Neutral Citation Number: [2022] EWHC 452 (Comm)

Case No: CL-2021-000501

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2022

Before :

SIR ANDREW SMITH
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

(1) OCM Maritime Nile LLC
(2) OCM Maritime Kama LLC
Claimants

- and –

(1) Courage Shipping Co.
(2) Amethyst Ventures Co.
(3) Oryx Shipping Limited
Defendants

- -
- -

Robert Bright QC, Charles Holroyd (instructed by **Reed Smith LLP**) for the **Claimants**
Graham Dunning QC, Chris Smith QC, Claudia Wilmot-Smith (instructed by **Rosling King LLP**) for the **Defendants**

Hearing dates: 19, 20, 24, 25 and 26 January 2022

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JUDGMENT

Sir Andrew Smith:

Introduction

1. The Claimants are incorporated in the Marshall Islands, and are ultimately beneficially owned by investment funds managed by Oaktree Capital Management LP ("Oaktree CM"), a Delaware limited partnership with headquarters in California, United States of America. The First Claimant, OCM Maritime Nile LLC ("OCM Nile"), is the owner of the vessel "Courage", and the Second Claimant, OCM Maritime Kama LLC ("OCM Kama"), owns the vessel "Amethyst". They are represented in these proceedings by Mr Robert Bright QC and Mr Charles Holroyd, instructed by Reed Smith LLP ("Reed Smith").

2. The Defendants are also incorporated in the Marshall Islands. Before June 2021, their shares were legally and beneficially owned by Mr Abdul Jalil Mallah ("Mr Mallah"), a Syrian national, apparently resident in Greece, who was also their sole director. They were represented by Mr Graham Dunning QC, Mr Chris Smith QC and Ms Claudia Wilmot-Smith, instructed by Rosling King LLP ("Rosling King").

3. During the trial, with effect from 20 January 2022, the Third Defendant, Oryx Shipping Limited ("Oryx"), was dissolved. Rosling King and the Defendants' counsel learned this on 24 January 2022, and Mr Dunning informed me when the Court sat on 25 January 2022. At that time, those acting for the Defendants had not been able to take advice about the effect of dissolution under the law of the Marshall Islands. I therefore told the parties that I would decide in this judgment the issues between the Claimants and the first two Defendants, Courage Shipping Co ("CSC") and Amethyst Venture Co ("AVC"), and deal with the position of Oryx when I deliver this judgment and in light of my conclusions in it. There was no objection to this.

4. By an agreement made between Oaktree Maritime Finance I LLC ("Oaktree Maritime") and Oryx on 12 July 2019, Oaktree Maritime offered, and Oryx accepted, terms on which Oaktree Maritime would provide finance for the acquisition of bulk carriers to be owned by single purpose companies wholly owned by Oaktree Maritime and to be chartered to companies controlled by Oryx. Oaktree Maritime was to provide up to half of the purchase price of the vessels (or, if lower, 60% of the appraised value of the broker at delivery). It was provided that each charter should be "a 'Hell or High Water' bareboat charter incorporating the terms of [the letter], based on Barecon 2001 terms", with a charter period of 25 months from delivery. The letter provided that the charter hire included a fixed element, designed to cover the capital provided by Oaktree Maritime, and a floating element, designed to cover interest at the rate of 7.5% above one-month LIBOR. The charters were also to provide the charterers with an option to purchase the vessels at any time during the charter period, and to be under an obligation to purchaser on the last day of the charter.

5. By a bareboat charterparty dated 5 November 2019, OCM Nile chartered the bulk carrier "Courage" to CSC, and by a bareboat charterparty dated 18 February 2021, OCM Kama chartered the bulk carrier "Amethyst" to AVC. By letters to OCM Nile dated 13 November 2019 and to OCM Kama dated 18 February 2021, Oryx entered into certain undertakings relating to the respective charterparties, having been

appointed as the "Approved Manager" under them, and being nominated as the "commercial, technical and/or operational manager" of the vessels by CSC and AVC.

6. Under the charterparties, the vessels were demised to the charterers, so that possession and control was given to the charterers, who were responsible for, inter alia, maintenance of them, crewing and insuring them; and, as contemplated in the agreement of 12 July 2019, the charterers were given an option to buy the vessels during the charterparties and were obliged to do so at the end of the charter period.

7. On 10 June 2021, the United States authorities designated Mr Mallah a "Specially Designated Global Terrorist" ("SDGT") under Executive Order 13224 of 23 September 2001 ("EO 13224"), and he was included on the "Specially Designated Nationals and Blocked Persons List" ("SDN List"). His property and property interests were "blocked", and, being owned by Mr Mallah, the Defendants' assets were also blocked. According to a press release of the US Treasury, Mr Mallah was associated with Mr Sa'id al-Jamal, who was himself designated for having materially assisted or supported Iran's Islamic Revolutionary Guard Corps-Qods Force ("IRGC-QF"): the press release said that, at Mr Sa'id al-Jamal's direction, Mr Mallah had facilitated transactions with a Yemen-based exchange house used by Mr Sa'id al-Jamal to send US dollars to IRGC-QF officials in Yemen; and that Mr Mallah had facilitated the shipment of Iranian crude oil to Hezbollah. I am not in a position to decide whether or not any of these allegations or any of the concerns about Mr Mallah that led to his designation are true, and I express no view about them.

8. The Claimants say that, when and after Mr Mallah was so designated, various "Events of Default" under the charterparties occurred, whereby they were entitled to terminate the charterparties. They served Notices of Events of Default in respect of each charterparty dated 18 June 2021, 19 July 2021 and 26 August 2021, and they claim that they were entitled to take possession of the vessels. In fact, on about 1 September 2021 OCM Kama obtained possession of the "Amethyst", which is (or until recently was) in Sharjah, United Arab Emirates ("UAE"), but OCM Nile has not obtained possession of the "Courage", which is at Latakia, Syria.

9. The Claimants seek declarations that the charterparties have been lawfully terminated and that they are entitled to possession of the vessels. In the case of the "Amethyst", OCM Kama seeks a declaration that it is under no liability to AVC or to Oryx in respect of having re-possessed her. Both Claimants also seek damages from all the Defendants.

10. The Defendants admit that Events of Default occurred under both charterparties (although they do not admit all the Events of Default alleged by the Claimants), but deny that the Claimants are entitled to possession of the vessels. First, they contend that, despite the admitted Events of Default, on the proper construction of the charterparties, the Claimants are not entitled to possession (the "Construction Defence"). Secondly, they submit that the Claimants' claim for possession relies on provisions that are penal, and so void and unenforceable (the "Penalty Defence"). Thirdly, they bring a counterclaim for relief from forfeiture by way of (i) restoration of the charters, or (ii) restitutionary relief in respect of payments made to the Claimants.

The Trial

11. The proceedings were issued on 23 August 2021. On 24 September 2021, Andrew Baker J ordered that the trial be expedited to take place in January 2022. The trial was held remotely on 19, 20, 21, 24 and 26 January 2022.

12. The Claimants called to give evidence Mr Henry Orren, a Senior Vice President at Oaktree CM, and Mr Martin Hugger, the Managing Director of Meerbaum Capital Solutions Inc ("Meerbaum"), which provides investment advice to Oaktree CM. They put in evidence a statement of Mr Christos Mangos, the Chief Executive Officer of Interunity Management Corporation SA ("Interunity"), which manages ships and provides advice and technical assistance on maritime matters, and which was appointed by the Claimants in July 2021 to assist them to trace the whereabouts of the "Courage" and the "Amethyst". The Defendants had the opportunity to cross-examine Mr Mangos but chose not to do so.

13. The Claimants put in evidence under the Civil Evidence Act, 1995 (i) a statement of the Master of the "Amethyst", Capt Tirso Subaan Jr, made on 29 August 2021, together with a supplemental statement of 30 August 2021; and (ii) a statement of Theophanis Manaikas, who conducted a surveillance exercise between October and December 2021 on behalf of the Claimants. The Claimants also relied, for limited purposes, on statements made in interlocutory proceedings by Mr Charles Weller, a partner in Reed Smith.

14. The Defendants adduced no evidence of fact.

15. Both parties called expert evidence of United States sanctions law. The Claimants' witness was Mr Adam M. Smith, who is a partner in the Washington DC office of Gibson, Dunn & Crutcher LLP, and who served for some four years as the Senior Advisor to US Department of the Treasury's Office of Foreign Asset Control ("OFAC"), which is charged with administering, implementing and enforcing the GTSR and EO 13224. The Defendants' expert witness was Mr Simon Harter, who is a member of the Bar of the States of New Jersey, New York and Connecticut, and who, after practising as a partner at Healy & Baillie LLP in New York City, founded his own firm in 2001. Both were impressive witnesses and gave helpful evidence, and they were almost entirely in agreement. Where they differed, I prefer the evidence of Mr Smith, whose experience with OFAC gave his evidence particular weight on some questions.

The Terms of the Charterparties

16. As was contemplated by the agreement of 12 July 2019, the charterparties of both the "Courage" and of the "Amethyst" are based on the Barecon 2001 form, albeit with substantial amendments, including amendments to their terms in relation to Events of Default, termination and re-possession of the vessels, and as to the Defendants' options and obligations to purchase the vessels. The two charterparties are in generally similar, but not identical, terms. They both expressly provide that the charters "shall in all respects be governed by and interpreted in accordance with English law".

17. Both charterparties included the following terms (the emphasis indicated below being in the original and the deletions marking amendments from the standard Barecon 2001 form, clauses 1 to 31).

18. Clause 6, headed "Trading Restriction", provided for trading limits, including Syria.

19. Clause 10, headed "Maintenance and operation", provided that "the Charterers shall maintain the vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice …".

20. Clause 11, headed "Hire", required the Charterers to pay hire "punctually", and that "time shall be of the essence". It provided that "Payment of hire shall be made in cash …".

21. Clause 13, headed "Insurance and Repairs":

> "During the Charter Period, the Vessel shall be kept insured by the Charterers at their expense against hull and machinery, war and Protection and Indemnity risks … in such form as the Owners shall in writing approve, which approval shall not be un-reasonably withheld….".

22. Clause 28, headed "Termination":

> "(a) Charterers' Default
>
> The Owners shall be entitled to withdraw the Vessel from the service of the Charterers and terminate the Charter with immediate effect by written notice to the Charterers if:
>
> (i) The Charterers fail to pay hire in according with **the provisions of this Charter** …
>
> (ii) The Charterers fail to comply with the requirements of:
>
> (1) Clause 6 (Trading Restrictions)
>
> (2) Clause 13(a) (Insurance and Repairs).
>
> provided that the Owners shall have the option, by written notice to the Charterers, to give the Charterers a specified number of days grace within which to rectify the failure without prejudice to the Owners' right to withdraw and terminate under this Clause if the Charterers fail to comply with such notice;…".

23. Clause 29, headed "Repossession":

> "In the event of the termination of this Charter in accordance with the applicable provisions of **this Charter** ~~Clause 28~~, the Owners shall have the right to repossess the Vessel from the Charterers at her current or next port of call **or at sea**. or at a port or place convenient to them without hindrance or interference by

> the Charterers, courts or local authorities. Pending physical repossession of the Vessel in accordance with this Clause 29, the Charterers shall hold the Vessel as ~~gratuitous~~ bailee only to the Owners **and continue to maintain, class and insure the vessel as required by the terms of this Charter notwithstanding the termination of the chartering of the Vessel.** … All arrangements and expenses relating to the settling of wages, disembarkation and repatriation of the Charterer's Master, officers and crew shall be the sole responsibility of the Charterers….".

24. Clause 34, headed "Charter Hire", provided that the Charterers should monthly on the so-called Hire Payment Dates pay charter hire, comprising "Fixed Hire" and "Variable Hire".

25. Clause 35, headed "Payments/LIBOR":

> "… the Charterhire and other payments to be made by the Charterers hereunder .. shall be made as follows: …
>
> (b)… in dollars … to the Owners' account number as advised by the Owners …".

It is not in dispute that the designated accounts were with Joh. Berenberg, Gossler & Co. KG ("Berenberg") in Germany.

26. Clause 36, headed "Maintenance, Operation and Other Vessel Undertakings":

> " …
>
> (l) **Tracking**
>
> (i) The Charterers shall (or shall procure that the Approved Manager shall) allow any Mortgagee and/or the Owners (or its agents), at any time and from time to time, to access all information pertaining to the Vessel and to monitor and/or track the position of the Vessel using third party services….
>
> …
>
> (o) **Sub-chartering**
>
> The Charterers may:
>
> (i) …
>
> (ii) without the prior written consent of the Owner enter into any time or consecutive voyage charters in respect of the Vessel which fulfils the Sub-letting Criteria for a term which exceeds (or by virtue of any optional extension may exceed) six months but which does not exceed (and

which may not, by virtue of any optional extensions, exceed) 15 months; and

(iii) other than as described in paragraphs (i) or (ii) above, only enter into any time or consecutive voyage charters in respect to the Vessel with the prior written consent of the Owners,

Where "**Sub-letting criteria**" means that any such proposed sub-charter must:

(X) be on terms that EITHER

(A) the aggregate net charter hire receivable thereunder for the period of such charter exceeds the aggregate of (i) the relevant Monthly Fixed Hire for the period of such charter, (ii) the Variable Hire for the period of such charter and (iii) the Anticipated Opex for the period of such charter;

OR

(B) if the aggregate net charter hire payable thereunder is less than the aggregate of the relevant Monthly Fixed Hire and the Variable Hire for the period of the charter and the Anticipated Opex for the period of such charter (i) the Owners have consented thereto and (ii) …

AND

(Y) be to a charterer that:

(A) is a first class company with good market standing, a good track record as a charterer and no generally known risk of financial difficulties…".

27. Clause 38, headed "Indemnity":

(a) The Charterers agree, from time to time on demand, to indemnity and keep indemnified:

(i) the Owners against any Losses suffered or incurred by the Owners arising directly or indirectly out of the … operation, condition, maintenance, repair."; ...

(vii) the Owners against any Losses incurred or suffered by the Owners as a result of or in connection with any Event of Default … including, without limitation, all Losses incurred or

suffered by the Owners under any Loan Agreement as a result of any such Event of Default…".

28. Clause 42, headed "Representations and Warranties":

"The Charterers acknowledge that the Owners have entered into this Charter in full reliance on the representations and warranties by the Charterers set out in this Clause 42 (Representations and Warranties).

(a) **General**

The Charterers make the representations and warranties set out in this Clause 42 (Representations and Warranties) to the Owners on the date of this Charter….

...

(jj) **Sanctions**

The Charterers

(i) are not, and no director or officer of the Charterers are, a Restricted Person;

(ii) are not owned or controlled by or acting directly or indirectly on behalf of or for the benefit of, a Restricted Person.

…

(mm) **Repeating Representations**

The representations and warranties contained in this Clause 42 (Representations and Warranties) shall be deemed to be repeated by the Charterers as of the Delivery Date and on each date for the payment of Charter Hire hereunder as if made with reference to the facts and circumstances existing on each such date…".

29. Clause 43, headed "Undertakings":

" …

(o) **Change of Ownership Structure**

The Charterers shall not, without the prior written consent of the Owners (which they may withhold in their discretion) change or permit any change in the owning structure or control of the Charterers and the Approved Manager and will maintain the Charterers as a wholly owned subsidiary of the Shareholder…".

