Neutral Citation Number: [2022] EWHC 830 (Admlty)

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

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2022

Before :

SIR NIGEL TEARE
Sitting as a Judge of the High Court

- -

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**

Written submissions: Received between 21 February and 4 April 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

Sir Nigel Teare :

1. On 8 February 2022 I handed down a judgment in this collision action ("the substantive judgment") which apportioned liability for the collision between ALEXANDRA 1 and EVER SMART 70:30 in favour of ALEXANDRA 1; see [2022] EWHC 206 (Admlty). This further judgment is concerned with matters consequential upon the substantive judgment. Although much of the draft order giving effect to my judgment has been agreed substantial matters are not agreed. The substantial matters in dispute concern costs, a stay of execution and permission to appeal. I shall deal with those substantial matters in the expectation that the draft order can then be agreed.

Costs

2. In my substantive judgment I described the case as having had a long and unusual history; see paragraph 1. To that history can now be added the following facts. On 23 October 2015 the Owners of ALEXANDRA 1 offered to settle the dispute as to apportionment of liability 70:30 in favour of ALEXANDRA 1. That offer was not accepted and the litigation proceeded. On 10 August 2016, which was prior to the first trial in the Admiralty Court the Owners of ALEXANDRA 1 offered to settle the dispute as to apportionment of liability 60:40 in favour of ALEXANDRA 1. On 19 June 2020, which was after the decision of the Court of Appeal and before the appeal to the Supreme Court, the Owners of ALEXANDRA 1 again offered to settle the dispute as to apportionment of liability 60:40 in favour of ALEXANDRA 1. On 24 February 2021, which was after the decision of the Supreme Court and before the re-apportionment hearing before me, the Owners of ALEXANDRA 1 once again offered to settle the dispute as to apportionment of liability 60:40 in favour of ALEXANDRA 1.

3. There is no dispute that with regard to the first trial and the re-apportionment hearing the Owners of EVER SMART must pay the costs of the Owners of ALEXANDRA 1 from 14 November 2015 and 70% of the costs of ALEXANDRA 1 incurred before that date. There is also no dispute that the Owners of ALEXANDRA 1 must pay 30% of the costs of the Owners of EVER SMART incurred before 14 November 2015. That date is of course 21 days from the date of the offer made by the Owners of ALEXANDRA 1 on 23 October 2015 upon which the Owners of EVER SMART were unable to improve by continuing with the litigation.

4. In addition, the Owners of ALEXANDRA 1 seek an order that the Owners of EVER SMART shall pay the costs incurred by the Owners of ALEXANDRA 1 in successfully resisting the appeal of the Owners of EVER SMART to the Court of Appeal and in unsuccessfully seeking to resist the appeal of the Owners of EVER SMART to the Supreme Court. Such orders are resisted by the Owners of EVER SMART who seek an order that the Owners of ALEXANDRA 1 should pay the costs of both appeals.

5. This dispute has been referred to me by the Supreme Court by order dated 18 February 2022.

6. The submission made by counsel on behalf of ALEXANDRA 1 is simple. The Owners of EVER SMART have not been able to improve upon the offer made on 23 October 2015 and therefore the Owners of EVER SMART must pay the costs of ALEXANDRA 1 incurred after 14 November 2015 which include the costs of the appeals to the Court of Appeal and the Supreme Court.

7. The submission made by counsel of behalf of EVER SMART is almost as simple. The Supreme Court allowed the appeal of the Owners of EVER SMART on the two issues of principle argued before the Supreme Court. The Owners of EVER SMART were thus the winners and should have the costs of the appeal to the Supreme Court and also the costs of the appeal to the Court of Appeal whose decision on those two issues of principle was held to be wrong. Although the Owners of ALEXANDRA 1 defeated the Owners of EVER SMART on a further issue in the Court of Appeal which was not renewed on appeal to the Supreme Court, that circumstance did not need to be reflected in the costs order because the Owners of ALEXANDRA 1 had lost on their Respondent's Notice.

The court's jurisdiction with respect to costs

8. I have been referred to CPR 61.4 which concerns collision actions and provides as follows:

> "(10) The consequences set out in paragraph (11) apply where a party to a claim to establish liability for a collision claim (other than a claim for loss of life or personal injury) –
>
> (a) makes an offer to settle in the form set out in paragraph (12) not less than 21 days before the start of the trial;
> (b) that offer is not accepted; and
> (c) the maker of the offer obtains at trial an apportionment equal to or more favourable than his offer.
>
> (11) Where paragraph (10) applies the parties will, unless the court considers it unjust, be entitled to the following costs –
>
> (a) the maker of the offer will be entitled to –
> (i) all his costs from 21 days after the offer was made; and
> (ii) his costs before then in accordance with the apportionment found at trial; and
> (b) all other parties to whom the offer was made –
> (i) will be entitled to their costs up to 21 days after the offer was made in accordance with the apportionment found at trial; but
> (ii) will not be entitled to their costs thereafter.
>
> (12) An offer under paragraph (10) must be in writing and must contain –
>
> (a) an offer to settle liability at stated percentages;
> (b) an offer to pay costs in accordance with the same percentages;
> (c) a term that the offer remain open for 21 days after the date it is made; and
> (d) a term that, unless the court orders otherwise, on expiry of that period the offer remains open on the same terms except that the offeree should pay all the costs from that date until acceptance."

