did not contribute to ALEXANDRA 1's mistake at C-14 to C-12. But from C-10 I accept that EVER SMART's breach of the narrow channel rule must have "reinforced" ALEXANDRA 1's misunderstanding. To that extent there is mitigation for ALEXANDRA 1's second fault.

(b) EVER SMART

160. EVER SMART was in breach of the narrow channel rule from C-10. Initially this was probably because of the effect of the wind on a high sided container vessel (see

paragraph 73 of my first judgment). At this time the distance between the vessels was over 2 miles and it was or ought to have been obvious to EVER SMART that ALEXANDRA 1 was waiting to embark a pilot. EVER SMART had ample time to return to her starboard side of the channel. She was not inhibited in doing so by ALEXANDRA 1's failure to take action as the give way vessel under the crossing rule. Indeed, her alteration of course at C-8 to 319 degrees may well have been an attempt to do so.

161. From C-6 EVER SMART did not keep a lookout and so was unaware of the need to return promptly to the starboard side of the channel in view of ALEXANDRA 1's presence in the pilot boarding area and on the port bow of EVER SMART. At this time the distance between the vessels was about 1 and half miles. EVER SMART never did return to the starboard side of the channel. Again, she was not inhibited in complying with the narrow channel rule by ALEXANDRA 1's failure to take action to keep out of the way.

162. Another consequence of her lack of lookout was that EVER SMART proceeded at an unsafe speed after dropping the pilot.

163. There is no mitigation available for EVER SMART's failure of lookout. Her master was oblivious of the fact that, when she increased her speed after dropping the pilot, ALEXANDRA 1 had not altered to starboard and was heading across the channel entrance. As a result EVER SMART neither reduced speed substantially nor applied hard starboard helm. She only went hard starboard when it was too late.

164. Counsel for EVER SMART submitted that her breach of the narrow channel rule was "somewhat technical", "excusable", "diminished", "not as severe", "relatively insignificant" or "not as culpable in a crossing situation because the vessel which is the give-way vessel should never be approaching. And the breach of Rule 16 in this case was persisted in by the Alexandra 1."

165. It is true that the developing close quarters situation came about because ALEXANDRA 1 did not take early and substantial action to keep out of the way of EVER SMART. It is also true that that breach was persisted in in the sense that no action to keep clear of EVER SMART was taken at any time. It is also correct, as emphasised by counsel, that when I considered the respective faults in my first judgment I was not dealing with a crossing case where the give-way vessel had breached her duty. But, notwithstanding that breach, those on board EVER SMART knew or ought to have known what ALEXANDRA 1 was doing.

166. The criticism made by the master of EVER SMART of ALEXANDRA 1 in his report to his owners was that ALEXANDRA 1 did not alter course to starboard. It is clear from section 1 of the report that what he had in mind was a failure to turn to starboard in the last minutes before the collision. (It is also to be noted that in his unsigned summary of his evidence (see paragraph 81 of my first Judgment) the master said that he expected that the vessels would pass port to port after EVER SMART had cleared the channel.) There is no suggestion that he did not know what ALEXANDRA 1 was doing. Nor is there a suggestion that ALEXANDRA 1 had created a situation of difficulty or danger for EVER SMART by having failed to take action to keep out of the way of EVER SMART at an earlier time when EVER SMART was proceeding along the fairway. Thus this was not a case where, as a result of a failure by the give-

way vessel to take early and substantial action to keep out of the way, the stand-on vessel was left in doubt as to when was the right time to take action under Rule 17(a)(ii) and (b). From the dropping of the pilot the master of EVER SMART kept no lookout. It was that which led him to have to take action to avoid the collision at C-30 seconds. It was not ALEXANDRA 1's breach of the crossing rule which led to the master of EVER SMART having "to make a quick decision or a decision based on inadequate information" (the language used by Sheen J. in *The Majola II* [1993] 1 Lloyd's Reports 48 at pp.50-51 when describing the desirability of avoiding a close quarters situation). It was the absence of any lookout by the master of EVER SMART.

167. Although moving very slowly towards the channel entrance ALEXANDRA 1 was waiting to embark a pilot prior to proceeding down the channel. When the pilot left the bridge of EVER SMART he said there was a vessel to port and that the master should take care. In those circumstances EVER SMART ought to have kept to the starboard side of the channel pursuant to the narrow channel rule.