30. Clause 44, headed "Insurances, Total Loss and Compulsory Acquisition":

" …

(b) **Maintenance of obligatory insurances**

The Charterers shall keep the Vessel insured at its expense in the name of the Owners as primary insured against:

(i) hull and machinery plus freight interest and hull interest and increased value and any other usual marine risks (including excess risks);

(ii) war risks;

(iii) protection and indemnity risks (including liability for oil pollution for an amount of no less than $1,000,000,000 and excess war risk P&I cover) on standard Club Rules, covered by a Protection and Indemnity association which is a member of the International Group of Protection and Indemnity Associations…

(c) **Terms of obligatory insurance**

…

in the case of oil pollution liability risk, for an aggregate amount equal to … but such amount shall not be less than $1,000,000,000 …

on approved terms; and

through Approved Brokers and with western insurance companies and/or underwriters or, in the case of war risks and protection and indemnity risks, in first class war risks and protection and indemnity risks associations in the International Group of P&I Clubs, in each case approved by the Owners in their sole discretion ….".

31. Clause 45, headed "Events of Default":

"Each of the following shall be an "**Event of Default**" for the purposes of this Charter:

…

(b) **Specific obligations**

A breach occurs of … Clause 44(b) (Maintenance of obligatory insurance), Clause 44(c) (Terms of obligatory insurances) or Clause 44(e) (Renewal of obligatory insurances).

(c) **Other obligations**

A Transaction Obligor does not comply with any provision of any Relevant Document (other than those referred to in Clause 45(a) (Non-payment) and Clause 45(b) (Specific obligations)) to which it is a party, and:

(i) if such breach is in the Owners' reasonable opinion capable of remedy, it is not remedied within fourteen (14) days of the Owners' request that the relevant Transaction Obligor remedy such breach; or

(ii) if such breach is in the Owner's reasonable opinion not capable of remedy

An Event of Default shall be deemed to have occurred upon the occurrence of such breach.

(d) **Misrepresentations**

Any representation or statement made or deemed to be made by the Charterers in this Charter or any other document delivered by or on behalf of the Charterers under or in connection with any Relevant Document is or proves to have been incorrect or misleading when made or deemed to be made.

…

(o) **Material adverse effect**

Any event or circumstance occurs which has or is reasonably likely to have a Material Adverse Effect.

…

(q) **Charter termination**

This Charter is cancelled or rescinded or … frustrated or the vessel is withdrawn from service under this Charter before the time this Charter was scheduled to expire or an Event of Default occurs ….

(r) **Insurances**

If either (A) the Charterers shall fail at any time to effect or maintain any insurance required to be effected and maintained under this Charter, or any insurer shall avoid or cancel any such insurances … or (B) any of the said insurances shall cease for any reason whatsoever to be in full force and effect prior to any replacement cover being placed.

(s) **Change of Ownership**

There is any change in the immediate and/or ultimate legal and/or beneficial ownership or control of the Charterers and any Approved Manager from that existing on the date of this Charter without the prior written consent of the Owners (which they may withhold in their discretion).

…

(u) **Performance of Relevant Documents**

If any event occurs which would, or would with the passage of time, render performance of any Relevant Documents by any party to any such document impossible, unlawful or unenforceable by the Owners.

…

(w) **Fundamental Term**

The Owners and the Charterers agree that it is a fundamental term and condition of this Charter that no Event of Default shall occur during the Charter Period and that the occurrence of an Event of Default shall entitle (but not oblige) the Owners at any time during the continuation of such Event of Default to accept the repudiation by the Charterers of this Charter constituted by the occurrence of such Event of Default".

32. Clause 46, headed "Owners' Rights":

"(a) At any time after any circumstances described at Clause 45 (Events of Default) have occurred and are continuing, the Owners may, by notice to the Charterers, (aa) … and (bb) in all other cases immediately or on such date as the Owners shall specify, terminate the chartering by the Charterers of the Vessel under this Charter, whereupon the Owners may at their option (but with no obligation so to do):

(i) declare by notice given to the Charterers the aggregate amount of (i) the then Outstanding Principal and (ii) the Indemnity Sum to be immediately due and payable whereupon the same shall become immediately due and payable and the Charterers shall be obliged to pay the actual balance of the same to the Owners together with any interest in accordance with Clause 35(d) and then the applicable payment premium payable pursuant to Clause 34(i) as if the Outstanding Principal was being prepaid on the date of the Owners' notice; and/or

(ii) take any action at law and under the Relevant Documents to collect the full amount as mentioned in Clause 46(a)(i) above; and/or

(iii) unless the Charterers have paid to the Owners the full amount as mentioned in Clause 46(a)(i) above, by their agent or otherwise without further legal process, re-take the Vessel (wherever she may be)…

(iv) unless the Charterers have paid to the Owners the full amount as mentioned in Clause 46(a)(i), declare by notice given to the Charterers that the Vessel should be promptly re-delivered by the Charterers to the Owners whereupon the Charterers shall be obliged to cause the Vessel to be re-delivered to the Owners …

(v) unless that [sic] Charterers have paid to the Owners the full amount as mentioned in clause 46(a)(i), with or without retaking possession of the Vessel … to sell, lease or otherwise dispose of the Vessel …

(d) No remedy referred to in this Clause 46 … is intended to be exclusive, but each shall be cumulative. Save as expressly stated in this clause 46 …, the exercise or purported exercise of any one remedy shall not prevent the simultaneous or later exercise of any other remedy nor shall it prevent the later exercise of the same remedy. ….

(f) The Owners and the Charterers each agree that the payment of the Outstanding Principal and the Indemnity Sum as set out at Clause 46(a)(i) above is a reasonable pre-estimate of the damages that will be suffered by the Owners from the termination of the chartering of the Vessel and represent liquidated damages and not a penalty …".

33. Clause 48, headed "Purchase Option and Obligation":

"Provided that (i) no Event of Default has occurred and is continuing … the Charterers shall be entitled to exercise an option to purchase … the Vessel at any Hire Payment Date at the purchase option price (the "**Purchase Option Price**"), being the amount in dollars specified below for the relevant date of completion of purchase:

(a) before the 1st anniversary of the Delivery Date: 103% of the then Outstanding Principal; and

(b) after the 1st anniversary of the Delivery Date but on or before the second anniversary of the Delivery Date: 102% of the then Outstanding Principal" ….

> If the Charterers have not exercised their Purchase Option before the Final Option Date, then they must purchase the Vessel (the "**Purchase Obligation**") for the Purchase Obligation Price. The date of completion of the purchaser must be the day of the Final Option Date. ….
>
> Provided (i) the Charterers pay the Purchase Option Price (or the Purchase Obligation Price, as the case may be), the Indemnity Sum, the Success Payment, Charter Hire up to the date of completion of the purchase (the "**Completion Date**") and any outstanding interest under this Charter in full on or before the Completion Date, (ii) no Event of Default is continuing on the Completion Date, (iii) the Owners have not terminated the chartering of the Vessel under Clause 46 …, the Owners shall be obliged to deliver to the Charterers …. the title which the Owners had in respect of the Vessel …
>
> Notwithstanding the aforementioned, , if on the completion date an Event of Default is continuing, the Owners shall have the sole discretion in deciding whether or not the Owners and the Charterers should fullfil [sic] their respective obligations under the Purchase Option on the completion date".

34. Clause 59, headed "Definitions":

> "In this Charter, unless the context otherwise requires, the following expressions shall have the following meanings:
> …
> "**Anticipated Opex**" means, in respect of any Charter Hire Period, the amount certified by the chief financial officer of the Charterers and agreed by the Owners as being the aggregate operating and voyage expenses, agency fees, management, general and administrative expenses, repair and maintenance costs, in respect of the Vessel for that Charter Hire Period. …
>
> "**Approved Broker"** means any firm or firms of insurance brokers appointed by the Charterers and as may from time to time be approved in writing by the Owners …
>
> "**Event of Default**" has the meaning given to it in Clause 45 (Events of Default) and an Event of Default is "continuing" if such Event of Default has not been remedied by the Charterers or waived by the Owners…
>
> "**Final Option Date**" means the date falling on the last date of the Charter Period …
>
> "**Indemnity Sum"** [means] the aggregate from time to time of any outstanding indemnity payments payable by the Charterers to the Owners pursuant to Clause 38 … or any other provision of this Charter…

"**Losses**" means all losses, costs, charges, expenses, fees, payments, liabilities, penalties, fine, damages, injuries, claims, demands, awards, judgments or other sanctions of a monetary nature…

"**Material Adverse Effect**" means in the opinion of the Owners a material adverse effect on:

(a) the business, operations, property, condition (financial or otherwise) or prospects of the Charterers;
(b) the ability of any Transaction Obligor to perform its obligations under any Relevant Document;
(c) the validity or enforceability of, or the effectiveness or ranking of any Security granted or intended to be granted pursuant to any of, the Relevant Documents or the rights or remedies of the Owners under any of the Relevant Documents…

"Outstanding Principal" means, at any relevant time [the part of the purchase price provided by OCM Nile or OCM Kama] less the aggregate Fixed Hire which has at any relevant time been received by the Owners in accordance with this Charter …

"**Purchase Obligation Price**" means at any relevant time the Outstanding Principal …

"**Relevant Document**" means … this Charter …

"**Restricted Person**" means a person that is (i) listed on, or owned or controlled by a person listed on any Sanctions List;…

"**Sanctions List**" means the "Specially Designated Nationals and Blocked Persons" list issued by OFAC…

"**Shareholder"** means the holder of all the shares in the Charterers as notified to the Owners on or before the date of this charter …

"**Transaction Obligor**" means each of the Charterers and any Approved Manager ….".

35. The Amethyst Charterparty further provided inter alia as follows:

Clause 36, headed "Maintenance, Operations and Other Vessel Undertakings":

"…. (s) **Sanctions**. The Charterers shall:

(i) not be, and shall procure that any Transaction Obligor and any affiliate of any of them, or any director, officer, agent, employee or person acting on behalf of the foregoing is not, a Restricted Person and does not act directly or indirectly on behalf of a Restricted Person or have a course of dealings with a Restricted Person;

> (ii) and shall procure that each Transaction Obligor and each affiliate of any of them shall, not use any revenue or benefit derived from any activity or dealing with a Restricted Person in discharging any obligation due to the Owners;
>
> …
>
> (iv) procure that no proceeds from any activity or dealing with a Restricted Person are credited to any bank account held with the Owners in its name or any affiliate of any of them;…".

36. In clause 45, the events of default included under sub-clause (b), headed "Specific obligations" this: "A breach occurs of Clause 36(s) (Sanctions)…".

The Events following Mr Mallah's designation as a SDGT

37. I next set out the relevant history of events after Mr Mallah was designated a SDGT. I do so at some length since the Claimants argue that, because of their conduct, including their response to orders of this Court, the Defendants are not entitled to ask the Court for equitable relief from forfeiture.

38. On 11 June 2021, the day after Mr Mallah was so designated, funds representing the hire due for the "Amethyst" were received into the account of OCM Kama at Berenberg, and on 14 June 2021 funds for hire of the "Courage" were received into the account of OCM Nile there. The receipts were credited to the accounts and remained there until after OFAC issued a licence allowing their release in December 2021.

39. The Claimants plead that these payments were "blocked" by Berenberg, and were "not accessible" to them. Mr Hugger gave evidence that on 14 June 2021 he learned from an article in Tradewinds that Mr Mallah's name had been put on the SDN list, and, having informed Oaktree, he spoke to Berenberg, who told him that it could not accept funds from a SDGT and, since the funds had been received after Mr Mallah was designated, its compliance department would be consulted. Berenberg soon informed him that the compliance department had concluded that any funds received by the bank after 10 June 2021 would need to be "blocked", and that it could not "handle" the funds received on 11 and 14 June 2021 or any further payment from the Defendants unless OFAC granted a licence.

40. On 15 June 2021 at 14.32, Mr Jon Baker, a consultant engaged by the Oaktree Group, sent an email to Berenberg that the charterers of the "Courage" and the "Amethyst" had been placed on "a sanctions list", and that the Oaktree Group would issue an Event of Default notice and terminate the charterparties. He informed Berenberg of "[a]ctions we would like to take", which included "[t]he money [received on 11 and 14 June 2021] will be frozen and left in the relevant bank accounts", and he asked Berenberg to "confirm agreement".

41. On 16 September 2021 Mr Baker sent an email to Berenberg, asking that it confirm to Reed Smith that, "the accounts for Nile and Kama have been frozen, and for something to confirm this that might be presented to the Court". Berenberg responded on 17

September 2021 that "all incoming funds received on 10 June 2021 (or later) for OCM Kama and OCM Nile have been frozen to the responsive accounts of the [Claimants] and blocked …".

42. It was argued by the Defendants that, contrary to the Claimants' pleaded case, it was the Oaktree Group, and not Berenberg, who decided to "freeze" the funds received from the Defendants. They relied on the email of 15 June 2021 and the fact that bank statements for the Claimants' accounts provided by Berenberg did not mark the receipts as unavailable to them. I accept that the Oaktree Group, and the Claimants, had apparently decided not to deal with the receipts without a licence from OFAC, but it does not follow that Berenberg would otherwise have been willing to release the funds. A reputable bank, such as Berenberg, would naturally be cautious when learning that Mr Mallah had been put on the SDN list, and its email of 17 September 2021 confirms that it would not allow the Claimants to deal with the funds received. While the Claimants had apparently decided that in any event they should not deal with the funds, I accept the Claimants' pleaded case that Berenberg refused access to them because of Mr Mallah's designation.

43. I return to the events of June 2021. On 10 June 2021, when the US authorities designated Mr Mallah as a SDGT, the "Amethyst" was sub-chartered by OCM Kama to ACF Trade SA ("ACF") under a time charter dated 8 April 2021 for a period of five months, with an optional further period of five months. According to its terms, she was to be delivered to ACF at a safe port in the Dakar-Douala range between 1 and 15 June 2021. By an addendum to the sub-charterparty dated 14 June 2021, being Addendum no 1, AVC and ACF agreed to amend the delivery range to the Persian Gulf – West Coast of India and the delivery dates to 15 July to 15 October 2021.

44. By a second addendum ("Addendum No 2"), it was agreed by AVC and ACF that the optional further period of five months be rescinded. The significance of this change is that, since under the charterparty of 18 February 2021 the maximum period for which the vessel might be sub-chartered without OCM Kama's prior written consent was six months, the time charter of 8 April 2021 was made in breach of the bareboat charter. The Defendants say that Addendum No 2 remedied the position, and that it was concluded on 14 or 15 June 2021. (Strangely it is headed "Addendum No 2 dated 14th June 2021", but the terms are introduced with the words "It is today 15th June that Owners and Charterers mutually agreed to form addendum no 2 …")

45. By two bills of lading dated 15 June 2021, the Master of the "Courage" acknowledged shipment of cargo at Iskenderun, Turkey for carriage to Lagos, Nigeria. By six further bills of lading dated 19 June 2021, the Master acknowledged receipt of further cargos shipped on board the vessel at Mersin, Turkey, also for carriage to Lagos.

46. The Protection and Indemnity ("P & I") insurance covers for both vessels were cancelled with effect from 15 June 2021 as a result of Mr Mallah being designated a SDGT. The vessels' Hull and Machinery ("H & M") insurances were also terminated, although it is not clear from the evidence when this was done. The Defendants did not inform the Claimants of the termination of insurance covers, and the Claimants were unaware of it. The Defendants continued to operate the vessels without insurance.

47. Having consulted its American lawyers, Simpson Thatcher & Bartlett LLP ("ST"), on 18 June 2021 OCM Nile and OCM Kama each issued a "Notice of Event of Default

and Termination of Bareboat Charter" to the Defendants (the "First Notices"). They notified the Defendants of the termination of the charters on grounds relating to Mr Mallah's designation as a terrorist, stating that the Claimants would re-possess the vessels at their next ports of call.

48. After the First Notices were served, both vessels turned off their Automatic Identification System ("AIS") and other systems which enabled the vessels to be tracked. The "Courage" did so on 25 June 2021, while sailing off Latakia Anchorage, Syria, and the "Amethyst" on 26 June 2021, while off Ghana. The Defendants were thereby in breach of clause 36(l) of the charterparties, and also of paragraph 2.4.7 of Regulation 19 ("Carriage requirements for shipborne navigational systems and equipment") of Chapter V of the International Convention for the Safety of Life at Sea ("SOLAS").