9. I have also been referred to CPR 44.2 which deals with costs and provides as follows:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> (b) the court may make a different order.
>
> (3) The general rule does not apply to the following proceedings –
>
> (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
> (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

Costs in the Supreme Court

10. The Supreme Court has power to award costs. The Rules of the Supreme Court provide that the Supreme Court may make "such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or other application to or proceeding before the Court"; see rule 46.1. Counsel did not suggest that there was any reason to doubt that costs generally follow the event or that the Supreme Court is able to take into account when exercising its discretion the terms of any offer which a respondent has made to settle an appeal to the Supreme Court.

The costs in the Supreme Court in this case

11. The submission made by counsel for EVER SMART was that

> "in the present case there can be no doubt as to the identity of the successful party in the appeal process. "The event" in the Supreme Court related solely to the two points of construction raised by Questions 1 & 2. ES Interests

> overturned the decisions at first instance and in the Court of Appeal as to the application of the crossing rules. Accordingly ES Interests must be entitled to its costs, irrespective of the subsequent re-apportionment exercise."

12. The submission made by counsel for ALEXANDRA 1 was that

> "the appellate process in this case cannot properly be regarded as separate from the determination and apportionment of liability".

13. It was said that the approach of EVER SMART was

> "wrongly predicated on the idea that the relevant event is the determination of the crossing rules point of principle" and "ignores the importance of the Re-apportionment in determining where responsibility for the appellate costs should lie".

14. I was told (see paragraph 14 of ALEXANDRA 1's responsive submissions) that at the inception of the appeal to the Supreme Court it was envisaged that the Supreme Court should itself deal with any necessary reapportionment, "so it is only with hindsight that the Appellant can even begin to argue that the appeal to the Supreme Court was not concerned with apportionment". Thereafter it was agreed that the re-apportionment should be conducted by me.

15. I of course accept that the ultimate result of the appeal to the Supreme Court depends upon the re-apportionment of liability. But when one has regard to what was argued before the Supreme Court and the decisions reached by the Supreme Court I find it impossible to say that the successful party was ALEXANDRA 1. The arguments advanced on her behalf were rejected. Those advanced on behalf of EVER SMART were accepted. Indeed, counsel for ALEXANDRA 1 was only able to say that ALEXANDRA 1 was the ultimate winner because the result of the re-apportionment meant that EVER SMART had not beaten the offer made by ALEXANDRA 1 to settle the appeal. This confuses the "event" with a "successful offer". Had the Supreme Court dealt with re-apportionment and concluded, as I did, that liability should be apportioned 70:30 in favour of ALEXANDRA 1, "the event" would have been a reduction in EVER SMART's liability from 80% to 70% and, in the absence of any other relevant factors, costs would follow that event. In the present case there is another relevant factor, namely, the offer made by the Owners of ALEXANDRA 1 on 19 June 2020 to settle the appeal to the Supreme Court 60:40 in favour of ALEXANDRA 1. To that I now turn.

16. The submission made on behalf of the Owners of ALEXANDRA 1 relied primarily upon its first CPR 61 offer made in October 2015. However, reliance was also placed upon the offer made prior to the appeal to the Supreme Court in June 2020. That offer was made expressly "for the purposes of costs protection in the Supreme Court". Although the Owners of EVER SMART won on the two points argued in the Supreme Court the result of the consequential re-apportionment hearing was that the offer of 60:40 was not "beaten". Had the offer been accepted no costs would have been incurred thereafter. Offers to settle are to be encouraged and that is why a "successful" offer which has not been accepted will usually result in the offeree being ordered to pay the costs incurred by the offeror following the non-acceptance.

17. Counsel for EVER SMART submitted that

> "in the event that [ALEXANDRA 1] wanted to protect its position as to the costs of the appeal process, A1 Interests could have done so by simply accepting the application of the crossing rules. The case could then have moved on to the re-apportionment. Whereas parties in collision proceedings make offers in relation to apportionment at trial, the appeal to the Supreme Court was not concerned with apportionment."

18. What appears to be suggested is an open acceptance by the Owners of ALEXANDRA 1 that the crossing rules applied. This would have avoided the costs later incurred in the Supreme Court but seems somewhat improbable given that the Admiralty Court and the Court of Appeal had held that the crossing rules did not apply and so there would have been some degree of uncertainty at the re-apportionment hearing as to why the crossing rules applied. But the essential question is whether the offer made in June 2020 was effective to provide protection against costs in the Supreme Court. It appears to be suggested that it was not effective because the appeal to the Supreme Court was not concerned with apportionment. I am unable to accept that suggestion. First, the collision claims brought by ALEXANDRA 1 and EVER SMART were to establish liability for the collision. Section 187 of the Merchant Shipping Act 1995 provides that "the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault." Thus where both ships are at fault apportionment of liability is a necessary part of establishing the degree of each ship's liability for the collision. Second, on an appeal in a collision case the normal course of events is for the appellate court to apportion liability in the event that it had been determined that the first instance court had erred in law; see, for example, *The Koscierzyna v The Hanjin Singapore* [1996] 2 Lloyd's Reports 124 at pp.131-132. Third, in those circumstances the natural and expected manner in which a respondent would seek protection as to the costs of the appeal would be to offer to settle liability in certain stated proportions, as the Owners of ALEXANDRA 1 did in this case. Fourth, although it was ultimately agreed in the present case by the parties and by the Supreme Court that any necessary re-apportionment would be carried out, not by the Supreme Court, but by me sitting in the Admiralty Court, it was initially the case of EVER SMART, consistent with the normal course of events, that any necessary re-apportionment would be carried out by the Supreme Court. I therefore see no reason why the offer of June 2020 was not in principle effective to give the desired protection as to costs.