168. Had she done so the vessels would have passed at a distance of three-quarters of a cable (see paragraph 66 of my first judgment) so that there would have no collision. Plots prepared for this hearing (plots 16 and 17) suggested the distance was about the same, 0.7 of a cable. Whilst three quarters of a cable is a close quarters situation and, as advised by the Assessors, less than the minimum passing distance of 3 cables for which a give-way vessel ought to have planned, it does not follow that EVER SMART's breach of the narrow channel rule was "somewhat technical" or "excusable". Rather, it emphasises the importance of EVER SMART keeping to her starboard side of the channel.

169. I therefore do not consider that EVER SMART's breach of the narrow channel was "somewhat technical" or "excusable". It is to be noted that the Supreme Court described EVER SMART as having "flouted" the narrow channel rule (see paragraph 140 of the Supreme Court's judgment). I respectfully agree with that description.

Relative blameworthiness

170. I am unable to accept the submission by counsel for EVER SMART that her fault was "relatively insignificant" when compared with that of ALEXANDRA 1. I consider that in terms of relative blameworthiness the faults of EVER SMART were much more culpable than those of ALEXANDRA 1, for these reasons.

171. Although each vessel was in breach of a Regulation governing the conduct of a vessel in a particular situation there was mitigation for ALEXANDRA 1's breach of the crossing rule. Conversely there was none for EVER SMART's breach of the narrow channel rule. Moreover, the very matters which found ALEXANDRA 1's mitigation were the very reasons why EVER SMART was able to avoid a collision with ALEXANDRA 1. ALEXANDRA 1 was moving at a very slow speed and, as was or ought to have been apparent to EVER SMART, was in fact waiting to embark the pilot before proceeding along the dredged channel. Keeping to the starboard side of the channel, as was the duty of EVER SMART, would have avoided a collision.

172. ALEXANDRA 1 was observing EVER SMART but her aural lookout was defective and led to her failing to turn to starboard at C-5 or C-4. Her misapprehension as to EVER SMART's intentions which caused her not to apply starboard helm at C-5 or C-

4 was encouraged by EVER SMART's failure to keep to the starboard side of the channel. By contrast EVER SMART had no visual lookout from C-6. That led to her failing to return to the starboard side of the channel, failing to reduce speed substantially at C-4 and to increasing her speed to full ahead sea speed. In my first judgment at paragraph 114 I compared the lookout on both vessels and concluded that the fault of EVER SMART in that respect was much greater than that of ALEXANDRA 1. I remain of that view.

173. The contrast between the visual lookout on both vessels cannot be better illustrated than by reference to the audio record. From C-7 the master of ALEXANDRA 1 was commentating on what he saw of EVER SMART and of the developing situation and was becoming, to say the least, concerned (see paragraphs 18-21 of my first judgment). Yet, when Port Control contacted EVER SMART as late as 30 seconds before the collision, the master merely replied "Jebel Ali port. Ever Smart. Good morning" (see paragraph 32 of my first judgment). After the collision he enquired of the officer of the watch and helmsman: "Both of you …have you seen it or not ?" (see paragraph 34 of my first judgment). The master's failure to observe ALEXANDRA 1 at all from C-6 was, I think, remarkable. Not only had he been informed that there was a vessel to port but that vessel was a laden VLCC. There is no mitigation for that failure of lookout. Had he kept a good lookout he would have had ample time to avoid a collision.

174. As explained by the Supreme Court a vessel is not freed from the effect of the crossing rules merely because, as in this case, she is waiting for a pilot and waiting to enter the narrow channel (see paragraph 98(vi) of the Supreme Court's judgment). Further, as stated by Rule 17(d), that Rule does not relieve the give-way vessel of her obligation to keep out of the way. I have those principles well in mind, but in assessing "the inter-relation of the respective faults" of the two vessels (the phrase of Lord Morris in *The Miraflores and The Abadesa*) and weighing the degree of the respective faults all the circumstances of the case must be taken into account, one of which is that in this case EVER SMART knew or ought to have known what ALEXANDRA 1 was doing, namely, waiting in the pilot boarding area for a pilot before entering the channel. The pilot's advice to the master of EVER SMART on leaving the bridge advised care but did not anticipate that EVER SMART would have difficulty in passing ALEXANDRA 1.

Apportionment of liability; the conclusion

175. Having sought to compare the relative causative potency and blameworthiness of each vessel's faults, liability for the damage caused by the collision must now be apportioned.