49. According to a later (undated) statement of the Master of the "Courage", on 26 June 2021 she began to have problems with her main engine: it is said that a high temperature alarm sounded, the engine was stopped and inspected, and water mixed with oil was found inside it because of damage to the cylinder liner. The Master's statement said that the vessel was "unsuitable" to continue the cargo voyage, and she requested towage to the nearest port for repair. However, she was not taken to port, but from 26 June 2021 until 23 September 2021 she remained in her position just outside Syrian waters, using her main engine at low revolutions.

50. On 14 July 2021, Mr Panagiotis Chiotelis, a solicitor acting for the Defendants, responded to the First Notices. He wrote in his email that Mr Mallah's listing was the result of a "misconception [that] will soon be resolved". He also said that the matter was "rather academic because in actual fact the relationship [between the Defendants and Mr Mallah] has altered with effect from January 2021" and that Oryx was "not linked to Mr Mallah anymore". He acknowledged that the change of ownership was, itself, an Event of Default. Mr Chiotelis said that the Defendants could provide "all necessary documentation" about the change. He also said that the "current status of the vessels" was that they were "under TC [sc. time charters] with cargo on board".

51. Mr Chiotelis' email was misleading: the "Amethyst" had not been delivered under the charter of 8 April 2021, and she had not loaded cargo. Further, Mr Mallah had not disposed of his interest in the Defendants in January 2021 or thereabouts: even on the Defendants' own case, he did not do so until June 2021. Mr Chiotelis' account was put forward to dispute the First Notices, which relied upon Mr Mallah being associated with the Defendants at the time of his designation as a terrorist in June 2021, and was dishonest. (I make clear that, here and elsewhere, I do not find, and the Claimants do not allege, that Mr Chiotelis was personally dishonest, rather than acting on instructions that he was dishonestly given by the Defendants.)

52. On 19 July 2021, the Claimants served further notices of Events of Default and termination of the charters (the "Second Notices"), stating that the Claimants would re-possess the vessel at their next ports of call. The grounds in the case of the "Courage" were that there had been a change of ownership or control of CSC; and, in the case of the "Amethyst", that, at the time of the charterparty, AVC had said that Mr Mallah was its sole shareholder, and, as Mr Chiotelis had written, this was not so. These Second Notices were expressed to be served without prejudice to the earlier ones.

53. Under cover of an email sent on 28 July 2021, the Claimants served notices dated 27 July 2021 requiring the Defendants to switch on the vessels' AIS beacons, to confirm their positions and to redeliver the vessels to the Claimants at specified locations. Mr Chiotelis responded with two emails sent on 29 July 2021, stating that the designation of Mr Mallah as a SDGT did not prevent the Defendants from performing their obligations under the charters or the Claimants from receiving hire, and on this basis he invited the Owners to withdraw their notices for termination of the charters and repossession of the vessels, contending that "this is a paradigm case for the Court granting relief from forfeiture". He said that the Charterers were willing to pay all of the remaining sums due under the charterparties to the Claimants, directly or into escrow.

54. On 7 August 2021, Reed Smith wrote on behalf of the Claimants to Mr Chiotelis, asking that by 9 August 2021 the Defendants confirm where the vessels were, turn on the AIS beacons, provide evidence of the alleged change in beneficial ownership, and undertake not to market the vessels for sale. Mr Chiotelis replied on 13 August 2021 that the Defendants would not comply with the Claimants' requests, unless the Claimants agreed "for the time being that they will not take any steps to repossess the Vessels". Mr Chiotelis referred to his email of 29 July 2021, and confirmed that the Defendants would provide security for all remaining payments under the charterparties and were willing to pay immediately "in order to resolve the position once and for all".

55. Despite the offer in Mr Chiotelis' email of 14 July 2021, the Defendants did not provide any documents about their change of ownership. On 13 August 2021, Reed Smith repeated their request for documents, stating that their failure to provide them "obviously casts doubt upon the veracity of the claimed change of ownership". On 18 August 2021, Mr Chiotelis sent Reed Smith three Certificates of Incumbency about the Defendants dated 17 August 2021 and issued by the Marshall Islands authorities, each of which said that Mr Yousef Darbis was the "sole Director from June 23, 2021" and the "current Sole Shareholder/UBO of the Corporation from June 23, 2021". Mr Chiotelis said that Mr Darbis, "who is controlling now the companies following the removal of Mr Mallah", resided in Greece and "would be available to discuss and progress matters". He said that the "Courage" was "off Cyprus" and had "a technical problem which is attended to", and that the "Amethyst" was "PG", sc. in the Persian Gulf.

56. In reply, Reed Smith sought more precise details about where the vessels were, and confirmation that the AIS beacons were turned back on. They also requested documents about Mr Darbis and the transactions said to have taken place on 23 June 2021, information about the sub-charters and any further information that the Defendants were prepared to show to the US authorities "to show them that Mr Darbis is not acting on behalf of Mr Mallah". On 19 August 2021, Mr Chiotelis replied that he was collecting the documentation requested, except for documents about the time charters, challenging the relevance of these. He said that the Defendants were not willing to switch on the vessels' AIS beacons unless the Claimants undertook not to seek to re-possess the vessels, and that, if the Claimants intended to seek to re-possess them, the Charterers would apply for an interim injunction "to hold the ring".

57. On the same day, 19 August 2021, Reed Smith learned that the vessels' P&I and H&M insurances had been terminated. They wrote to Mr Chiotelis about this, and suggested that both vessels be "sailed to a convenient port in a suitable jurisdiction immediately,

and subject to the order of the English Court". They asked for more information about the problems with the "Courage". Before Mr Chiotelis had replied, on 20 August 2021, the Claimants applied to this Court without notice for interim injunctions, and Cockerill J ordered that CSC forthwith sail the "Courage" to Gibraltar and that AVC forthwith sail the "Amethyst" to Dubai (or in each case to another port agreed between the parties). She ordered that the Defendants forthwith cause the AIS beacons of the vessels to be switched on, that the Defendants allow the Claimants' representatives or surveyors forthwith upon their arrival to have access to survey them, and that the Defendants should not cause or permit them to enter or remain within any of the areas excluded under the Charterparties, which included Syria. Copies of the injunctions were emailed by Reed Smith to Mr Chiotelis later that day.

58. On 22 August 2021, Mr Mallah's brother, Mr Luay Mallah, instructed the Master of the "Amethyst" to move her to some 30 to 35 nautical miles from the nearest land, either the UAE or Iran. He also instructed the Master to transfer 10mt of marine gas oil ("MGO") from the "Amethyst" to the mt "Rival", another vessel managed or controlled by Oryx.

59. The vessels' AIS beacons were not switched on until 23 August 2021. In a witness statement of 24 August 2021, Mr Chiotelis said that this was because he was on holiday and his communication with the Defendants was delayed. He offered an apology.

60. On 23 August 2021, Mr Chiotelis asked Reed Smith that, since both vessels were, he said, under charter, the Claimants agree to the vessels going to different ports from those ordered by Cockerill J (without identifying which ports). He said that the "Courage" could not sail immediately as it was "still awaiting completion of its repairs". He also said that P&I covers had been reinstated, attaching certificates, and that reinstatement of H&M covers was "under way". On 24 August 2021, Reed Smith asked where the Defendants wished the vessels to proceed, and for copies of the time charters. The Defendants on the same day applied to the Court to allow the "Courage" to sail to Lagos and the "Amethyst" to Brazil.

61. In a witness statement dated 24 August 2021 in support of the application, Mr Chiotelis stated:

    (i) that the "Courage" was subject to a sub-voyage charter dated 5 June 2021, and was laden with a cargo bound for Lagos, and bills of lading had been issued for it: he exhibited bills of lading and a fixture recap. He said that she was undergoing repairs, and unable to sail to either Lagos or Gibraltar until they were complete; and

    (ii) that the "Amethyst" was "currently the subject of a sub-time charter dated 8 April 2021 … for a period of 5 plus 5 months at charterers' option" and that ACF had "ordered the MV 'Amethyst' to load a cargo of fertilizer at either Ruwais, UAE or Sohar, Oman for discharge at various ports in Brazil". He exhibited a redacted extract from the fixture "recap" email for the charterparty of 8 April 2021.

62. On 25 August 2021, Reed Smith again asked for more information about the engine problems on the "Courage", and for a full copy of the "Amethyst" recap and copies of her voyage orders. They also asked for (i) documents about Mr Darbis and the

transaction of 23 June 2021, and (ii) confirmation that the replacement insurers had been informed of the circumstances in which the previous insurances were cancelled and the relationship between Mr Mallah and Mr Darbis.

63. On 26 August 2021, the Claimants served further termination notices (the "Third Notices"), without prejudice to the validity of the First Notices or the Second Notices. These relied upon Events of Default arising from the change in ownership in June 2021 and from lapse of the insurances.

64. Before the hearing to vary the injunctions, Mr Chiotelis provided documents evidencing the change in shareholding and control of the Defendants from Mr Mallah to Mr Darbis on 23 June 2021, comprising (i) certificates dated 23 June 2021 that Mr Darbis was the registered shareholder of each company; (ii) letters of 23 June 2021 of Mr Mallah whereby he resigned as their Sole Director and Sole Officer; (iii) statements of Mr Mallah of 23 June 2021, countersigned by Mr Darbis, whereby Mr Mallah stated that he had "bargained, sold and transferred and … did [thereby] bargain, sell and transfer unto [Mr Darbis] all [his] right title and interest in and to" the shares in the Defendant companies; and (iv) minutes of Extraordinary General Meetings of the companies, said to have been attended by Mr Mallah and Mr Darbis, whereby Mr Mallah's resignations were accepted and Mr Darbis was appointed as their Sole Director and Sole Officer in his place. Mr Chiotelis also provided further documents: further cargo and fixture documents concerning the "Courage"; and a "Main Engine Trouble Report" from the Master and Chief Engineer of the "Courage"; but no further documents about the ACF time charter or the voyage orders for the "Amethyst".

65. The application was heard by Bryan J. on 27 August 2021. The Defendants relied on Mr Chiotelis' evidence that the "Amethyst" had been ordered to load fertiliser at Oman or Sohar and carry it to Brazil as grounds for varying the order about the "Amethyst". In the event, Bryan J. varied the injunctions so that the "Courage" was to be towed to a port to be agreed between the parties for repair and the "Amethyst" was to proceed to either Ruwais or Sohar, but neither vessel was to conduct any cargo operations, pending a return date of 24 September 2021. He ordered that "Unless it will interfere with the Vessel's departure from her current position to Sohar or Rowais, [AVC] must allow access to the Claimant's [sic: clearly, OCM Kama's] representatives and or surveyors … prior to departure for Sohar or Ruwais". The Claimants told the Court that representatives could attend the vessel within hours.

66. On 28 August 2021, Ms Kiki Akritas, legal counsel at Interunity, spoke by telephone to Mr Darbis about giving Mr Mallah notice of the Court Orders. Mr Darbis said that orders might be sent to him, and that he could accept documents because Mr Mallah was his "cousin". (This has given rise to an issue on the pleadings about whether or not they were cousins, but that seems to me unimportant. I do not consider the evidence of Ms Akritas' conversation sufficient to show that they were: the word "cousin" is presumably a translation from Greek, and whatever exactly was said, Mr Darbis might have been speaking figuratively.)

67. Mr Mangos and Captain Stavros Kokosioulis of Interunity attended the "Amethyst" to inspect her as OCM Kama's representatives on 28 August 2021. She was lying alongside the "Rival". They found that Captain Subaan, the Master, was unaware of the injunction. He said that the AIS was in good working order, but that, in June 2021 he had been told by Mr Luay Mallah to it switch off and had done so. He also said that the

crew had not been paid, the officers' contracts had expired and officers and crew wanted to be repatriated. The Master told Mr Mangos that the vessel was not under charter and had had no voyage instructions for some time, and later, having received a copy of the order of Bryan J, he said that he saw no reason to go to Ruwais or Sohar.

68. According to the evidence of Mr Mangos, which was not challenged and which I accept, while he was on the vessel that day, he spoke at the Master's request to Mr Luay Mallah on the bridge telephone, and, when told that they had come to inspect the vessel, Mr Luay Mallah cut the conversation short and asked to speak again with the Master. Mr Mangos' impression was that the Master was being told that Captain Kokosioulis and he should leave the vessel.

69. Mr Mangos realised that the Master of the "Rival" was also on the "Amethyst", and he asked Mr Mangos to speak on the telephone with "my owner", who introduced himself as Mr Mallah. Mr Mangos could tell from his voice that he was not Mr Luay Mallah, to whom he had spoken earlier. His evidence that he spoke to Mr Abdul Jalil Mallah was not challenged, and I accept it. Mr Mangos described him as "more aggressive" than his brother had been, and Mr Mallah told him to "get off my vessel". Mr Mangos replied that he was on board at the invitation of the Master, and understood that he was entitled to be there because of the orders of the English Court.

70. After the conversation, Mr Mangos was asked by Captain Subaan to stay on the vessel, but the Master of the "Rival" told him to leave. Captain Subaan told Mr Mangos that he would sail to Dubai, but in the event he was unable to do so because the Master of the "Rival" refused to leave the ship, saying that he had been ordered by his "owner" to stay, and summoned the crew of the "Rival" to the deck of the "Amethyst". Further, the "Queen Reem", which Mr Mangos understood to be owned by the same group as the "Rival", arrived alongside the "Amethyst". Concerned about these developments, Mr Mangos called the Coastguard and left the "Amethyst".

71. The UAE authorities ordered the "Amethyst" and the "Rival" to Sharjah. On 30 August 2021, UAE Port State Control inspected the "Amethyst" and detained her on account of deficiencies. On 31 August 2021, she was fined by the Sharjah Harbour Master for transferring MGO to the "Rival". The crew left the "Amethyst", and OCM Kama took possession of her on 1 September 2021.

72. On 31 August 2021, Reed Smith wrote to Mr Chiotelis that Mr Mangos and Captain Kokosioulis had not completed their inspection of the "Amethyst" because they were prevented from doing so by the intervention of Mr Mallah and Mr Luay Mallah, both of whom claimed to represent her "owner", by the Master of the "Rival" and by the actions of the "Queen Reem"; and that they had left after being instructed to do so by the Master of the "Rival", "acting on the instructions of Messrs Mallah". They proposed that the "Amethyst" remain in Sharjah, and that the injunction should be varied accordingly. They challenged the argument that she should go to Ruwais or Sohar, relying on Mr Mangos' evidence that the Master did not know of a charter with ACF. They also complained about the Defendants refusing to engage with agreeing upon a repair port for "Courage".

73. The Claimants applied to Court on 2 September 2021 to vary the order of 27 August 2021. Later that day, Mr Chiotelis sent emails denying that Mr Mallah had contacted anyone on the "Amethyst", denying that there had been any illegal bunkering and

attaching a copy of what he described as "the CP with ACF", an unsigned version of the ACF charter. I reject the denial that Mr Mallah had spoken to anyone on the "Amethyst", and the denial of illegal bunkering.

74. At a hearing of the Claimants' application on 8 September 2021, Jacobs J accepted an undertaking from the Claimants to keep the "Amethyst" at Sharjah until the return date, and rescinded the order that she proceed to Ruwais or Sohar.

75. On 14 September 2021, the Defendants served a witness statement of Mr Chiotelis in response to the Claimants' application, repeating that both vessels were "under charter to third parties", the "Amethyst" having orders to load at Ruwais or Sohar a cargo of fertiliser for Brazil. He said that the ACF charter was "for a period of about 5 months plus 5 at the sub-charterers option", and that the vessel was delivered into the charter service on 8 April 2021 and that, if ACF exercised the option, it would "therefore expire in February 2022". He also said that "protective steps [had] been taken in Sharjah to ensure that the vessel remained there, under arrest", exhibiting an interlocutory "Precautionary Seizure Statement" of the Sharjah Court dated 6 September 2021.