19. The Supreme Court has power to make "such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or other application to or proceeding before the Court". It was submitted by counsel on behalf of the Owners of EVER SMART that

> "it is neither fair nor just for A1 Interests to fight the application of the crossing rules "tooth and nail" and then, having lost comprehensively, to argue that the costs of this particular exercise should be dependent upon the re-apportionment."

20. But where an offer is made to settle liability in certain stated proportions the offeror is entitled to argue questions of fault "tooth and nail" without prejudicing the effectiveness of its without prejudice offer. Of course, if points are taken unreasonably that might be reflected in the costs order, but that is not suggested in this case. Had the

Supreme Court, having decided that the crossing rules did not apply, gone on to deal with re-apportionment and concluded that liability should be apportioned 70:30 in favour of ALEXANDRA 1, it would be just to award ALEXANDRA 1 the costs of the appeal on the grounds that her offer had not been beaten, notwithstanding that she had argued "tooth and nail" that the crossing rules did not apply. I am not persuaded that any different conclusion should be reached in circumstances where it was ultimately agreed by the parties and the Supreme Court that I should carry out the re-apportionment exercise rather than the Supreme Court.

21. For these reasons I have concluded that the just order as to costs in the Supreme Court is that the general rule that costs follow the event should be displaced and that the just order is one which gives effect to the "successful" offer by ALEXANDRA 1. Thus, up to 21 days after the date of the June 2020 offer EVER SMART should pay 70% of ALEXANDRA 1's costs and ALEXANDRA 1 should pay 30% of EVER SMART's costs and thereafter EVER SMART should pay ALEXANDRA 1's costs of the appeal.

Costs in the Court of Appeal

22. The Court of Appeal has power to award costs; see CPR 52.20(2)(e). It is apparent from CPR44.2(3) that the Court of Appeal, when sitting on appeal from the Queen's Bench Division, and hence on appeal from the Admiralty Court, will have regard to CPR 44.2. Typically, the costs of an appeal will follow the event. That is "the general rule". Thus, if an appellant obtains a decision which he was denied at first instance, the appellant will often recover the costs of the appeal.

23. That has long been the position in the Court of Appeal when a shipowner seeks and obtains a more favourable apportionment of liability in a collision case than was ordered at first instance; see *The Young Sid* [1929] Probate 190. Scrutton LJ explained the matter thus, at p.197:

> "Speaking of my own experience in this Court in common law cases (and, I am sorry to say, I have had thirteen years' experience here) the question is constantly arising. An appellant brings a very wide-sweeping appeal, and succeeds in part. It is said on the one side : " See how much the appellant has failed in." It is said on the other side : " Ah, but he succeeded in this, and he had to come here to get it " ; and the Court acts on no settled rule of practice, but considers the circumstances of each case, and considers whether the appropriate order would be, in view of the fact that the appellant has failed in a large part of the appeal, to make a special order as to costs, or whether he has succeeded in a sufficiently substantial amount to justify giving him the costs of appeal."

24. Greer LJ said, in similar vein, as follows, at p.198:

> "It follows that the appeal from the county court was partially successful, and a remedy was obtained by the appellant that he could not have got without bringing the matter before the Divisional Court. For myself I should have thought, although there is no rule binding the discretion of the Court, that that was prima facie a reason why the present respondent, the appellant below, should have the general costs of the appeal."

25. CPR Part 61.4(10)-(12) provide that where an offer has been made in a collision case which the offeree has “failed to beat”, the offeror will be entitled to all his costs from 21 days after the date of the offer unless such an order would be unjust.

26. There was a dispute between counsel as to the relevance of CPR Part 61.4(10) – (12) to the costs of an appeal.

27. Counsel for EVER SMART submitted that:

> “These paragraphs contain specific provisions relating to collision trials where a party purports to make a costs protection offer in relation to apportionment. The provisions have no relevance to the appeal process especially where the issue is one of principle and not apportionment.”