176. It may be that in the typical case of a give-way vessel failing to give way and thereby placing the stand on-vessel in a difficult position the give-way vessel will often bear the greater share of blame for the collision where the stand-on vessel fails to take appropriate action to avoid a collision pursuant to Rule 17(a)(ii) or (b). *The Billings Victory* was such a case.

177. The present case, by comparison with what I have described as the typical crossing case, is one where the stand-on vessel is not just in breach of Rule 17(a)(ii) or (b). EVER SMART was in breach of the narrow channel rule from C-10 for reasons

unconnected with the give-way vessel's fault. She also failed to keep any lookout at all from C-6. That was also unconnected with the give-way vessel's fault. It resulted in EVER SMART failing to regain the starboard side of the channel in continued breach of the narrow channel rule. It also resulted in her proceeding at an unsafe speed.

178. Counsel for EVER SMART submitted that "on any view ALEXANDRA 1 must bear the preponderance of the blame". I am unable to accept that submission. For the reasons which I have given the faults of EVER SMART were both more causatively potent and more blameworthy than those of ALEXANDRA 1. I consider that there is therefore a "clear preponderance" of fault on the part of EVER SMART, notwithstanding that ALEXANDRA 1 was the give-way vessel under the crossing rule. But how great is that preponderance of fault ?[2]

179. Having analysed the vessels' faults and weighed their relative causative potency and blameworthiness in some detail it is appropriate to stand back from the detail. As Willmer LJ said in *The Koningin Juliana* [1974] 2 Lloyd's Reports 353 at p.364 in his dissenting judgment in the Court of Appeal which was upheld by the House of Lords: "The inquiry must be qualitative rather than quantitative. It is necessary to look at the over-all picture…" The assessment is to be broad, qualitative and based upon common sense; see the judgment in this case of Gross LJ in the Court of Appeal at paragraph 24(vi).

180. Although ALEXANDRA 1 was causatively at fault for failing to keep clear of EVER SMART it was or ought to have been obvious to EVER SMART that ALEXANDRA 1, although moving very slowly, was waiting in the pilot boarding area to embark a pilot. In such circumstances it was necessary for EVER SMART to comply with the narrow channel rule. Nothing prevented her or inhibited her from doing so. She was, without difficulty, able to avoid a collision, albeit that the passing distance would have been about three-quarters of a cable. The pilot when leaving EVER SMART advised care but cannot have envisaged difficulty in regaining and keeping to the starboard side of the channel.

181. Although ALEXANDRA 1 had a defective aural lookout which was causative of the collision, a most striking feature of EVER SMART's navigation was her lack of a visual lookout from C-6. A good lookout is essential to safe navigation yet from C-6 EVER SMART had no lookout despite having been warned by the pilot that there was a vessel to port and to take care. There was no mitigation at all for this failure of lookout. It was a most serious failure which led to an unsafe speed and prevented EVER SMART from appreciating the need to keep to her starboard side of the narrow channel.

182. In my judgment, the present case is one of those cases, contemplated by Lord Pearce in *The Miraflores and Abadesa*, where the consequences of ALEXANDRA 1's fault were

[2] The phrase "clear preponderance" of fault was perhaps first used by Lord Atkinson in *The Peter Benoit* (1915) 13 Asp. Maritime Law Cases 203 at p. 207 and has since been in common use when considering apportionment; see for example Willmer J. in *The Billings Victory* (1948) 82 Lloyd's List Law Reports 877 at p. 883 and Brandon J. in *The Anneliese* [1969] 2 Lloyd's Reports 78 at p.93. It was also used by Sir Henry Brandon in his article at p.1033. I used it in my first judgment at paragraph 117. Its use in the context of section 187(2) of the MSA 1995 (which states when liability must be apportioned equally) has been criticised; see *The Anneliese* [1970 1 Lloyd's Reports 355 at p. 363 per Davies LJ, which concerned the predecessor to section 187. However, there can be no objection to using it to express a clear conclusion that the degree of fault of one vessel is greater than the degree of fault of the other vessel.)

easily avoidable by EVER SMART whose own fault, particularly her absence of lookout, can justifiably be described as gross. (I have noted that counsel for EVER SMART described the failure of ALEXANDRA 1 to comply with her duty as the give-way vessel as gross. It was a breach of the crossing rule but I am unable to describe it as gross. There was mitigation for it for the reason I have given. In particular, ALEXANDRA 1 was proceeding at a very slow speed, making steerage way but not much more, in a location and in circumstances in which EVER SMART knew or ought to have known what she doing.)