76. With regard to the "Courage", Mr Chiotelis said that the Defendants had not been able to find a tug to take her to Piraeus, and that instead spare parts had been ordered so that repairs could be carried out afloat. He exhibited to his statement an invoice dated 25 August 2021 for spare parts including a crankshaft and main bearings, which were to be delivered in Lebanon. The Defendants asked that the injunction be varied to allow the "Courage", after repairs were completed, to proceed to Lagos "to comply with the subject charter and the contract contained in the bills of lading that have been issued in respect of that charter". On 15 September 2021, Mr Mangos emailed a company called Five Ocean Salvage to ask whether a tug would be available to take the "Courage" to Piraeus, and received five offers in response. I cannot accept, despite what Mr Chiotelis said in his witness statement, that the Defendants had made real efforts to find a tug.

77. On 18 and 19 September 2021, Mr Mangos went by launch to observe the "Courage". He saw her drift in a north-westerly direction, and then proceed east under her own power towards Syrian waters. Mr Mangos observed that these movements were consistent with her movements recorded by the AIS, which showed the vessel had been using her main engine since 23 August 2021 to maintain a position just outside Syrian waters.

78. On 20 September 2021, Mr Chiotelis sent Reed Smith various insurance documents. As well as P&I Certificates dated 20 August 2021, which had previously been sent on 23 August 2021, he attached a cover note issued by Neo Broker Ltd in respect of H&M cover for "Courage", placed with Turkish insurers, and a policy schedule issued by Al-Bahriah Insurance & Reinsurance S.A.L. of Lebanon in respect of H&M insurance for the "Amethyst".

79. On 23 September 2021, the Defendants served their skeleton argument for the return date hearing on 24 September 2021 of the Claimants' application to vary the Court's orders. They agreed that one of the quotes for towage obtained by Mr Mangos should be accepted, and that the "Courage" should be towed to Limassol or Piraeus for repairs. However, on 24 September 2021, shortly before the hearing before Andrew Baker J, Mr Chiotelis told Reed Smith by email that he had been informed that the "Courage" had "drifted inside of Syrian [waters] due to the weather condition", that she "was

ordered by Latakia port authority to enter the port", and that two crew members had been taken to hospital. Andrew Baker J. ordered that the Defendants by 27 September 2021 provide evidence on affidavit "in relation to the circumstances in which the 'Courage' [had] proceeded to Syria" and an indication as to "their intentions in relation to the 'Courage'". Andrew Baker J. continued the injunctions until trial, the Claimants undertook to keep the "Amethyst" at Sharjah until judgment or further order, and the Judge directed an expedited trial. His directions included that, by 8 October 2021, there be served "[c]orrective witness statements, to correct any errors in interlocutory witness statements previously served". In the event, no corrective statements were served.

80. After the hearing, Reed Smith requested of Mr Chiotelis, inter alia, copies of the deck and engine logs of the "Courage" and the bridge voice recording of the alleged orders from Latakia port. On 27 September 2021, the Defendants served an affidavit of Mr Chiotelis. He exhibited no contemporaneous documents from the "Courage", but said that he was informed by Captain Khalil that she had drifted under strong winds into Syrian waters, being unable to maintain her position due to "problems with the Vessel's engines"; that she was ordered to Latakia by the local port authorities; and that tugs from the port of Latakia proceeded to the vessel, arrived early on 24 September 2021 and towed her into port to disembark two crew members who were sick. The affidavit exhibited a statement from the Master of the "Courage", giving a similar account but without reference to the vessel being ordered to port or the use of tugs; a statement from the Harbour Master that the vessel had been granted free pratique on 24 September 2021 for the purpose of changing crew and taking crew to hospital; and two statements from personnel at the Al Nada Hospital about the two seamen.

81. Further, in response to the order that the defendants indicate their intentions as to the "Courage", Mr Chiotelis also sent Reed Smith an email on 27 September 2021, stating that the Defendants still intended to have the vessel towed to Limassol or Piraeus, but that it would take "a few days" to have her ready.

82. On 28 September 2021, the Claimants served further evidence by way of a statement of Mr Weller in response to Mr Chiotelis' affidavit and the order of Andrew Baker J. He observed that the Defendants had produced no contemporaneous documents, such as voyage data recordings, to support the explanation for the vessel entering Syrian waters. Mr Weller exhibited a chart based on AIS data of 23 and 24 September 2021, showing the vessel manoeuvring outside Syrian waters before proceeding east directly towards Latakia for some 12 nautical miles from the limits of Syrian territorial waters to the port at an average speed of over 2 knots. Mr Weller also set out weather data obtained from Marine Traffic, showing that the current was not in the direction of Syrian waters, and the wind, which was under 20 knots, was not blowing towards Syrian waters. On 28 September 2021, Mr Chiotelis sent Reed Smith copies of the engine and deck logs for 22 to 24 September 2021, and they do not record the main engine being used during this period. The Defendants' explanation for the vessel going to Latakia is belied by the vessel's movements and the evidence produced by Mr Weller, and I conclude that the "Courage" deliberately proceeded under her own power into Syrian waters.

83. At a hearing on 29 September 2021, Foxton J ordered that CSC and Oryx procure that the "Courage" be towed to Piraeus as soon as reasonably practicable and keep her there until judgment or further order. If they had not concluded a towage contract by 9.00am

on 7 October 2021, they were to serve a statement setting out the steps what had been taken and the progress made.

84. With regard to the "Amethyst", AVC and Oryx undertook to discontinue the Sharjah proceedings as soon as reasonably practicable. However, on 6 October 2021, the Claimants' agent in Sharjah was served with a legal document in Arabic dated 30 September 2021, requiring the Claimants' attendance at a hearing in Sharjah on 13 October 2021. It showed that, after the Sharjah Court had on 9 September 2021 rejected the Defendants' application for "precautionary seizure", AVC and Oryx had on 30 September 2021 issued a notice of appeal against that order. On 7 October 2021, the Claimants issued an application for an anti-suit injunction against AVC and Oryx in respect of the Sharjah proceedings. The Defendants served no evidence in response, and an anti-suit injunction was granted by Jacobs J. on 11 October 2021, AVC and Oryx being ordered to discontinue the Sharjah proceedings forthwith.

85. The Defendants did not conclude a towage contract by 7 October 2021, and in response to the order of Foxton J, they served a statement of Mr Chiotelis. He said that he was informed by Captain Khalil that permission of the Syrian Government was required to tow the vessel from Lakatia, and that the Defendants had contacted a towing company called Al Mersat Co for Maritime Services to seek the permission, having already sought assistance from another company without success.

86. On the same day, Mr Chiotelis sent Reed Smith an email saying that he had discontinued his services to the Defendants with immediate effect. Notice of change was filed on 18 October 2021, and Campbell Johnston Clark Limited ("CJC") went on the record as the Defendants' solicitors. On 22 October 2021, the Defendants served their Defence, in which they pleaded that the ACF charter had been amended "on or around 14th/15th June 2021", and ACF's option to extend the period of hire was revoked. On 29 October 2021, Rosling King replaced CJC as solicitors on the record for the Defendants.

87. On 18 November 2021, Mr Darbis sent an email to Mr Baker and Mr Hugger "[i]n [his] capacity as the general director and shareholder of [the Defendants] and in reference to the resignation of the previous director/shareholder Mr …. Mallah on 14 June 2021 and the acceptance of the resignation on that date". He requested a full statement of account of the outstanding balance "of the financing agreements of my 'Courage' and my 'Amethyst', including interest and associated costs, if any, in order the guarantor, [Oryx] to arrange swiftly the amount you claim to your designated bank account in order to close the matter fully and finally". He asked for a reply within 24 hours. By email of 26 November 2021, Mr Hugger declined to provide a statement, saying among other things that the Claimants could not accept payment from the "erstwhile bareboat charterers".

88. On 8 December 2021, I made an order on a disclosure application issued by the Claimants that the Defendants provide a witness statement about their searches for certain documents, and in response the Defendants served a witness statement of Mr Darbis dated 15 December 2021. It was unsatisfactory in many respects, including these:

    i) With regard to documents relating to insurance, specifically as to the circumstances of its cancellation on about 16 June 2021 and placing information

and other communications about replacement cover, Mr Darbis said that Captain Khalil was responsible for insurance and no longer worked for Oryx, and that Mr Darbis had found no documents.

ii) With regard to documents relevant to problems with the main engine of the "Courage", including her engine logs, Mr Darbis said that the crew of the vessel was uncooperative and searches had not been possible, and that he had been unable to obtain any logs.

iii) With regard to "All correspondence, communications or other documents referring to or evidencing … negotiation, conclusion and/or execution of the alleged Transfer Agreement …", Mr Darbis responded that "[i]n relation to the Transfer Agreement, the parties held a meeting to conclude this and so there is no documentation to disclose. In this part of the world [presumably, referring to Greece] many negotiations and even agreements are made orally". He said that his searches of email accounts had revealed nothing.

89. The Defendants had earlier disclosed the Transfer Agreement and Addendum No 2, and, under rule 32.19 of the Civil Procedure Rules ("CPR"), the Claimants should have served a notice by 4 December 2021 if they were to challenge the authenticity of disclosed documents. The Claimants served no notice in respect of the Defendants'' disclosed documents, and so, under the CPR, they are deemed to have admitted their authenticity Shortly before the trial, on 13 January 2022, I heard an application by the Claimants for an extension of time to serve a notice to challenge the authenticity of the Transfer Agreement and Addendum No 2. It was said that no notice had been served timeously through inadvertence. I was told that an expert forensic examiner, Ms Ellen Radley, had concluded that there was very strong evidence that the signatures of the four buyers in the Transfer Agreement were traced from copies of their passports. I refused the Claimant's application for reasons that I gave orally on 13 January 2022, including that, if the challenge were permitted in relation to the Transfer Agreement, and particularly if I permitted the Claimants to support it by advancing an unpleaded allegation of forgery and evidence from Ms Radley, the conclusion of this expedited trial would inevitably be very much delayed.

The US Sanctions Regime

90. There was a good measure of agreement between Mr Smith and Mr Harter about the relevant United States law, and they produced a joint report of largely agreed propositions, which I have found very helpful.

91. The United States operates controls under the US Global Terrorism Sanctions Regulations, Code of Federal Regulations ("CFR") part 594 (the "GTSR"), that are designed to limit the resources available to organisations that are considered terrorist. OFAC has been charged with administering, implementing and enforcing the GTSR. Under paragraph 594.201, "property and interests in property of [certain persons, including persons on the SDN List] that are in the United States, that hereafter come into the United States or that hereafter come within the possession or control of US persons … are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in". Further, "any person determined by the Secretary of the Treasury

… [t]o assist in, sponsor, or provide financial, material, or technical support for, or financial or other services to or in support of", a person whose property or interests in property are blocked, can be included on the SDN List.

92. Under paragraph 594.204 of the Regulations, it is provided that "no US person may engage in any transaction or dealing in property or interests in property of persons whose property and interests in property are blocked …". The term "US person" is widely defined at paragraph 594.315 as "any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches) or any person in the United States".

93. Thus, as Mr Smith and Mr Harter agreed, "US sanctions broadly prohibit US persons and those persons subject to US jurisdiction from engaging in transactions with or involving blocked (i.e. sanctioned) persons or their assets", and a "person can become subject to US jurisdiction by engaging in activity with a US nexus". Further, under EO 13224, OFAC "has the authority to block non-US persons if they meet certain enumerated criteria", and such persons are designated SDGTs and added to the SDN List. Accordingly, Mr Smith and Mr Harter were agreed upon the following propositions about risks under the regime facing persons, such as the Claimants, who are not within the definition of US person:

    (i) "Non-US entities such as Claimants can face civil and criminal penalties from US enforcement agencies for causing a US person to engage in a prohibited transaction with a SDGT";

    (ii) "If Defendants were considered blocked by the OFAC and continued to make payments to the Claimants in US dollars, there is a risk that Claimants would be penalized for causing a US financial institution or other US person to assist in processing that US dollar payment"; and

    (iii) "… non-US entities such as Claimants may be designated by OFAC if they 'assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of [Mr Mallah]' or are 'otherwise associated with [Mr Mallah]'. There is no requirement that this financial, material or technological support be provided directly, nor is there a requirement that such support meet a threshold of size or gravity".

94. In their Particulars of Claim, the Claimants plead, and in their Defence the Defendants admit, that on 10 June 2021 OFAC designated Mr Mallah as a SDGT, his property and interests in property were blocked pursuant to paragraph 594.201 of the GTSR, and his name was added to the SDN List. A person included on the list is entitled to apply to OFAC to be removed from it, and, according to the Defendants, Mr Mallah has so applied: certainly, in a letter of 16 August 2021 to Mr Chiotelis, Mr Mallah's lawyers, Nelson Mullins Riley and Scarborough LLP of Washington DC, wrote that he challenged the grounds of the OFAC's decision. There is no evidence about whether there has been any response to the application, if one has been submitted, nor was it suggested that he has been removed from the list.

95. Paragraph 594.412 of the Regulations states the so-called "50% rule", whereby, if a person whose property and interests are blocked owns, directly or indirectly, an interest

of 50% or more in an entity, the property and interests of such entity are blocked, and, as Mr Smith and Mr Harter agree, "such an entity is a person whose property and interests in property are blocked" under paragraph 594.201. The entity remains "blocked" as long as the listed person retains an interest of at least 50%. If the listed person divests himself of his interest, or it is reduced below a 50% interest, then automatically, and without recourse to the OFAC or any other official procedures, the entity ceases to be blocked. It is not in dispute that on 10 June 2021, when Mr Mallah was designated, he had an interest of more than 50% in each of the Defendants, and therefore the Defendants were all "blocked" entities. However, the Defendants contend that he disposed of his interest in them on 23 June 2021, and they ceased to be "blocked". The Claimants dispute this.

96. OFAC publishes guidance about its interpretation of the GTSR by way of Frequently Asked Questions ("FAQs"). In its guidance, OFAC "urges caution when dealing with or processing transactions involving [entities that have ceased to fall under the 50% rule] as those entities may become the subject of future designations or enforcement actions by OFAC. Sufficient due diligence should be conducted to determine that any purported divestment in fact occurred and that the transfer of ownership was not merely a sham transaction". It is agreed between Mr Smith and Mr Harter that, if OFAC considered the arrangements of 23 June 2021 to be a "sham transaction", it would view the Defendants as being still owned as to 50% or more by Mr Mallah, and thus still blocked. It is also agreed that in considering whether a transaction is "sham", OFAC would adopt a "holistic approach that takes into account not only the express terms of any divestment-related agreements, but also the surrounding circumstances, the actual consequences of the attempted divestment, and the evidenced intent of the parties". Further, if OFAC considered that the arrangements of 23 June 2021 involved property or property interests of Mr Mallah under US jurisdiction, it would regard the arrangements as null and void, and incapable of divesting Mr Mallah of his interests in the Defendants.

97. An application can be made to OFAC for a licence to do what would otherwise be prohibited. It is agreed by the experts that the decision to grant a licence "is one based on US foreign policy and national security interests and is neither based on precedent nor can it be predicted based on past practice", and that "[r]elative to other US sanctions programs, the GTSR provides very few general licences (regulatory exemptions)" and that "[o]f the specific licences that OFAC has issued and that have been made public, few were granted pursuant to the GTSR".