28. Counsel for the ALEXANDRA 1 submitted that:

> “there is nothing in Part 61 which suggests that appellate proceedings are outside its scope altogether, and every reason to believe that they are capable of being dealt with in exercise of the discretion afforded by the “unless the court considers it unjust” caveat in r. 61.4(11)”

29. This point has been resolved in relation to offers made pursuant to CPR Part 36. It was decided in two cases in 2003 which concerned the power to order indemnity costs in the event that an appellant “failed to beat” a Part 36 offer. It was held that such an offer made before trial did not encompass the costs of an appeal; see *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* [2003] 1 Lloyd’s Reports 265. Brooke LJ said as follows at paragraphs 5 and 6:

> “5. Mr. Males contended that his clients ought to receive the benefit of CPR 36.21 even though they made no Part 36 offer in connection with the appeal proceedings. He said that we could interpret the word "trial" in CPR 36.21(1) as if it meant both the first instance trial and the hearing of the appeal. When we asked him to say what should happen if the defendants succeeded in reducing their liability on the judgment by, say, 15 per cent. on the appeal without "beating" his clients’ original offer, he said that this might be an occasion when the Court might consider it "unjust" to make the usual order envisaged by CPR 36.21(2)-(4): see CPR 36.21(4) and (5).
>
> 6. In our judgment we should not strain the meaning of CPR 36.21(1) in this way. Part 36 provides a straightforward code whereby a claimant may protect himself against the subsequent costs of first instance proceedings, or the subsequent costs of an appeal, but there is no hint that the rule makers ever considered that a claimant might make a portmanteau Part 36 offer which would provide him with the protection of the code in CPR 36.21 both at first instance and on a subsequent appeal. If he wants to protect himself as to the costs of an appeal, he must make a further offer in the appeal proceedings. Then everyone will know where they stand, and it is unnecessary to give CPR 36.21 a convoluted meaning.”

30. That decision was followed in *Rowlands v Bryn Alyn Community Holdings Ltd.* [2003] EWCA Civ 383 per Waller LJ at paragraphs 10-13.

31. The language of CPR 36.4 was then amended to give effect to those decisions; see the notes in the White Book to CPR 36.4 and CPR 52.22.1. Thus CPR 36.4 now specifically provides that a Part 36 offer made before trial does not apply to the costs of an appeal save where a Part 36 offer is made in relation to the appeal.

32. CPR Part 61 does not deal with the question as clearly as CPR Part 36.4 now does. However, by parity of reasoning with the case law relating to Part 36 (and noting the reference to "trial" in CPR Part 61.10 and 11), it is arguable that an offer to settle made before trial pursuant to Part 61.10 cannot affect the costs of an appeal and that if a respondent wishes to seek protection in costs in relation to an appeal the respondent must make an offer to settle the appeal.

33. I drew counsel's attention to these cases after submissions had been exchanged.

34. In response counsel for ALEXANDRA 1 emphasised that CPR 61.4(11)(a)(i) provides that the successful offeror will be entitled to "all his costs", wording not to be found in CPR 36.4. (Counsel also referred to the phrase "all the costs" in CPR 61.4(12)(d) but wrongly referred to it as CPR 61.4(2)(d).)

35. In response counsel for EVER SMART submitted that for the purpose of Part 61.4(10) & (11), the various references to "trial" relate only to the first instance hearing and not the subsequent appeal proceedings. Trial cannot mean something different in Part 61 than it means in Part 36. It follows that offers made at trial cannot inure for the benefit of appellate proceedings (unless expressly stated).

36. Whilst CPR 61.4(11)(a)(i) refers to the successful offeror recovering "all his costs", CPR 36.17(iii)(a) refers to the successful offeror recovering "costs (including any recoverable pre-action costs)." In circumstances where both CPR 61.4 and CPR 36 refer to "trial" I am not persuaded that the words "all his costs" were intended to include not only costs incurred at trial but also costs incurred at a subsequent appeal. Whilst CPR 36 does not apply to collision trials or to offers made pursuant to CPR 61.4 I think that I cannot ignore the reasoning of Brookes LJ in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* I am therefore not persuaded that the words "all his costs" are sufficiently clear to lead to the conclusion that a party to a collision trial may make "a portmanteau" Part 61.4 offer which will provide him with the protection of the code in CPR 61.4 both at first instance and on a subsequent appeal. If he wants to protect himself as to the costs of an appeal, he must make a further offer in the appeal proceedings. Since ALEXANDRA 1 did not make an offer in respect of the appeal to the Court of Appeal I have concluded that the offer made prior to trial cannot affect the costs of that appeal.[1]

37. Counsel for ALEXANDRA 1 made an alternative submission. Where the result in the Court of Appeal has not "beaten the offer" made before trial, the costs in the Court of

---

[1] After making my ruling counsel for ALEXANDRA 1 advised me that I had not understood that counsel's reference to CPR 61.4(12) was in support of a submission that "while, per Brooke LJ in Utaniko, a Part 36 offer would automatically lapse for the purposes of an appeal, r.61.4(12)(d) therefore expressly maintains the validity of a Part 61 offer without time limit." It is correct that I had missed that that was the import of the reference to CPR 61.4(12). However, this further point does not dissuade me from the view I have formed. I do not consider that the words of CPR 61.4(12), when set out in the offer made pursuant to CPR 61.4(10), are sufficiently clear, given the references to "trial" in CPR 61.4(10) and (11), to mean that the offer remains open for acceptance after trial.

Appeal were effectively caused by the failure of the EVER SMART to accept the offer made before trial and so, taking into account CPR Part 44.2(4), the general rule may be displaced by an order that the successful appellant pays the costs of the respondent whose offer was "successful".