183. Sir Henry Brandon observed, at p.1041 of his article, that it may be helpful where there is a preponderance of fault to ask how many more times at fault one ship is than another. That is the approach which I and other Admiralty Judges have followed in the past; see *The Samco Europe and MSC* Prestige [2011] 2 Lloyd's Reports 579 at paragraph 81.

184. To conclude that EVER SMART was twice as much to blame as ALEXANDRA 1 would, I think, underestimate the relative causative potency and blameworthiness of EVER SMART compared with ALEXANDRA 1. To conclude that EVER SMART was four times as much to blame as ALEXANDRA 1 would replicate the apportionment of liability in my first judgment. However, that would fail to reflect ALEXANDRA 1's failure to comply with her duty as the give-way vessel which I think must be reflected. Thus to conclude that EVER SMART was four times as much to blame as ALEXANDRA 1 would overestimate the relative causative potency and blameworthiness of EVER SMART.

185. I have therefore considered whether the just apportionment, reflective of the relative degrees of fault, is 75:25 in favour of ALEXANDRA 1 (EVER SMART being three times as much to blame) or 70:30 in favour of ALEXANDRA 1 (EVER SMART being more than two times but less than three times to blame than ALEXANDRA 1). On this assessment of relative degree of fault my mind has wavered. Given EVER SMART's breach of the narrow channel from C-10 and her absence of lookout after C-6 in circumstances where she knew or ought to have known what ALEXANDRA 1 was doing it is arguable that that her fault was three times as much to blame as ALEXANDRA 1 notwithstanding that the latter vessel had been in breach of the crossing rule from C-13 and, at about the same time. had a poor aural lookout which led to her failing to alter course to starboard at C-5 or C-4. But ultimately I have concluded that apportioning liability 75:25 in favour of ALEXANDRA 1 would not give sufficient weight to ALEXANDRA 1's breach of the crossing rule which allowed a close quarters situation to develop. I have therefore decided that EVER SMART should bear 70% of the damage caused by the collision and that ALEXANDRA 1 should bear 30% of the damage caused by the collision.

Alternative apportionments

186. In view of the issue of law raised by counsel for EVER SMART as to the effect of Rule 17(a)(ii), namely, the possibility that Rule 17(a)(ii), together with the requirements of good seamanship, may not impose any obligation upon the stand-on vessel to take action to avoid the collision, I have been asked to say what my apportionment would have been if Rule 17(a)(ii) is hereafter held not to impose such an obligation.

187. In view of the issue of law raised by counsel for ALEXANDRA 1 as to the effect of the Supreme Court's judgment, namely, that a Group 3 vessel can bring about the retrospective disapplication of the crossing rule by becoming a Group 2 vessel, I was also asked to say what my apportionment would have been if counsel's submission were correct.

188. These are unusual requests. But it is also unusual in a collision case for discrete issues of law to be raised. In such a case it may be appropriate for the court to make "alternative" apportionments, assuming that that can be done without difficulty. The reason for doing so is that in the event of a successful appeal there is no need for a further apportionment hearing. I think it is practical to make alternative apportionments in the present case. It may not always be so.

189. With regard to the Rule 17(a)(ii) issue, I do not consider that the just apportionment of liability would be any different. EVER SMART would remain at fault for her failure to return to the starboard side of the channel and for her failure to keep a lookout which prevented her from seeing why it was necessary to return to the starboard side of the channel and resulted in her failure to reduce speed substantially at C-4 and her failure to apply hard starboard helm at about C-2 when about to exit the channel at buoys no.1. For the reasons explained earlier in this judgment the failure to reduce speed substantially would remain a fault (as would the other faults) even if Rule 17(a)(ii), coupled with good seamanship, did not impose an obligation to act. If, contrary to my view, the correct criticism of EVER SMART's speed is that she ought not to have increased speed to full ahead sea speed at C-3.5 and ought to have reduced speed substantially at C-3 (instead of at C-4) that would not lead to any different apportionment of liability. In qualitative terms there would be no material difference.

190. With regard to the Group 3/Group 2 issue, there would also be no different apportionment. Since ALEXANDRA 1 never "converted" herself from a Group 3 vessel into a Group 2 vessel the crossing rule continued to apply even if the legal argument advanced were correct. There would therefore still be a breach of the crossing rule at C-13 which would have to be reflected in the just apportionment of liability.