98. On 12 July 2021, ST applied on behalf of Oaktree CM and the Claimants for a licence from OFAC to allow them "to take all reasonable and necessary steps to confirm that the [charterparties] ha[d] been terminated and [Oaktree CM] is legally entitled to the Vessels, including appearing before the courts of the United Kingdom", to communicate with the crews, and to direct the vessels to port. On 20 July 2021, the OFAC granted a licence to Oaktree CM and associated parties. In its covering letter, the OFAC said that it did not consider representation in Court proceedings to be prohibited by GTSR, and the licence and the covering letter make clear that the licence covers Oaktree CM and "any US person principal of [the Claimants] and any US persons assisting in the operations of [the Claimants]". Thus, OFAC accepted that the Claimants themselves, not being US persons, did not require a licence, but that US persons who acted as their principals or who assisted their operations did require one.

As Mr Smith said when cross-examined about this, the Claimants "are not sentient beings, so [the licence] obviously applies to the people in charge of [the Claimants] which seems to be the US person principals, the US persons assisting".

99. On 21 September 2021, ST applied on behalf of Oaktree CM for a specific licence to allow charterparty payments held by Berenberg to be released to it, and authorising Oaktree CM to receive any damages awarded "arising out of the misconduct of Mr Mallah, his companies and/or the Charterers". On 17 December 2021, OFAC granted the application.

100. According to Mr Smith's evidence, the OFAC only grant licences of this kind if it considers that the United States' foreign policy interests or its national security interests would be promoted thereby. It would not, he said, be sufficient that the United States' foreign policy and national security interests would not be compromised by a licence being granted. Mr Dunning challenged this, and elicited in cross-examination that Mr Smith did not know in what way the licences that had been granted to Oaktree CM promoted the United States' foreign policy or national security interests. He insisted, however, that otherwise they would not have been granted, and disagreed with Mr Harter's view that OFAC is "committed to discharge its regulatory and enforcement functions without unreasonably impeding commercial relations". I accept Mr Smith's evidence about these matters: he was an impressive witness, and his experience when he worked for the OFAC gave him particular insight into such questions. To my mind, it is not surprising that the OFAC requires special reasons to exempt a person or a transaction from the sanctions regime, nor that it does not entertain commercial arguments for relaxing the regime in individual cases.

101. The Defendants relied on reports from the New York Times which listed companies which had obtained from OFAC "permission to bypass sanctions". I do not consider that these reports detract from Mr Smith's evidence or help me to assess whether the Claimants and the Oaktree Group would be granted further licences, should they apply for them. I accept that, on their face, the reports show that licences have been issued to commercial companies, but Mr Smith was properly reluctant to speculate why they were granted in particular cases, knowing nothing of the circumstances, still less the considerations that were taken into account by OFAC.

The Claimants

102. Oaktree CM is a Delaware limited partnership, whose business is to manage alternative investments, and it is the investment manager of the funds which ultimately own the Claimant companies Its headquarters are in Los Angeles, and it has other offices elsewhere in the USA and also in Europe, including in London, in Asia and in Australia.

103. It is registered with and regulated by the US Securities and Exchange Commission. For this and other reasons, as Mr Orren explained, it is understandably concerned to comply with its obligations under the US sanctions regime. Mr Orren identified three specific reasons:

i) Its obligations to its investors require it to comply with applicable laws and regulations, and to maintain an effective compliance programme.

ii) Compliance is necessary in order for Oaktree CM to maintain its reputation with its investors, including institutional investors, pension funds and Sovereign Wealth funds

iii) The potential penalties for non-compliance could be very severe.

This part of Mr Orren's evidence was not challenged, and I accept it.

104. The Claimants themselves are incorporated in the Marshall Islands. The shares in OCM Nile are owned by Oaktree Management Finance I LLC ("OCM I"), and the shares in OCM Kama are owned by Oaktree Management Finance I LLC ("OCM III"). Both OCM I and OCM III and their own immediate shareholders are incorporated in the Cayman Islands.

105. The ultimate beneficial owner of the Claimants are the investors in funds, the ultimate legal owners of which are Oaktree Capital Group LLC of Delaware. The investment funds hold their assets, including the Claimant companies, through a complex structure using a series of limited partnerships, the details of which were explained by Mr Orren but are unimportant for present purposes.

106. The Claimants plead that, although they are incorporated in the Marshall Islands, they are affected by paragraph 594.204 of the Regulations that imposes prohibitions on "US persons" because they are "owned by investment funds that are ultimately managed and owned by US persons", including Oaktree CM and Oaktree Capital Group LLC, and because "the individuals who oversee, manage and operate the Claimants are or may be deemed US persons and are therefore required to comply with the [R]egulations". They identify the following as the relevant natural persons: Mr Sherman Lau, Mr Jordan Mikes, Mr Brian Laibow, Mr Bob O'Leary and Mr Orren. It was not disputed that those individuals are "US persons" within the meaning of the Regulation.

107. Meerbaum Capital Solutions Inc ("Meerbaum") is a Marshall Islands company. It is not part of the Oaktree Group, but is described by Mr Orren as its "joint venture partner". It is based in Germany. It provides the Oaktree Group with investment advice, and has particular experience in buying and selling ships. Mr Hugger is a Managing Director of Meerbaum. He is a German Citizen and works in Germany. He works closely with Berenberg, Oaktree's bank in Germany where the Claimants have accounts, and he works amongst others with Mr Marcus Weber of Berenberg, who is also a German resident.

108. The Oaktree Group also uses the services of Mr Baker, who works in London and uses the address of its London office. Mr Baker is, according to Mr Hugger's evidence, which I accept, engaged as a consultant. He had an "Oaktree Capital" email address, and writes emails in the name of Oaktree CM.

109. Mr Baker was, as Mr Orren confirmed, "heavily involved" in the transactions with the Defendants from the start, including in forming the Claimant companies. He was also involved in events immediately after Mr Mallah was designated a SDGT, and Mr Hugger was cross-examined about his involvement at some length. In particular:

i) he sent Berenberg the email of 15 June 2021, telling them that "one of our clients", the bareboat charterer of the "Courage" and the "Amethyst", had been

placed on "a sanctions list", and that the funds received on 11 and 14 June 2021 should be "frozen and left in the relevant bank accounts";

ii) he sent Berenberg the email of 16 September 2021, asking for confirmation about the freezing of the Claimants' account; and

iii) on 17 December 2021, OFAC emailed to Mr Baker its licence to receive the June 2021 payment held by Berenberg.

110. It was suggested to Mr Hugger in cross-examination that his evidence that he spoke to Berenberg on 14 June 2021 was untrue, and fabricated in order to obscure and minimise Mr Baker's involvement in the Claimants' business, and so to conceal that Oaktree and the Claimants were conducting their business by or through a "non-US person", who was not subject to restrictions in the GTSR. The Defendants submitted that Mr Hugger had deliberately avoided referring to Mr Baker in his first witness statement, and that the emails that revealed Mr Baker's involvement were disclosed only shortly before the hearing. Mr Baker undoubtedly dealt with financial, banking and other important matters for the Oaktree Group, but I reject the Defendant's suggestion: in my judgment, Mr Hugger was honest in his evidence about this and other matters. He described Mr Baker as "basically our accountant", and said that Mr Baker did not have "decision-making" responsibilities. (He referred to him having a "clerical" role, by which he did not mean that Mr Baker dealt with only with routine and unimportant matters, but that he did not have authority to oversee or manage the Claimants' operations.) Asked specifically about the email of 15 June 2021, Mr Hugger explained, and I accept, that Mr Baker sent it on the instructions of Mr Sherman Lau, who was described as being "responsible for this investment" under supervision of Mr O'Leary.

The Defendants

111. CSC and AVC are single purpose vehicle companies incorporated in the Marshall Islands. Oryx was also incorporated in the Marshall Islands, and, according to a report by Infospectrum (which was not disputed), it carried on business as ship owners and managers from a trading address at 8 Charilaou Trikoupi Street, Piraeus, Greece ("8 CT St"). Mr Mallah was the sole shareholder and director of the companies until 23 June 2023, and his brothers, Mr Luay Mallah and Mr Mustafa Mullah, were also involved with them. It appears that some of the vessels of the Oryx group, including the "Courage" and the "Amethyst", were managed on a daily basis by Captain Khalil, who is said in Mr Darbis' witness statement of 15 December 2021 to be "no longer working" for Oryx.

112. Among the associated companies identified by Infospectrum was another Marshall Island company, Olympos Ship Management SA ("OSM"), which was appointed by Oryx to manage the "Courage" and the "Amethyst". In his statement of 15 December 2021, Mr Darbis described OSM as "the previous management company", but he did not say when or in what circumstances it ceased its role. Mr Mallah is, or was, a director and the primary shareholder of OSM, and, according to information from the Hellenic Ministry of Shipping, Mr Darbis is, or was, its "legal representative".

113. This leads to the issue about whether Mr Mallah has disposed of his interest in, and control over, the Defendants. The Defendants' pleaded case, which was verified by Mr Darbis, is that "[o]n 23rd June 2021, Mr Mallah transferred his interest in the

Defendants, and resigned as a director thereof as further particularised below". It is then pleaded that "Pursuant to the terms of an agreement dated 14th June 2021 (the "Transfer Agreement") Mr Mallah transferred all his rights in, and management authority which related to, the Defendant companies to El Khatib Jamil, Abla Channir, Yousef Darbis and Haissam El Zakkawi as buyers ("Buyers")", and that "[o]n 23rd June 2021, and in accordance with the Transfer Agreement, Mr Mallah resigned as a director and officer of the Defendants (and Mr Darbis was appointed in his place)". It was further pleaded that the reason that Mr Mallah transferred his interests voluntarily in the Defendants was to avoid the Claimants and the Defendants being prejudiced by his being placed on the SDN list and designation as a SDGT (although that placement and designation were said to be wrongful and based on false grounds), so that the charterparties could be performed.

114. The Transfer Agreement is a document of two pages, headed "Agreement dated 14 June 2021", signed, or purporting to be signed, by Mr Mallah as seller, Mr Darbis, Mr Jamil, Ms Channir, and Mr El Zakkawi as buyers. It included these provisions:

> "The seller will transfer all his rights and management authority to the buyers against 1 USD dollar. Motor vessel Courage and Amethyst will be buyers vessel" (clause 4).
>
> "If the seller clears his name from OFAC within 6 months starting today, the shares and the management authority will be transferred back to the seller against 1 USD dollar" (clause 5).
>
> "If the seller cannot clear his name from OFAC within 6 months, the buyers at their cost will appoint one of the big four auditing companies and obtain an evaluation report for these three companies [sc. the Defendants]. The value of the companies will be paid to the seller in four instalments starting from the date of the valuation report. Buyers cannot transfer any asset of the company during the six months until the full value is paid after the valuation report" (clause 6).
>
> "After signing this agreement the seller will not enter the company offices. Will not use company money or will not engage in any business activity regarding these three companies" (clause 7).
>
> "For smooth transition sellers brothers Luay Mullah and Mustafa Mullah will stay in the company as long as they and buyers wish" (clause 8).
>
> "The buyers will decide their own percentage of shares within themselves. In any case El Khatip Jamil and Abla Channir will hold at least 51 percent of the shares and control the companies" (clause 9).
>
> "The buyers will nominate Yousif Darbis as the sole shareholder and director in these companies" (clause 10).

115. My decision about whether Mr Mallah is still the beneficial owner of the Defendants, or has disposed of his beneficial interest in them, is constrained by two products of the adversarial nature of litigation in this Court. First, I have set out the Defendants' pleaded case as to how and when Mr Mallah disposed of his interest in the Defendants. During the parties' opening submissions, I made clear that I would attach importance to how the case was pleaded, and if the Defendants intended to depart from it, they would have to apply to amend it. They made a considered decision not to do so: the only case that is open to them is that Mr Mallah disposed of his beneficial interest in the shares on (and not before) 23 June 2021 by transferring it to the four buyers (and not only Mr Darbis) on the terms of the Transfer Agreement.

116. Secondly, as I have explained, the Claimants are deemed to have admitted the authenticity of the Transfer Agreement, including that it was entered into on 14 June 2021 and was signed by Mr Mallah, Mr Darbis and the other buyers.

117. The defendants called no witnesses, and their pleaded case was supported by no oral evidence. According to Mr Darbis' statement of 15 December 2021, Mr Mallah is not willing to "cooperate and be included in these proceedings", and this might explain why he has not been called. There is no explanation for Mr Darbis not giving evidence: indeed, Rosling King said in correspondence on 11 November 2021 that he would be doing so, and it was only on 7 December 2021 that the Claimants were told otherwise. Nor is there any explanation for none of the other buyers being called to explain the transaction.

118. I consider the fact that none of the four buyers gave evidence, either orally or even by way of a witness statement submitted under the Civil Evidence Act, casts real doubt on the Defendants' case that Mr Mallah disposed of "all his rights in and management authority" in the Defendants. I am entitled to draw this adverse inference, whether under the structured approach that was generally understood to be favoured by the Court of Appeal in Wisniewsky v Central Manchester Health Authority, [1998] PIQR 324,340, or viewing it simply as "a matter of ordinary rationality" or common sense, as Lord Leggatt preferred in Efobi v Royal Mail Group Ltd., [2021] UKSC 33 at para 41,

119. Further, despite my order of 8 December 2021, the Defendants have produced no documents other than the Transfer Agreement itself that refer in any way the three buyers other than Mr Darbis, or indicate that they were involved in any way with the Defendants. If they had a real interest in the Defendants, it is, to say the least, improbable that the Defendants would not have more disclosable documents that reflected this.

120. Further doubt is cast on the Defendants' case because it is inconsistent with other statements made on their behalf. First, in his email of 18 August 2021, Mr Chiotelis referred to Mr Darbis as "controlling now the companies following the removal of Mr Mallah", and he did not refer to the other buyers. He sent under cover of the email the Certificates of Incumbency dared 17 August 2021, which stated that Mr Darbis was "current Sole Shareholder/UBO" (sc. Ultimate Beneficial Owner) of the Defendants.

121. Next, Mr Chiotelis' email of 14 July 2021: again, Mr Chiotelis did not there suggest that the beneficial interest in the Defendants had been transferred to four persons. On the contrary, his account was that there was one new beneficial owner: "In case you wish to get introduced to the current UBO of the structure in question, that would be

welcome …". He also said that Mr Mallah had disposed of his interest in the Defendants "with effect from in January 2021". That was, of course, not the case. The Defendants plead that "Mr Chiotelis' message referred to the incorrect date because the Charterers were investigating whether or not the transfer of ownership could lawfully and effectively be backdated so as to remove any impediment to the Charterparties being performed. On learning that this could not be done in a legitimate manner, the Charterers abandoned this plan". No disclosed documents support this explanation, and I am unable to accept it: it beggars belief that Mr Chiotelis, a solicitor, made such an error. The account in the email of 14 July 2021 must have been a deliberate untruth. (I repeat that I do not say that Mr Chiotelis was dishonest: he was, it should be supposed, acting on instructions.) If Mr Mallah had disposed of his interests in June 2021 in order to avoid both the Claimants and the Defendants being prejudiced by his listing, it would, to say the least, be strange to keep this hidden from the Claimants and to concoct this untruthful account.

122. Thirdly, on 2 December 2021 Mr Darbis sent an email to OFAC about the listing of Mr Mallah. It was headed "Application for Licence". He wrote "We, the new Board of Directors and majority shareholders representing the 70% of the shares have accepted [Mr Mallah's] resignation as director on 23 June, 2021 and also accepted and affected his divestment in the … three companies on 23 June 2021". He signed it, "On behalf of the majority shareholders and in my capacity as Director". The email is curious in many ways: for example, Mr Darbis did not say to whom he was referring by "we". However, it is clearly inconsistent with the Defendants' case, both in that the reference to a new Board of Directors is inconsistent with its case that Mr Darbis became the sole director of the Defendant companies, and, perhaps odder, in the suggestion that new directors had a 70% interest in the shareholdings. Whether this be taken to refer to legal or to beneficial interest, it cannot be reconciled with the Defendants' case, nor with Mr Darbis' claim in his email of 18 November 2021 to Mr Baker and Mr Hugger to be the shareholder of the Defendants and his reference in it to the "Courage and the "Amethyst" being "my" vessels.