38. This argument was not accepted in the context of an appeal by Brooke LJ in in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* [2003] 1 Lloyd's Reports 265. Brooke LJ said as follows at paragraphs 7 and 8:

> "7. Mr. Males then submitted that even if he was wrong about CPR 36.21, we should exercise our discretion under CPR 44.3 to direct that his clients should receive their costs of the appeal on an indemnity basis. He did not seek to argue that there was anything about the defendants' conduct of the appeal to take this case out of the norm. He simply argued that as an exercise of discretion we should award costs on an indemnity basis, by analogy with CPR 36.21(3), because none of the costs of the appeal need have been incurred by either side if only the defendants had been willing to accept his clients' original Part 36 offer.
>
> 8. It goes without saying that if his clients had made an admissible offer to settle the appeal proceedings then this would have been a factor we would have been bound to take into account (see CPR 44.3(c)). In the absence of such an offer they must be taken to have resiled from their willingness to accept 75 per cent. of their claim, so that their original Part 36 offer can no longer be regarded as being on the table. If they did not wish to offer to settle on the appeal for less than the full amount awarded to them on the judgment, it would have been open to them to craft a letter relating to the costs of the appeal which might have persuaded us that it would be just that they should continue to be awarded indemnity costs. But in the absence of any such letter, we see no reason why the usual rule as to standard costs should not be applied. The appeal raised points of law that were considered fit for argument in this Court when permission to appeal was granted, and although the defendants did not succeed, we see no reason why the usual rule as to costs should not follow, in the absence of some letter relating to the costs of the appeal proceedings."

39. Of course, there are no hard and fast rules in the exercise of the court's discretion as to costs but the approach in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd* is clear guidance as to how the Court of Appeal would view the suggested argument. As it was put in *Rowlands v Bryn Alyn Community Holdings Ltd.* [2003] EWCA Civ 383 by Waller LJ the Court of Appeal will be "disinclined" to reach the same result by reference to CPR Part 44. Waller LJ summarised the effect of *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd* in these terms at paragraph 13.

> "First, it makes clear that unless a fresh Part 36 offer was made during the appeal proceedings the machinery of Part 36 is not available to the appeal court. Second, it makes clear that the Court of Appeal will be disinclined to use its discretion to achieve a similar result by reference to a pre-trial Part 36 offer."

40. Counsel for ALEXANDRA 1 submitted that EVER SMART "could have settled liability at a 70/30 apportionment in October 2015. All of the liability costs subsequently incurred would have been avoided if that had happened and ES would have achieved exactly the same apportionment as it has obtained in the Re-apportionment." Counsel further referred to "the Court's approach to unaccepted offers, including withdrawn offers, which is to ask whether costs subsequently incurred were incurred by the offeree's unreasonable refusal to accept the offer: see *Samco Europe v. Prestige* [2011] 2 CLC 679, per Teare J at [26]."

41. The analysis of Brooke LJ in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* [2003] 1 Lloyd's Reports 265 at paragraph 8 was that in the absence of an offer after trial and before appeal a respondent must be taken to have resiled from his willingness to accept a lesser percentage of his claim than had been awarded to him at trial "so that their original Part 36 offer can no longer be regarded as being on the table." In the context of the present case the Owners of ALEXANDRA 1 had secured a judgment which apportioned liability 80:20 in their favour. Prior to trial they had been willing to accept 70:30 in their favour (from October 2015) and 60:40 in their favour (from August 2016). It seems to me that in the absence of a further offer after trial and before the appeal by the Owners of ALEXANDRA 1 to accept a lesser apportionment than they had secured at trial it is reasonable to infer that the Owners of ALEXANDRA 1 did not remain so willing. It was therefore incumbent upon them, if they wished to obtain protection against the costs of an appeal, to make an offer to accept a lesser apportionment than they had secured at trial (as they did before the appeal to the Supreme Court).

42. However, a withdrawn offer (which is no longer "on the table") can remain effective with regard to the costs of a trial for the reasons given in *Samco Europe v. Prestige*; see in particular paragraphs 19-27. Thus where an offer has been unreasonably refused it can be said that the subsequent proceedings flowed from that refusal. However, the decision in Samco Europe was concerned with an offer which had been withdrawn before trial and its effect on the order concerning the costs of the trial. The dispute in the present case concerns an offer made before trial which was not repeated after trial and before appeal and its effect on the order concerning the costs of an appeal. Those were the circumstances of *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd* from which decision it can be seen, as explained by Waller LJ in *Rowlands v Bryn Alyn Community Holdings Ltd*. [2003] EWCA Civ 383, that the Court of Appeal will be "disinclined" to accept an argument based upon the premise that "none of the costs of the appeal need have been incurred by either side if only the defendants had been willing to accept his clients' original Part 36 offer." I note, however, that both of the above cases concerned the question whether the costs were to be assessed on the indemnity basis rather than the question of who was to pay the costs of the appeal. I also note, of course, that both cases involved CPR 36 and not CPR 61.4.

43. In the present case an offer to settle the dispute as to apportionment of liability on terms no worse than those assessed by the Court on the re-apportionment of liability had been available for acceptance from October 2015 until the trial in January 2017, a period of some 15 months. The refusal to accept that offer was, assessed objectively, unreasonable and had the offer been accepted the costs of the trial and the subsequent appeal to the Court of Appeal would not have been incurred. The submission made on behalf of the Owners of ALEANDRA 1 therefore has undoubted attraction.

44. However, the approach of the Court of Appeal in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* has the attraction of certainty. In the event of an appeal a further offer should be made so that, as Brooke LJ put it, "everyone will know where they stand". Certainty is one aspect of what is fair and just. There was certainty with regard to the appeal to the Supreme Court because the Owners of ALEXANDRA 1 made an offer with regard to that appeal. (It is also interesting to note that in the present case the Owners of EVER SMART made an offer after trial and before the appeal to the Court of Appeal, though whether they had made an offer before trial I do not know.)

45. For that reason I am minded to follow the approach of Brooke LJ as to what justice requires in the context of an appeal notwithstanding that he decision of the Court of Appeal did not involve the question of who pays the costs of an appeal but concerned the basis of assessment and notwithstanding that the decision concerned CPR 36 and not CPR 61.4.

46. I have noted that the unreported decision of the Court of Appeal in *Bristol and West Building Society v Evan Bullock* dated 5 February 1996, which was the start of the line of authority which I followed in *Samco Europe v MSC Prestige*, appeared to concern the costs of an appeal from the district judge to the High Court; see paragraphs 19-21 of my judgment in *Samco Europe v MSC Prestige*. The case concerned a Calderbank offer to settle an application under RSC Ord.14.

47. To the extent that there is conflict, or at least tension, between the approach of the Court of Appeal in Bristol and West Building Society v Evan Bullock with regard to the costs of an appeal and the approach of the Court of Appeal in *East West Corporation v DKBS 1912 and AKTS Svendborg Utaniko Ltd.* with regard to the costs of an appeal I consider that I should be guided by the approach of the later case which was decided under the CPR with reference to CPR Part 36 which has a similar purpose to that of CPR 61.4(10) and (11).

48. For these reasons I have concluded that it would not be just or consistent with the later guidance from the Court of Appeal on the question of appeal costs to award the Owners of ALEXANDRA 1 the costs of the appeal to the Court of Appeal on the basis of an offer made before trial in circumstances where the offer was not repeated after trial and before the appeal.

49. In the final submissions made on behalf of the Owners of ALEXANDRA 1 it was said that if the court considers that CPR Part 36 applies they would wish to claim indemnity costs and the other matters provided by CPR Part 36. I have not held that CPR Part 36 applies. I have merely had regard to the reasoning of the Court of Appeal in cases concerning CPR Part 36 when considering how CPR 61.4 should be applied in circumstances where no offer was made after trial and before an appeal to the Court of Appeal.

50. There remains the question of what the order should be with regard to the costs of the appeal to the Court of Appeal. There were three "principal" issues; see paragraph 11 of the judgment of Gross LJ at paragraph 11. The issue which took up the greatest part of the judgment was the first; see paragraphs 35-85 of Gross LJ's judgment. The second took up much less of the judgment; see paragraphs 86-93. In the light of the decision of the Supreme Court it can now be said that the Owners of EVER SMART ought to have

succeeded on those two issues in the Court of Appeal. The third issue argued in the Court of Appeal was the relevance of speed to causative potency. The Owners of ALEXANDRA 1 were successful on that and there was no appeal to the Supreme Court. That issue, which was considered at paragraphs 99-125 of Gross LJ's judgment, took up less of the judgment than the first issue and more of the judgment than the second issue. Finally, there was a Respondent's Notice which took up very little of the judgment; see paragraphs 94-98 of Gross LJ's judgment. The Owners of ALEXANDRA 1 failed on that. Thus of the three principal issues EVER SMART must be regarded as having won on two (and also on the Respondent's Notice) and as having lost on the third principal issue. Thus the contested issues on which EVER SMART won consumed about 70% of the relevant parts of the judgment (61 out of 87 paragraphs), whilst the contested issue on which ALEXANDRA 1 won took up about 30% of the relevant parts of the judgment (26 out of 87 paragraphs). The amount of the judgment devoted to those issues is only a very rough guide to the appropriate order. But doing the best I can, and seeking to reflect the issues on which each party won and lost, I consider that the Owners of EVER SMART should be awarded 40% of their costs of the appeal to the Court of Appeal.

Stay of execution

51. The Owners of EVER SMART seek a stay of execution (or the continuation of the stay of execution) pending the determination of the application for permission to appeal and, if permission is granted by the High Court or Court of Appeal, pending the determination of the appeal itself. A stay of execution is opposed by the Owners of ALEXANDRA 1.

52. The essential question is "whether there is a risk of injustice to one or both parties if it grants or refuses a stay".

53. The Owners of ALEXANDRA 1 are impecunious and so there is a risk that if a stay were refused and an appeal were to succeed the Owners of EVER SMART may not be able to recover what they had (wrongly) paid. It is true that the proceeds of sale of ALEXANDRA 1 are in court in Singapore but there are several claimants on those proceeds and I do not have sufficient information to know whether EVER SMART's claim on those proceeds will enable it to recover what it may (wrongly) have paid.