123. Next, there is evidence that Mr Darbis acts as a proxy for others, and that he has been, and still is, associated with Mr Mallah. The Claimants instructed Interunity to investigate whether Mr Darbis had connections with Mr Mallah, and in a preliminary report submitted on 20 August 2021, they referred to Mr Darbis as "the Legal Representative of [OSM]", reported their understanding that he had no "shipping background", and said that he "operates as a professional proxy for several Syrian nationals and firms". Taken in isolation, this report would be too vague and the source of the information too uncertain to be given much weight. It is, however, consistent with information from the Hellenic Ministry of Maritime Affairs and Insular Policy that Mr Darbis was the "legal representative" of the Greek Office of OSM on 22 January 2020. His association with Mr Mallah is further evidenced by his agreement in his conversation with Ms Akritas on 28 August 2021 to accept documents on behalf of Mr Mallah, his "cousin".

124. There is further evidence that Mr Darbis continued to have dealings with Mr Mallah, and that Mr Mallah attended the offices of Oryx at 8 CT St. after 23 June 2021 by way of a report of surveillance conducted by Mr Manaikas. It covers the period from 15 October 2021 to 15 November 2021, and 22 December 2021, and reports that Mr Mallah frequently attended the office of Oryx during this time, on several occasions

when Mr Darbis was there. Once when Mr Mallah was there, Mr El Zakkawi, another party to the Transfer Agreement, went there.

125. Mr Mallah's involvement with the Defendants after 23 June 2021 is also evidenced by the following:

i) When the Claimants took possession of the "Amethyst" and had access to her data systems, they found email exchanges between the Master and Ms Maybelle Pacaña who was apparently a crewing agent in the Philippines. In an email of 9 August 2021, Ms Pacaña asked whether there was food on the vessel, saying that she had followed up earlier requests for food "with Luia", apparently referring to Mr Luay Mallah, and on 12 August 2021, Ms Pacaña said that she would call Mr Luia Mallah and also inform "his brother". Although the Claimants invited the inference that this shows that Mr Mallah was still understood by Ms Pacaña to be involved with the "Amethyst", taken by itself, the email might have been referring to Mr Mustafa Mullah, who, according to the Transfer Agreement, was to "stay in the company" with Mr Luay Mullah. However, there were also exchanges between the Master and Ms Pacaña about the crew not being paid, and in an email of 18 August 2021, she wrote that she would follow that matter up with "Jalil", clearly meaning Mr Mallah.

ii) Next, there was Mr Mangos' unchallenged evidence that on 28 August 2021 Mr Mallah referred to the "Amethyst" as "my vessel".

iii) Finally, in January 2021 the Civil First Instance Court of Tartus, Syria, arrested the "Courage" on an application by a Mr Othman Abdullah Jindi, who alleged that Mr Mallah was in breach of an agreement. The Master of the "Courage" made a declaration in, or in relation to, those proceedings, that Mr Mullah was the owner of Oryx and of the "Courage", and that he managed her activities and was responsible for her expenses and the wages of her crew. If Mr Mallah had had no involvement with Oryx or CSC since June 2021, it is unlikely the Master would still have been unaware of this in January 2022.

iv) The position is the stranger because on 18 January 2021, Mr Baker received an email that was, or purported to be, from the Master of the "Courage" about the crew's wages being unpaid, and saying that he had learned that Mr Mallah was "no longer involved". It is not explained how the Master became aware of Mr Baker's email address. Whether or not the email did in fact come from the Master, it does not explain his declaration in relation to the proceedings.

126. The Defendants do not contend that Mr Mallah's beneficial interests in the shares were transferred when the Transfer Agreement was made on 14 June 2021. Nor can I accept that his beneficial interests were transferred to the buyers on 23 June 2021. Assuming that the Transfer Agreement was authentic, as I am bound to do, and even assuming that, when made, it was binding upon the parties, I cannot accept that the changes on 23 June 2021 were made pursuant to it, or that the arrangements contemplated by the Transfer Agreement were ever implemented. The Claimants' evidence shows that clause 7 of the Transfer Agreement was not implemented: Mr Mallah did not cease to "enter the company offices," or to give orders. Although Mr Mullah did not "clear his name from OFAC" within six months of 14 June 2021, there is no evidence of anything being done to obtain an evaluation report, as required by

clause 6: I infer that nothing has been done. Further, there is no evidence that the buyers reached an agreement about their respective participation in the companies pursuant to clause 9: on the contrary, only Mr Darbis appears to have had any involvement with the companies, apart from Mr El Zakkawi on one occasion attending at 8 C T St. I infer that Mr Darbis was and is acting as proxy or nominee for Mr Mallah, who has not disposed of his beneficial interests.

127. If Mr Mallah, directly or indirectly, still has an interest in the Defendants as to 50% or more, they would be considered "blocked entities" under the Regulation, and the Claimants, and persons assisting and acting for them, could be exposed to potential penalties if they deal with the Defendants or their property. Moreover, the Claimants point out that, whatever my decision about whether Mr Mallah has disposed of his interest, OFAC would in all probability regard the transfer as a "sham" transaction and consider that the Defendants are still "blocked" entities: the Claimants and those associated with them would still be exposed to the same risk of penalties. I agree, and shall consider those risks in the context of the Defendants' application for relief from forfeiture. Here, I confine myself to two observations about the Claimants' concern that, whatever my conclusion on the evidence before me about whether Mr Mallah retains an interest in the Defendants, OFAC might consider that he does.

128. First, OFAC would not be constrained as I am in reaching a decision about this: the question whether Mr Mallah has disposed of his interests would not be restricted by the Defendants' pleaded case, and the argument that the Transfer Agreement is a sham would not be constrained by the Claimants' deemed admission as to its authenticity.

129. Secondly, Mr Smith explained that under the US sanction regime the transaction would be considered by OFAC to be of no effect if the consideration of US$1 was paid to Mr Mallah under the Transfer Agreement and was deposited in a US dollar denominated bank account, and as a result US financial institutions were involved with the payment. To my mind, it is unlikely that the nominal (or fictional) consideration was actually paid, although the Defendants chose to give no information about this. OFAC, however, might well be more concerned about this question, and require to be satisfied about whether and how any payment was made.

The Construction Defence

130. The Claimants contend that, upon termination of the charterparties upon an Event, or Events, of Default, they were entitled to call for possession of the vessels, and remain entitled to possession. The Defendants dispute this. The issue turns on the proper interpretation and effect of clause 46 of the charterparties. The Defendants contend that the owner can repossess the vessel after the charterparty was terminated only if it has served a notice under clause 46(a)(i) and the charterer has not paid the amount stated in the notice. The Claimants say that the owner is entitled to repossess the vessel unless it has chosen to service a notice under clause 46(i) and the charterer has paid the full amount required.

131. In my judgment, the Claimants' interpretation is correct. First, it respects the wording of clause 46 itself. Nothing in the clause indicates that, if the charterparty is terminated for an Event of Default, the owner is required to serve a notice on the charterer under clause 46(i): on the contrary, it makes clear that the owner has an option to serve notice, but is not obliged to do so. Sub-clauses 46 (ii), (iii), (iv) and (v) state the position if

notice is served and the charterer complies with it, but they do not require that notice be served. The sub-clauses set out the different remedies available to the owner if the charterparty is terminated by notice following an Event of Default, and the conjunction "and/or" between the sub-clauses marks that the remedies in the sub-clauses are independent of each other. Clause 46(d) confirms this.

132. The Defendants submitted that, in sub-clauses 46(a)(iii), (iv) and (v), the words "unless the Charterers have paid to the Owners the full amount as mentioned in clause 46(a)(i)" presupposes that the owner will have sent and the charterer will have received a notice under clause 46(a)(i). I am not persuaded of that. It simply says that the remedies in those sub-clauses are not available to the owner if it has served a notice and the charterer has made full payment.

133. Secondly, the Claimants' interpretation of clause 46 is harmonious with clause 29, and the Defendants' is not. Under the 1989 version of the standard bareboat charterparty, the predecessor of the 2001 version on which the charterparties of the "Courage" and the "Amethyst" were based, there were two competing lines of authority about whether, upon termination of the charterparty for an event of default, the owner was immediately entitled to possession of the vessel: see Carver on Charterparties, 2nd Ed.(2002) para 6-073. In the 2001 form, the right to end a charter for an Event of Default is dealt with separately from the right to possession, in clauses 28 and 29 respectively. Under this version of the standard form, on termination of the charterparty, the owner has the right to repossess the vessel, and, pending repossession, the charterer holds it as gratuitous bailee.

134. In the charterparties of the "Courage" and the "Amethyst", clause 29 was amended and departed from the standard form, and on termination the Defendants held the vessels pending repossession not as gratuitous bailees, but with obligations with regard to maintenance, class and insurance. However, this amendment of the standard form of the clause in no way compromised or limited the owners' right to repossess the vessels: on the contrary, it was enhanced in that the revised wording provided that the vessels might be re-possessed at sea. On the Claimants' interpretation, clause 46 adds a gloss to clause 29, in that, as the owners, they might serve notice and so potentially, if the charterer paid in accordance with it, thereby waive the right to repossess the vessel. But that is consistent with the owner being entitled to repossess as clause 29 provides: it simply means that it might opt not to exercise its entitlement before serving a clause 46(a)(i) notice, and so risk losing the right to repossess if the charterer complies with the notice.

135. On the other hand, the Defendants' interpretation of clause 46 is, to my mind, inconsistent with clause 29 in that the right to repossession, for which clause 29 provides in unqualified terms, would be reduced to a wholly contingent right. It means that, despite clause 29 and despite the charterer after termination of the charter being bailees at will, the owner has no right to re-possess the vessel after the charter has been terminated, unless it has served a clause 46(i)(a) notice and the charterer has failed to comply with it. Mr Dunning submitted that clause 29 is a printed clause in the standard form of bareboat charter, and to be interpreted subject to the typed clauses, including clause 46. This overlooks that the parties introduced significant revisions to clause 29, and did not adopt the standard wording.

136. In their submission in support of the Construction Defence, the Defendants place great emphasis on the underlying purpose of the arrangements between the Claimants and the Defendants being a financing arrangement to enable Oryx to acquire the vessels and to provide security for the finance until it was fully repaid. It was never intended that the Claimants would have possession of the vessels unless they were forced to realise their security. They submit that, accordingly, their interpretation therefore makes good commercial sense; it means that the charterparties ensured that the Claimants would always be entitled to recover the finance that they provided and the agreed interest on it. The Claimants would have no need to realise the security if the Defendants paid the amount demanded by a notice under clause 46(i): the notice covered both the Outstanding Principal and the Indemnity Sum, and so effectively covered the Owners for any losses that they might suffer from the financing being structured as a sale and lease-back arrangement. Indeed, by clause 46(f) the partiers agreed that the payment of the Outstanding Principal and the Indemnity Sum was "a reasonable pre-estimate of the damages that will be suffered by the Owners arising from the termination of the chartering of the Vessel …". The consequence of the Claimants' interpretation, on the other hand, is that, if there is an Event of Default, however minor, the Defendants would lose the vessels and the investment that they had made in them, unless granted relief from forfeiture. This, it is said, does not make commercial sense, and the Defendants' interpretation avoids this improbable consequence.

137. I am not persuaded by that argument: first, even on the Defendants' interpretation, the charterers could face major consequences as a result of any Event of Default, however minor, in that (subject to relief from forfeiture) they could lose possession of the vessels unless they were able, and chose, immediately to provide the full finance for them. More importantly, while the purpose of the arrangements was to provide finance for the purchase of the vessels, the parties chose to give effect to that purpose by chartering arrangements, and the consequences of Claimants' interpretation are not commercially remarkable in the context of a chartering arrangement. The Court is not entitled to disregard the structure of the arrangements on which the parties agreed because it considers that the underlying purpose of the arrangements might have been structured differently.

138. Moreover, this case itself illustrates the practical problems that could arise if the Claimants could re-possess the vessels only after serving notices under clause 46(a)(i) requiring payment of an indemnity sum, which includes an indemnity for losses resulting from a failure to maintain the vessel. An owner might not be in a position to estimate the indemnity sum where, as here, a charterer has prevented access to the vessel or obstructed inspection of the vessel.

139. It might be that the parties agreed charterparty terms which are more advantageous to the Claimants than the Defendants, but I cannot accept that the Claimants' interpretation lacks commercial sense, or that it is so commercially unreasonable as to permit an interpretation that departs from the natural meaning of clauses 29 and 46, and indeed the charterparties read as a whole. I accept that Mr Bright's submission that, in some circumstances, the Claimants' might understandably prefer to take possession of the vessel in response to an Event of Default rather than to serve notice under clause 46(i)(a) and take the Outstanding Principal and the Indemnity Sum. By way of illustration, Mr Bright observed that, if an Event of Default involves arrest of a vessel or a breach of trading restrictions, the Claimants might need to take urgent steps to

preserve her (and so their security). He also pointed out that where, as here, the Event of Default involves breach of a sanction regime, the Claimants might be unable, or might quite reasonably not wish, to take payment from the Defendants.

The Penalty Defence

140. The Defendants pleaded that "to the extent that, under clauses 28 and/or 29 and/or 46 of the Charterparties, the Claimants would otherwise obtain an immediate and/or unrestricted right to possession in the event that the Charterparties were terminated, such clause(s) … are unenforceable penalty clauses because: (a) The exercise of such a right would deprive the Defendants of their right to purchase the Vessels for their respective Purchase Options and/or Purchase Obligation Prices…."; and so the Defendants would lose their contribution to the purchase price of the vessels and any capital appreciation in their value, and thereby suffer a detriment disproportionate to any legitimate interest that the Claimants might have in enforcing the Defendants' primary obligations.

141. Despite the terms of the pleading, it is immediately apparent, as Mr Dunning acknowledged, that the focus of the penalty defence is not clause 28, 29 or 46, but clause 48, and unless the qualifications to the "Purchase Option" and the "Purchase Obligation" in clause 48 are void and unenforceable penalties, the Defendants have no credible alternative argument that clauses 28, 29 and 46 are penal. The Defence was not formally amended to allege that clause 48 is penal, but the Defendants, at my request, submitted a note setting out their case about clause 48, and I received submissions from both parties about it. No point is taken by the Claimants about the terms of the pleading.

142. The Defendants' note makes clear that the allegation that clause 48 is penal is directed to the qualification of the charterers' "Purchase Option" with the words "Provided that (i) no Event of Default has occurred and is continuing, (ii) the Owners have not terminated the chartering of the vessel under Clause 45(q)"; the qualification of the owners' obligations with regards to the Purchase Obligation with the words "Provided … (ii) no Event of Default is continuing on the Completion Date, (iii) the Owners have not terminated the chartering of the Vessel under clause 46 …"; and the paragraph that gives the owners a discretion to decide whether or not the parties should fulfil their obligations under the Purchase Option if an Event of Default is continuing.

143. I should first introduce a preliminary point: the Claimants submit that the Defendants are not entitled or obliged to buy the vessels if, as is the case, there is a continuing event of default or if, as is also the case, the charterparties have been terminated under clause 46 for an event of default. It is not disputed (i) that there is a continuing event of default under clause 45(s) of the Charterparties in that there has been a change in the immediate and/or ultimate legal ownership of the Charterers, or (ii) that the Claimants have terminated the charterparties. The Defendants respond that, if relief from forfeiture is granted, the Owners are not to be regarded, for the purposes of clause 48, as having terminated the Charterparties. I come later to the Defendants' application for relief from forfeiture. The question whether material parts of clause 48 are penal is one of contractual construction, to be decided by reference to when the charterparties were concluded and without regard to later events.