54. The Owners of ALEXANDRA 1 have security for their claim and so, if a stay were granted, would still, in the event that an appeal were refused or dismissed, recover their judgment (subject to whatever other claims there are on the judgment debt). On the other hand it is said that the Owners of ALEXANDRA 1 may be inhibited in resisting an appeal, in the event that permission were granted, by a lack of funds. But it is difficult to evaluate this risk in circumstances where the Owners of ALEXANDRA 1 have in fact been able to fight both the appeal to the Supreme Court and the re-apportionment incurring, I am told, costs, respectively, of over £340,000 and over £370,000.

55. On balance I consider that there is a greater risk of injustice to EVER SMART were a stay to be refused than the risk of injustice to ALEXANDRA 1 were a stay to be granted. I shall therefore grant the requested stay.

Permission to appeal

56. Permission to appeal has been sought on three grounds.

57. The first ground of appeal is expressed as follows:

> "The Judge erred in law in failing to have regard to the failure on the part of A1 to take early and substantial action at C-18. The Judge concluded that the relevant time was C-13 which was the "latest" rather than the "optimal" time (C-18) for taking early and substantial action. In the light of Rule 7(d)(i) of the Collision Regulations and having been advised by the Nautical Assessors and having found that the "optimal" time was C-18, the Judge ought to have held that ALEXANDRA 1 should have taken action under Rule 16 of the Collision Regulation at C-18 and not C-13 and was, therefore, in breach of the Collision Regulations from C-18."

58. I considered the question as to when ALEXANDRA 1 was at fault for having failed to take early and substantial action as the give-way vessel between paragraphs 57 and 103 of my judgment. I do not consider that there is a real prospect that the Court of Appeal will consider it appropriate to reconsider my assessment of the evidence there discussed.

59. The suggested ground of appeal is that I erred in law in failing to find that the relevant time was C-18 which in the opinion of the Assessors was the "optimal" time for taking early and substantial action. The assessors also advised that C-15 was the latest time at which "early and substantial action" could have been taken and that the range of time for such action was C-18 to C-15. There is no real prospect that the Court of Appeal will consider that there was an error of law in identifying the time when ALEXANDRA 1 was at fault as the latest time at which she could take "early and substantial action" as the give-way vessel. On the facts of this case there was a range of times which could qualify as the time when "early and substantial action" may be taken and so the breach of that rule can only occur when it is too late for such action to qualify as "early"; see paragraphs 58-59, 61-62, 64, 68, 72-76, 81 and 90-91 of my judgment which address this point. I assessed the time of breach at C-13 having had regard to (i) the Assessors' advice that the minimum passing distance was 3 cables and (ii) the further plots provided to the court; see paragraphs 96-101. No error is suggested in that assessment.

60. I therefore refuse permission to appeal on the first ground because there is no real prospect of success.

61. The second ground of appeal is expressed as follows:

> "The Judge erred in law in taking into account a series of factors in his re-apportionment which were not "valid" and which he should not have taken into account in arriving at his re-apportionment and/or failing to take into account factors which were valid. In particular:
>
> (1) Contrary to §§156 - 157 of the Judgment, the failure on the part of ALEXANDRA 1 to take action at C-18 (or C-13) could not conceivably have been mitigated by the prior request at 2254 (C-48) by Jebel Ali Port Control to proceed to buoys no.1 and there embark at 2315 the pilot who was on board EVER SMART.

> (2) Contrary to §§159 and 172 of the Judgment. EVER SMART's breach of the narrow channel rule did not influence A1's misunderstanding of the VHF conversation between Port Control and ZAKHEER BRAVO.
>
> (3) The fact that it was or should have been obvious to EVER SMART that ALEXANDRA 1 was waiting for the pilot was irrelevant."

62. There is no real prospect that the Court of Appeal will consider that the factors which I took into account when assessing the blameworthiness of ALEXANDRA 1's faults in paragraphs 156-159 of my judgment ought not to have been taken into account (points (1) and (2) of this ground of appeal). Section 187(2) of the Merchant Shipping Act requires the court to have regard to all the circumstances of the case; and see also paragraphs 133-135 and 138 of my judgment. The factors which I took into account were amongst the particular circumstances of this case and were therefore matters which I was obliged to take into account.

63. Although this ground of appeal is described as taking into account factors which I ought not to have taken into account and/or as failing to take into account factors which I ought to have taken into account, this ground of appeal in fact seeks to challenge my assessment of the circumstances of the case by saying that the factors taken into account were not "valid" or, as it is put in the Skeleton Argument, unsustainable or not supported by the evidence or by the whole of the evidence. There is no real prospect that the Court of Appeal will consider it appropriate to review my assessment of the blameworthiness of ALEXANDRA 1's faults, having regard to the nature of the exercise upon which I was engaged; see paragraph 135 of my judgment. This is an attempt to invite the Court of Appeal to substitute its own assessment of the degree of ALEXANDRA 1's blameworthiness in place of my assessment. This is not an exercise upon which the Court of Appeal will readily embark.

64. There is also no real prospect that the Court of Appeal will conclude that the fact that it was or should have been obvious to EVER SMART that ALEXANDRA 1 was waiting for the pilot was irrelevant (point (3) of this ground of appeal). When considering the relative blameworthiness of each vessel the knowledge which EVER SMART had or ought to have had that ALEXANDRA 1 was waiting for the pilot is a circumstance of the case which the court was bound to take into account. Further, the court has to assess the "inter-relationship" of the respective faults of the vessels; see paragraph 135 of my judgment. In this particular case there was, as noted in paragraph 171 of my judgment, a clear relationship between the respective faults of the two vessels because the very matters which founded ALEXANDRA 1's mitigation of her breach of the crossing rule were the very reasons why EVER SMART was able to avoid a collision by complying with the narrow channel rule; see also paragraph 180 of my judgment.

65. I therefore refuse permission to appeal on the second ground.

66. The third ground of appeal is expressed as follows:

> "The Judge's (70:30) re-apportionment is in any event manifestly wrong. In particular:

(1) The application and importance of the crossing rules (as determined by the Supreme Court [2021] UKSC 6) self-evidently required a substantial adjustment to the 80:20 apportionment as determined by the Judge at the first trial [2017] EWHC 453 (Admlty). The minor and insignificant adjustment made by the Judge was bizarre, unsustainable and demonstrates that the Judge's decision-making process has gone seriously wrong.

(2) He erred in law or misdirected himself by holding that the contribution of EVER SMART to the damage sustained by ALEXANDRA 1 meant that "the causative potency of EVER SMART's faults exceeded the causative potency of ALEXANDRA 1's faults" notwithstanding that the situation of danger and the collision were created by ALEXANDRA 1.

(3) He failed to give proper effect to the fact that the dangerous situation which resulted in the collision and the collision itself were created by the ALEXANDRA 1 and, in particular, her breach of the crossing rules.

(4) He failed to give proper effect to the fact EVER SMART's faults in relation to her lookout and speed occurred at C-6 [§161] and C-4 respectively, in contrast to ALEXANDRA 1's continuous breach of the crossing rule from C-18 or, on the Judge's analysis, C-13 and continuous failure to maintain a good aural lookout from C-14

(5) On the facts found, the Judge erred in law or misdirected himself in finding that EVER SMART was more than twice to blame than ALEXANDRA 1."

67. My assessment of the relative liability of each vessel was preceded by an account of the principles underlying that assessment between paragraphs 132 and 140 of my judgment. No criticism of that account is suggested. I then assessed the relative liability of each vessel between paragraphs 142 and 185 of my judgment. That assessment involved (a) an assessment of the relative causative potency of the faults of each vessel (paragraphs 142-151), (b) an assessment of the relative blameworthiness of each vessel (paragraphs 152-174), (c) an assessment that there was a clear preponderance of fault on the part of EVER SMART (see paragraphs 175-182) and (d) an assessment that the fault of EVER SMART was more than twice that of ALEXANDRA 1 and less than three times that of ALEXANDRA 1 (see paragraphs 183-185). Having regard to the need to review and judge all the circumstances of the case I do not consider that there is a real prospect that the Court of Appeal will consider that my apportionment of liability was manifestly wrong (or bizarre and unsustainable) or wish to substitute its apportionment for my apportionment.

68. With regard to the five suggested particular errors:

i) There is no real prospect that the Court of Appeal will consider that the application and importance of the crossing rules (as determined by the Supreme Court) self-evidently required a substantial adjustment to the 80:20 apportionment as determined by the Judge at the first trial. That is because, as explained by Lord Pearce in The Miraflores and The Abadesa, all depends upon the particular facts of the case and, as recognised by the Supreme Court in the present case, it does not necessarily follow that because the crossing rule applied

some different apportionment is appropriate; see paragraphs 139-140 of my judgment.

ii) The Court of Appeal has confirmed that the contribution made by a vessel to the damage resulting from the collision is one element of the assessment of the causative potency of that vessel's fault and that excessive speed is a prime example of a fault likely to contribute to the extent and severity of the damage or loss suffered; see paragraph 124 of the judgment of Gross LJ which was not the subject of an appeal to the Supreme Court. There is no real prospect that the Court of Appeal will consider that I erred in my assessment that "the causative potency of EVER SMART's faults exceeded the causative potency of ALEXANDRA 1's faults"; see paragraph 151 of my judgment.

iii) There is no real prospect that the Court of Appeal will consider that I failed to give proper effect to the fact that the fault of ALEXANDRA 1 permitted a close quarters situation to develop. I referred to that in paragraphs 143-144 of my judgment and concluded that her fault was the greater of the two; see paragraph 149.

iv) There is no real prospect that the Court of Appeal will consider that I failed to give proper effect to the timing of EVER SMART's faults of lookout and speed. I had made findings as to the timing of the respective faults at paragraphs 103-104 (ALEXANDRA 1) and paragraphs 107-108 and 125-128 (EVER SMART). When comparing the relative blameworthiness of the faults I had in mind the timing of the respective faults; see paragraphs 156 and 158 (ALEXANDRA 1) and 160-162 (EVER SMART). In making my assessment I had in mind that EVER SMART's breach of the narrow channel rule began at C-10.

v) I do not consider that there is a real prospect that the Court of Appeal will consider that I erred in law or misdirected myself in finding that EVER SMART was more than twice at fault than ALEXANDRA 1. This is the final stage in the apportionment exercise and is based upon all the circumstances of the case.

69. For these reasons I refuse permission to appeal.

70. Having now determined the three main issues in dispute I very much hope that the parties can agree the necessary order.