144. Following the decision of the Supreme Court in Cavendish Square Holding BV v Makdessi, [2013] UKSC 76, an issue whether a term is penal, and so void and unenforceable, raises an initial question as to whether the term that is challenged is capable of being a penalty. It is clear from the judgments in the Cavendish Square case that this depends on whether the term is, in substance, a "secondary obligation" on a contracting party that applies when that party is in breach of a "primary obligation". If it is, then the second question is whether it is in fact penal, and this depends upon whether it imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the wronged party in enforcing the primary obligation.

145. The Claimants submit that clause 48 fails the initial test: that it does not impose a secondary obligation on the parties. I agree. As Lords Neuberger and Sumption explain in the Cavendish Square case at paragraph 13 and 14, the legal rules about penalties do not regulate the fairness of contractual rights and obligations, but regulate the remedies available for breach of obligations. Accordingly, the question whether the rules are engaged may depend on how a contractual provision is framed.

> "Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform an act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty" (at para 14).

146. I recognise both that the wording of a provision is not necessarily determinative of whether it is penal, and that there can sometimes be room for debate about whether a particular term satisfies the initial test. This is illustrated by the different views taken by Lords Neuberger, Sumption and Carnworth on the one hand and Lords Clarke, Hodge and Toulson on the other hand about whether clause 5.6 in the Cavendish Square case passed the test. But the reason for their differing views seems to me to be instructive. Lord Hodge (with whose reasoning on this point Lords Clarke and Toulson agreed) was concerned that clause 5.6 was one "designed to deter" the seller from breach (loc cit at para 280). I consider it more significant for present purposes that Lords Neuberger, Sumption and Carnworth concluded that clause 5.1, under which the seller in default was not entitled to receive the price to which otherwise he was entitled, was not capable of being a penalty, and Lord Hodge (again, with Lords Clarke and Toulson agreeing), while not deciding that question, recognised the strength of the argument for this view (loc cit at para 270).

147. Here, the terms of clause 48 are not framed in terms of the charterers being under any obligation that arises if they fail to comply with other terms of the charterparties. The provisions about the Purchase Option do not involve any obligation on the charterers at all: they give the charterers a right (or entitlement), albeit a qualified right in that it will not be available to the Defendants in some circumstances, including if there is an Event of Default or the Claimants have terminated the charterparties under clause 45(q). The provisions about the Purchase Obligation impose a primary obligation on the Claimants to deliver the vessel and on the Defendants to purchase her, albeit the Claimants are

released from their obligation in some circumstances, including if an Event of Default is continuing on Completion Date or if they have terminated the chartering of the vessel under clause 46. In those circumstances the Defendants too will be released from their obligation to purchase the vessels. I cannot accept that, either in form or in substance, clause 48 is to be taken to impose any secondary obligation on the charterer in the event of breach of a primary obligation.

148. Accordingly, in my judgment the question whether clause 48 imposes a detriment on the charterers out of all proportion to any legitimate interest of the owners in enforcing the charterers' primary obligations does not arise. I shall therefore only say that I consider that here the Defendants have a more powerful argument. Mr Dunning identified the essential reasons in his submissions, including these:

(i) The provisions of which the Defendants complain could be triggered by any one of the many and varied Events of Default, although some might cause no, or no significant, damage.

(ii) The detriment to the Defendants resulting from losing the Purchase Option would, in all likelihood, be substantial whenever it occurred, because they had contributed half of the purchase prices of the vessels, and because hire, which was designed to repay the Claimants' contribution, was payable monthly in advance.

(iii) With regard to the provisions concerning the Purchase Obligation, which could be exercised only after the charter period had expired, the detriment that the Claimants might suffer from a failure on the Defendants' part to comply with primary obligations would often largely or entirely be compensated by the payment by the Defendants of, inter alia, the Indemnity Sum.

149. In response, the Claimants submitted that the essential Events of Default related to Mr Mallah, the legal and beneficial owner of the Defendants at the relevant time, being designated a SDGT, and that the Claimants had a legitimate interest in ensuring that the Defendants were not controlled or managed by terrorists. That is so, but it is beside the point: the question whether a provision is penal is matter of construction and so is to be decided as at the time that it was agreed, when Mr Mallah was not so designated. The events which later occurred, including the nature of any Event of Default, are irrelevant.

150. However, since I consider that clause 48 is not subject to the penalty rules, I reject the penalty defence.

Relief from Forfeiture

151. The Defendants apply by counterclaim for relief from forfeiture (i) by way of an order reinstating the charterparties, or alternatively (ii) by way of an order that the Claimants reimburse to them payments of hire and initial payments for the purchase of the vessels, together with an account of the capital appreciation in the value of the vessels attributable to their contributions to the purchase prices. Although relief from forfeiture usually takes the form of restoration of a contract, sometimes on terms, the remedy is flexible enough to permit the sort of restitutionary relief that the Defendants seek in the alternative: see Stockloser v Johnson, [1954] QB 476, and On Demand Information plc v Michael Gerson (Finance) plc, [2002] UKHL 13 esp. per Lord Millett.

152. The grounds on which the Defendants rely in their pleading in support of their claim for relief from forfeiture can, I think, be summarised as follows:

(i) Before Mr Mallah's listing, the Defendants had performed the charterparties without complaint from the Claimants and without any issues arising between the parties.

(ii) The Events of Default stem from Mr Mallah being placed on the SDN list, which was "wrongful", and they involved no fault or culpability on the part of the Defendants; and Mr Mallah has applied for his name to be removed from the list.

(iii) Mr Mallah's listing does not prevent or make it unlawful for the Claimants to perform the charterparties since Mr Mallah is no longer a director or officer of the Defendants, and he does not own them. In any case, an application could be made to OFAC to permit the parties to perform the charterparties.

(iv) The Defendants will suffer irremediable prejudice if the charterparties are terminated and the vessels repossessed. Correspondingly, if the charterparties are terminated and the vessels repossessed, the Claimants will receive unwarranted windfalls.

153. Before I come to these arguments, I must decide two preliminary issues: (i) whether the Defendants' rights under the charterparties are of a kind that can be protected by relief from forfeiture; and (ii) whether the Defendants have, by their misconduct in, and in relation to, these proceedings precluded themselves from seeking relief from forfeiture.

154. The remedy of relief from forfeiture is available only in respect of contracts involving the transfer of proprietary or, in some circumstances, possessory rights. It is not available to provide relief with regard to purely contractual rights and obligations. The charterparties did not involve the transfer proprietary rights, but, being by demise, they did involve the transfer of possessory rights, and so the question is whether the possessory rights are such as might qualify for protection.

155. In On Demand Information plc v Michael Gerson (Finance) plc,[2002] UKHL 13, para 29, Lord Millett endorsed this statement of Robert Walker LJ in the Court of Appeal about when possessory rights in hired goods qualify: "contractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owner's general property in the chattels, cannot aptly be described as purely contractual rights". Lord Millett added, "For my own part, I regard this conclusion as in accordance with principle; any other would restrict the exercise of a beneficent jurisdiction without any rational justification". In The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd, [2019] UKSC 46 at para 51, Lord Briggs, with whom Lord Carnworth, Lady Black and Lord Kitchen agreed, suggested that in relation to chattels "a rule that the possessory right should be indefinite may go too far", but Mr Dunning did not so argue and I can deal with this first preliminary question by reference to Robert Walker LJ's test. This was how it was approached by Hamblen J in Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd., [2010] EWHC 185, who, after noting that cases in which relief had been

held to be available were cases in which the applicant for relief was treated as having an "indefinite" right to possession, said that it would be "a major extension of existing authority to apply the relief jurisdiction to cases transferring a bare right to possession".

156. In this case, the chartering arrangements were a mechanism whereby the Oaktree Group provided finance to the Defendants, and if the arrangements went to plan, the Defendants were to possess the vessels until they bought them from the Claimants. In More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship "Jotunheim", [2004] EWHC 671, Cooke J observed that "in a bareboat charter which is also a hire/purchase agreement, the owners provide the ship in anticipation that they will do nothing further after delivery. They receive the charterers' payments and, if all goes well, will transfer the vessel to the charterers on receipt of the final instalment" (at para 50). He decided that he therefore had jurisdiction to grant relief from forfeiture relief, although on the facts he decided not to grant it. I agree with Cooke J, and conclude that the Defendants' rights under the charterparties are of a kind that can be protected by relief from forfeiture.

157. Have the Defendants, by their conduct in, and in relation to, these proceedings precluded themselves from seeking relief from forfeiture? The jurisdiction is, of course, equitable and so discretionary, and the Claimants say that the Defendants have failed to obey Court orders and to comply with undertakings to the Court in these proceedings and are guilty of dishonest and otherwise reprehensible behaviour, and that the Court should not exercise its discretion in the Defendants' favour.

158. The criticisms of Defendants' response to Court orders and compliance with undertakings to the Court include these:

(i) The AIS and other tracking systems of the "Courage" and the "Amethyst" were switched off on 25 and 26 June 2021 respectively. By her orders of 20 August 2021, Cockerill J ordered that the Defendants "forthwith" cause the vessels' AIS system and other tracking and communication systems to be switched on to allow the Claimants to track their positions. The orders were emailed that same day to the Defendants. The Defendants did not restore the beacons until 23 August 2021.

(ii) With regard to the "Courage", on 20 August 2021, Cockerill J prohibited CSC and Oryx from entering or remaining within areas excluded by the charterparty, which included Syrian waters. The "Courage" entered Syrian waters on 23 September 2021. I reject the explanation that she drifted there without power, and conclude that she was moved there under her own power. CSC and Oryx also failed to comply with the orders or 20 August 2021 and 27 August 2021, that the vessel be taken to Gibraltar or another port to be agreed between the parties.

(iii) CSC and Oryx, in breach of the order of Foxton J of 29 September 2021, have not procured that the "Courage" be towed to Piraeus, Greece as soon as reasonably practicable. She remains in Lakatia. I cannot accept that the Defendants have attempted to move her to Piraeus, and I reject the explanation that she was not towed there because the Defendants failed in genuine efforts to find a tug or to obtain permission from the Syrian

authorities. Had there been proper efforts, they would have been evidenced by disclosable documents.

(iv) On 20 August 2021, Cockerill J ordered that AVC "forthwith upon the arrival of [OCM Kama's] duly authorised representatives and/or surveyors, allow such representatives and/or surveyors access to carry out a survey of the Vessel and ascertain the state of the Vessel's maintenance". When Mr Mangos and Captain Kolosioulis arrived at the vessel on 28 August 2021, they were obstructed by the Master of the "Rival", who, I infer, was acting on the Defendants' instructions, and were ordered to leave by Mr Mallah, who again was acting for the Defendants Mr Dunning described the effect of this as "trivial" because Mr Mangos and Captain Kolosioulis conducted an inspection between 29 and 31 August 2021, but that does not excuse breach of the Court's order.

(v) AVC and Oryx did not discontinue the proceedings for precautionary seizure of the "Amethyst" in the Courts of Sharjah in breach of their undertaking to Foxton J. On the contrary, on 6 October 2021 they served the Claimants with a court document dated 30 September 2021 by way of an appeal against the refusal of their application by the Court of First Instance.

159. Except with regard to the delay in switching on the AISs, where Mr Chiotelis offered the rather limp excuse of his holiday, the Defendants have not provided any credible explanation for the breaches, or offered any apology for them.

160. Further, the Defendants, as I conclude, provided misleading and untruthful information to the Court in the course of the interlocutory proceedings:

(i) In his witness statement of 24 August 2021, Mr Chiotelis said that the "Amethyst" was under orders to load cargo at Ruwais or Sohar. I cannot accept that statement in view of Captain Subaan, as he told Mr Mangos, knowing nothing of such orders. I also observe that the evidence of Mr Chiotelis was misleading in that he said that the sub-charterparty of the "Amethyst" gave the option of a five months extension, without referring to Addendum No 2, but that that might have been an unintended error, and I attach no weight to it.

(ii) The complaint about the evidence that the "Amethyst" was under orders is aggravated because on 24 September 2021, in response to the Claimants'' criticisms of it, Andrew Baker J gave the opportunity for corrective witness statements to be served. The evidence was not corrected, nor were the criticisms answered.

(iii) Andrew Baker J was told on 24 September 2021 that the "Courage" had drifted into Syrian waters due to weather conditions, and this account was repeated in the affidavit of Mr Chiotelis of 27 September 2021, on the basis

of information, he said, that he was given by Captain Khalil. I reject that account as untruthful.

161. Moreover, the Defendants have presented their case for relief from forfeiture on the basis that Mr Mallah no longer has any proprietary interest in them or association with them. I have rejected the Defendants' contention and have concluded that the beneficial interest in the Defendants was not transferred to the four buyers. The Defendants cannot have advanced their case about the beneficial ownership as a result of some misunderstanding: it was a deliberate attempt to mislead the Court. Mr Dunning submitted in the Defendants' closing argument that this conclusion should not debar the Defendants from relief from forfeiture because "the application for relief from forfeiture is not put forward, necessarily, on the basis of a change of ownership", and the Defendants pursued their application for relief even if there was no change. I am not impressed by that argument: the case that Mr Mallah had disposed of his interests was deployed in support of the application, even if it was not necessarily crucial to it.

162. In support of their contention that the Defendants' application should not be entertained in view of their conduct in response to Mr Mallah being included on the SDN list, the Claimants make other justified criticism of the Defendants, including that:

i) the decision to switch off the AIS and other tracking equipment was a breach not only of the charterparties but also of SOLAS;

ii) Mr Chiotelis' statement in his email of 14 July 2021 that Mr Mallah's relationship with the Defendants ended in January 2021 was deliberately untrue;

iii) in the same email, Mr Chiotelis said that both vessels were "under [time charter] with cargo on board", whereas there was no cargo on the "Amethyst"; and

iv) the Defendants did not inform them about the termination of the insurance covers.

163. In answer to this argument, Mr Dunning did not respond to the individual complaints about the Defendants' conduct, but relied upon the principle that a party is not precluded from equitable relief unless the misconduct or impropriety has a sufficient connection with the equitable relief sought: see The Royal Bank of Scotland Plc v Highland Financial Partners LP, [2013] EWCA Civ 328. This principle can be traced back to the words of Lord Chief Baron Eyre in Dering v Winchelsea, (1787) 1 Cos 318, 319, who referred to "an immediate and necessary relation to the equity sued for".

164. I accept that, unless misconduct or impropriety on the part of the applicant for relief from forfeiture is closely connected with the application, while it is relevant to the decision whether to grant relief, it is to be assessed together with other considerations: thus, in Freifeld v West Kensington Court Ltd., [201] EWCA 806, a case about an application for relief from forfeiture of a lease, Arden LJ said "The windfall point is about proportionality. The appellants' egregious conduct is not relevant to the question of the windfall, which is a self-standing consideration to be considered on its own merits and *then* weighed against the appellants' egregious conduct. Once it is appreciated that the value of the leasehold interest is an advantage which the respondent will obtain from forfeiture, it has to be thrown into the balance with other considerations".

165. Therefore, with regard to the preliminary point about whether the Defendants' misconduct has precluded them from seeking relief, I have focused on Claimants' complaints about the Defendants' conduct in this litigation, and I am satisfied that these criticisms do debar the Defendants from equitable relief. Their connection with the relief from forfeiture sought by the Defendants is, to my mind, certainly sufficiently close: to give just two striking illustrations, (i) the dishonest account about Mr Mallah having severed links with the Defendants is at the heart of their arguments for relief; and (ii) as I shall explain, the Defendants support their arguments about the "windfall" that, it is said, the Claimants will enjoy with evidence about the value of the vessels, but their conduct with regard to the "Courage", in breach of Court orders, has prevented the Claimants from inspecting the "Courage" to obtain their own evidence about her condition and hence her value.

166. I therefore conclude that the Court should not entertain the Defendants' application for relief from forfeiture, but I shall comment on it relatively briefly. Before coming to what I have identified as the four essential grounds on which it is based, I make this observation: relief from forfeiture is a remedy available only in "appropriate and limited cases to relieve from forfeiture where the primary object of the bargain is to secure a stated result which can be attained when the matter come before the court": per Lord Wilberforce in Shiloh Spinners v Harding, [1973] AC 691, 723G/H. As Lord Wilberforce went on to explain, the question whether a case is "appropriate" involves consideration not only of any disparity of the value of property under threat of forfeiture and damage resulting from the breach, but also of whether the breach was deliberate and "the gravity of the breaches". When deciding whether a particular case is within the appropriate and limited category where relief will be granted, Courts have been wary about interfering in commercial bargains reached at arms' length to relieve parties of what they have agreed, recognising the need for certainty in business: again, I agree with Cooke J's judgment in the "Jotunheim" case (cit sup esp. at paras 55 and 67).

167. I come to the pleaded grounds on which the Defendants make their application for relief from forfeiture. I accept that there is no evidence or reason to think that, before Mr Mallah's listing, there were difficulties in the performance of the charterparties. On the contrary, WhatsApp exchanges between Mr Mallah and the broker indicate that all was going well (for example, on 20 April 2020, "Your track record is impeccable!!!! This is fantastic"; on 24 November 2020, "You just rock!!! Impeccable track record").

168. Next, the Defendants plead that Mr Mallah's name was wrongfully included on the SDN list and that the events of default that led to the termination of the charterparties resulted therefrom and involved no fault or culpability of the Defendants. As I have said, I cannot say whether or not Mr Mallah is a terrorist and whether his name was rightly or wrongly included on the SDN list, but I do not accept that the Events of Default involved no fault on the Defendants' part. In particular, the third termination notice of 26 August 2021, was based on (i) the change of ownership on 23 June 2021 without the Claimants' consent, and (ii) the failure to maintain insurance. The change of legal ownership was made without the Claimants' consent being sought: the Defendants could have sought it, they did not do so, and they have not said why.

169. As for the insurance, the Defendants have not disclosed documents or otherwise explained the circumstances in which cover was cancelled, but even if insurance was initially cancelled without fault on the Defendants' part, they aggravated their breach by not informing the Claimants that the vessels were uninsured. They are still reticent

about the circumstances in which replacement cover was placed and what disclosure was made to the new insurers. Moreover, the replacement cover does not comply with the requirements of the charterparties: for example:

i) The replacement P&I covers have a limit of US$500,000,000, and do not provide the required US$1 billion in respect of oil pollution liability;

ii) The replacement P&I covers were not placed with a member of the International Group of P&I Clubs;

iii) The replacement H&M covers were not placed with "western insurance companies and/or underwriters"; and

iv) The covers were not on "approved terms".

170. I observe in passing that Mr Dunning asserted that, if there is a continuing Event of Default in relation to the insurance, it "could be cured by the Defendants". He did not engage with Mr Bright's submission that the Defendants had every incentive to obtain replacement cover that complies with the requirements of the charterparties, and their failure to do so invites the inference that, as a result of Mr Mallah's designation, they could not do so. However, if Mr Dunning be right and the Defendants could have obtained compliant replacement cover but chose not to do so, that in itself detracts from the Defendants' contention that the Events of Default involve no fault on their part.

171. As for the Defendants' pleaded reliance on Mr Mallah having applied for his name to be removed from the SDN list, the Defendants have put no information before the Court about the grounds of any application.

172. I consider next the Defendants' submission that it would be unconscionable for the Claimants to enforce their rights to terminate the charterparties and take possession of the vessels in view of the loss that they, the Defendants, will suffer if they are refused relief, and the "unwarranted windfall" that the Claimants would receive. The Defendants would lose (i) their initial investments of $4,171,764 in the case of CSC and $5,300,000 in the case of AVC, and (ii) the sums that have been paid as hire under the charterparties, being $3,938,186 paid by CSC and $1,668,333 paid by AVC.

173. As for the Claimants' gain, according to Mr Hugger, the value of the vessels had increased by the time when the charters were terminated. He estimated, on the basis of valuations of "VesselValue.com, which monitors that value of second-hand vessels, that the "Courage" would then have realised a sale price of some $11.55 million and the "Amethyst" some $16.74 million. Valuation certificates of C W Kellock dated 30 November 2021 put the value of the "Courage" at $15 million and of the "Amethyst" at $21.75 million. Whether VesselValue's or C W Kellock's values be preferred, they far exceed the sums still to be paid under the charterparties at the date of termination, $885,416 under the "Courage" charterparty and $4,416,667 under the "Amethyst" charterparty. Thus, the Defendants submit, the amount of the Claimants' "windfall" is some $10,664,584 to $14,114,584 in the case of the "Courage" and some $12,323,333 to $17,333,333 in the case of the "Amethyst".

174. These are striking amounts. However, as Mr Bright submitted, they do not take into account the inevitable legal and other costs incurred by entities such as the Oaktree

Group when re-possessing and selling vessels. Further, they are based on desktop valuations, which take no account of the conditions and particular circumstances of the vessels. Inevitably, therefore, they overstate the values, and the Defendants' submissions overstate the Claimants' windfall.

175. In response, Mr Dunning submitted that the Indemnity Sums, to which the Claimants would be entitled from the Defendants, compensate them for loss resulting from any failure to maintain the vessels and other losses resulting from any Event of Default. However, that does not meet the point: the fact remains that the condition and circumstances of the vessels clearly will influence what potential purchasers will pay, and so how much the Claimants can recover from their security.

176. Mr Bright submitted that the Defendants therefore overstate the value of the "Courage" in particular, and hence any windfall that OCM Nile would enjoy, for these reasons:

(i) She has not been maintained, and, by the Defendants' account, she has problems with her main engine. Because she is at Latakia, she has not been inspected and the extent of the problems is unknown. The Defendants have not disclosed relevant documents.

(ii) Her insurance is unsatisfactory. Again, the Defendants' lack of disclosure obscures the position, but it does not comply with the requirements of the charterparties.

(iii) The only evidence of her hull and machinery cover is a Cover Note dated 17 September 2021 for the period from 16 September 2021 to 15 September 2022, and therefore it does not cover the period when the engine apparently suffered damage. In any case, the cover is of very doubtful value for other reasons, including trading limitations that exclude Syria, a "sanctions Limitation and Exclusion Clause", and the fact that cover commenced only when payment of the premium was received and there is no evidence of payment.

(iv) Further, the vessel is involved in Syrian Court proceedings and apparently under arrest there, but again the Defendants have provided little information about the proceedings.

177. I conclude that the Defendants have not shown that OCM Nile will receive a substantial windfall from taking possession of the "Courage" and selling her.

178. Subject to one, potentially major, qualification, the Defendants have a stronger argument with regard to the "Amethyst", but here too account should be taken of the limited information available to the Court about her condition and her insurances. Mr Mangos gave unchallenged evidence that the vessel was in a dangerous condition when he inspected her in late August 2021: for example, certificates had expired, life boats could not be deployed, the emergency generator was out of order and the vessel relied on a single Electronic Chart Display and Information System. There was no evidence about how want of maintenance and insurance would affect her sale value, and I do not have information to make any estimate of my own. I can only infer that it would reduce

the amount of the windfall for which the Defendants contended, but there would probably still a significant windfall after taking account of these matters.

179. However, there is another area of uncertainty. When Mr Bright made his closing submissions, it was understood that the "Amethyst" was detained by an order of precautionary attachment issued by the Sharjah Federal Court in respect of a claim by a Mr Ali Mohammed Ali against Mr Mallah for US$ 12.9 million, and this, Mr Bright submitted, was likely to reduce her value, and cast doubt on the Defendants' contention that OCM Kama would receive an unwarranted windfall. After the hearing before me, it was learned that the order has been reversed, and I was so informed. Then, as I was completing my judgment, I was told by Reed Smith of two subsequent developments: (i) that Mr Ali has successfully appealed against the order setting aside the attachment over the vessel, that the attachment has been reinstated and that the "Amethyst" vessel was prohibited from leaving the UAE; and (ii) Mr Ali has applied to join OCM Kama and OMF III as parties to his action against Mr Mallah for the delivery up of the "Amethyst", and that a hearing of the application to join them as parties has been set for 4 April 2022. I have also been informed that, on or about 23 February 2022, the vessel moved from Sharjah. The circumstances in which she did so are not clear from the information available to me.

180. If my decision on the application for relief from forfeiture had depended upon the potential windfall for OCM Kama, I would have invited further submissions about the value of the "Amethyst" in light of these developments. However, since I refuse the application for relief in any event, I say no more about whether this is likely to mean that OCM Kama will enjoy a significant windfall.

181. I come to the Defendants' contention that the US sanctions regime does not prevent the charterparties being performed lawfully. In support of this, the Defendants relied on their case that Mr Mallah had severed his connections with the Claimants, but I have rejected that and, importantly as far as concerns the risk of the Claimants being penalised for breaching the regime, OFAC might reach a similar conclusion. Mr Dunning argued that, nevertheless and even assuming that the Defendants are still subject to the 50% rule, the charterparties could lawfully be performed. The Claimants dispute this: they plead that, if relief from forfeiture were granted, they "would be left in a contractual relationship with entities whose property/interests in property they would be obliged … to treat as blocked. [They] would be unable to accept any payments from the Charterers and to transfer the Vessels to them at the end of the Charterparties (save with a licence from OFAC, which there would be no reasonable prospect of obtaining)".

182. Three questions arise:

(i) Assuming no licence is granted by OFAC permitting the parties to perform the charterparties, could they lawfully be performed, or alternatively, could the Claimants lawfully make restitutionary payments to the Defendants?

(ii) If so and again assuming no licence is granted by OFAC, would the Claimants and the OCM Group and its employees be exposed to risk under the sanctions regime?

(iii) What are the prospects of OFAC granting a licence permitting performance of the charterparties or payments to the Defendants?

183. I take the first two questions together. The US sanctions regime binds "US persons". Further, money and other property of a person on the SDN list, or of an entity so treated because of the 50% rule, is "blocked" if it comes within the possession or control of a US person or within US territorial jurisdiction. The Claimants are not US persons, and they are owned by Cayman Island companies. The Defendants are not US persons, nor are their shareholders. Payment of hire under the charterparties was to be made in US dollars, and if hire were paid through the US banking system, or US banks or other financial institutions were involved in the transfer of funds, it might well be "blocked", but, as Mr Smith accepted, US dollar payments do not necessarily involve the US banking system. Under the charterparties, hire is to be paid to the Claimants' accounts with Berenberg in Germany. Accordingly, the Defendants contend that they could make payments and otherwise perform the charterparties without contravening the sanctions regime.

184. The Defendants also say that the Claimants could lawfully transfer the vessels to them or make restitutionary payments. The immediate parties to the transfer or payments would not be US persons, and the vessels are not blocked property. In so far as the Claimants would have to act through natural persons, the Defendants contend that they would not have to act through US persons. Mr Baker, it is said, is not a US person, and he handled the Claimants' response to Mr Mallah's designation from 15 June 2021: he could act for the Claimants in effecting transfer of the vessels or arranging payments to the Defendants. Moreover, it is said, if the Claimants were ordered by the Court to transfer the vessels or make payments, then it is far-fetched to suppose that US persons in the Oaktree Group would be penalised by the US authorities for directing or assisting the Claimants in obeying the order of an English court.

185. I cannot accept that argument. I shall assume (without deciding) (i) that Berenberg does not have any presence in the United States that brings it within the definition of "US person" in paragraph 594.204 of the GTSR, and (ii) that the sums in question could be transferred without involving the US banking system or any US bank or other financial institution, although it must be said that normally substantial international payments in dollars are made through New York. Nevertheless, I cannot reconcile the Defendants' argument with the agreed evidence of Mr Smith and Mr Harter about the risks that the Claimants would face under the sanction regime. The terms of the licence of 20 July 2021, and Mr Smith's evidence when cross-examined about them, are in point: while the Claimants themselves are not subject to the sanctions regime, those whom the licence referred to as their "principals" are US persons, and the Claimants could only act if US persons were "assisting in [their] operations". It is no answer that Mr Baker has acted for them, on Mr Lau's instructions, in other matters, nor that he could be given authority actually to execute any transfers of money or the vessels: that would not mean that no US person controls the Claimants and would have to assist in or facilitate their operations, and those persons would be at risk of penalties under the OFAC regime. Nor does the Defendants' submission deal with the risk, about which Mr Smith and Mr Harter are agreed, that the Claimants might be themselves designated if they assisted or supported a designated person such as Mr Mallah.

186. For completeness, I mention that the Claimants also refer to clause 36 of the charterparty of the "Amethyst", and plead that AVC is estopped from disputing that

OCM Kama is a US person for the purposes of the sanctions regime. In view of my other conclusions and since I heard little by way of submissions about it, I need not engage with that argument and I say no more about it.

187. This leads to the question about the prospects of the Claimants or the Oaktree Group obtaining a licence (or licences) from OFAC if the Defendants were granted relief from forfeiture. I have concluded that Mr Mallah still beneficially owns the Defendants, and so it would confer commercial benefit on designated persons if the charterparties were restored and the Defendants were given possession of the vessels, or if they received payments by way of restitution. Mr Smith and Mr Harter agreed that "OFAC has not historically granted specific licences granting commercial benefits to persons the US government has identified as terrorists". As I have said, I accept Mr Smith's evidence that OFAC only grants licences when it considers that to do so promotes US foreign policy or national security interests, and it is not enough that a licence would not harm these interests.

188. Mr Orren said in cross-examination, that, if the Court made an order that required the Oaktree Group to do something for which a licence was required, then, subject to legal advice, it would seek to comply with the order. The Defendants suggested, if I understood their argument, that, if this Court made an order, its standing is such that the US authorities would respect it, and so it is the less likely that the Claimants, the Oaktree Group and persons associated with them would be penalised for complying with it, and the more likely any necessary licence would be granted. I am not persuaded by that argument: OFAC's remit is different from that of this Court, and it has and will have different information available to it: for example, as I have said, it would be free to examine whether the Transfer Agreement is "authentic" and whether, and if so why, signatures to it are traced. I would expect any US authority to give proper weight to any order of an English Court, but that does not require OFAC to agree with it without regard to other considerations.

189. I therefore conclude that there is little prospect that the Claimants would be granted licences to permit them to give effect to an order for relief from forfeiture, and that, if I were to grant relief from forfeiture, any order would put the Claimants and US persons associated with them at risk of penalties under the sanctions regime if they complied with it. This is a powerful reason to refuse the Defendants' application for relief. Having so concluded, I need refer only briefly to other arguments advanced on behalf of the Claimants, but, in my judgment each has considerable force:

    (i) If the Claimants and the Oaktree Group were to continue doing business with Mr Mallah or entities associated with him while he is on the SDT list, it is likely to damage their reputation with their investors, banks and others with whom they do business.

    (ii) The Claimants should not in any case be ordered to continue to do business with Mr Mallah or entities with which he is associated while he is a designated terrorist. This is a particularly strong point for OCM Kama in view of clause 36(s) of the charterparty, but it also applies in more general terms to the "Courage" charterparty.

190. I consider that these reasons are, in themselves, sufficient to show that it would not be appropriate to grant relief from forfeiture, but this conclusion is reinforced by the

conduct of the Defendants both in their dishonest dealings with the Claimants before this litigation was brought and their conduct in the course of the litigation.

191. I refuse relief from forfeiture. I conclude that the Defendants' conduct disentitles them to invoke the equitable jurisdiction, but in any event, I do not consider this an appropriate case to grant the application.

Conclusions

192. Therefore, as between the Claimants and the First and Second Defendants, I reject the Construction Defence and the Penalty Defence, and I refuse relief from forfeiture. I invite submissions about the order that I should make to give effect to these conclusions, about the position of Oryx, and about other consequential matters.