



Neutral Citation Number: [2011] EWHC 181 (Comm)

Case No: 2009 FOLIO 1700

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 February 2011

Before :

MR JUSTICE BURTON

Between :

MELINDA HOLDINGS SA

Claimant

- and -

**HELLENIC MUTUAL WAR RISKS ASSOCIATION
(BERMUDA) LTD**

Defendant

Mr Christopher Butcher QC and Mr Adam Turner (instructed by **Waterson Hicks**) for the **Claimant**
Mr Stephen Moriarty QC and Mr James Cutress (instructed by **Ince & Co**) for the **Defendant**

Hearing dates: 11, 12, 13, 17, 18, 19 January and 11 February 2011

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Approved Judgment**Mr Justice Burton :**

1. This has been the hearing of a claim by a Liberian company, Melinda Holdings SA (“Melinda”), as Claimant, to enforce its War Risks insurance by the Defendant, Hellenic Mutual War Risks Association (Bermuda) Ltd (“Hellenic”), in respect of its vessel the SILVA, which was arrested by the Port Suez Court in Egypt on 24 December 2008, where it still remains, now more than 2 years later. It is accepted that, by virtue of Rule 3.13.2 of Hellenic’s policy (Rules 2008 and Bye-laws), the vessel is a constructive total loss, and (by virtue of Rule 2A.5.1.4) if Melinda is otherwise entitled to recover under the policy, there is no dispute that freight and disbursements are also recoverable in those circumstances, such that the quantum, of US\$ 16m for hull and machinery and US\$ 3,200,000 for freight and disbursements, is agreed.
2. Two Rules within the Hellenic policy have been in issue before me, it being accepted that prima facie there is an insured cause of loss pursuant to Rule 2A.2.2 (“*capture, seizure, arrest, restraint or detention, and the consequences thereof*”), namely the Exclusions provided by Rule 3.6 (subrules 1, 3 and 4) and 3.15, which read as follows:

“3.6 Exclusion of claims arising out of ordinary judicial process etc.

An Owner of an Entered Ship is not insured for any loss, damage, cost or expense arising out of:

3.6.1 ordinary judicial process; or ...

3.6.3 action taken for the purpose of enforcing or securing payment of a claim; or

3.6.4 any financial cause of any nature.

...

3.15 Obligation to Sue and Labour

In the event of any occurrence which may give rise to a claim by an Owner upon the Association, it shall be the duty of the Owner and his agents to take and to continue to take all such steps as may be reasonable for the purpose of averting or minimising any loss, damage, liability, cost or expense in respect whereof he may be insured by the Association. In the event that an Owner commits any breach of this obligation, the Directors may reject any claim by the Owner against the Association arising out of the occurrence or reduce the sum payable by the Association in respect thereof by such amount as they may determine.”

3. The parties were ably represented by Counsel, whose concise and persuasive submissions and the nature of whose incisive cross-examination will become clear from my judgment below, namely Christopher Butcher QC and Adam Turner for the Claimant and Stephen Moriarty QC and James Cutress for the Defendant. One further purported Exclusion, provided for by Rule 3.8.1, was pleaded and heralded as to be relied upon by Mr Moriarty, notwithstanding scepticism as to its efficacy and applicability forcefully expressed by Mr Butcher in his opening, but such reliance was abjured by Mr Moriarty prior to closing submissions. The issues thus fell within the ambit of the two Rules, and I have set them out below, the first of which can be loosely described as “*ordinary judicial process*”, and the second as “*sue and labour clause*”.
4. I shall set out my findings of fact first in this judgment, and then deal first with the *ordinary judicial process* issue before coming to the *sue and labour clause* issue. With regard to the latter, a number of sub-issues arise, to which I shall turn later in the judgment. With regard to

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the former, there was, in the event, a great deal of common ground, the most important of which I shall mention now:

- i) After some jockeying in the helpful written opening submissions, and after some useful analysis of the history of the clause (including its derivation, analysed by Mr Butcher, from the 19th century Lloyds SG form policy, providing coverage for “*arrest, restraints and detentions of all kings, princes and people*”, and the principles set out in Schedule 1 to the Marine Insurance Act 1906, particularly at Rule 10) the question as to where the onus lies fell into place. It was agreed that, Rule 3.6 (like 3.15) being an exclusion, the legal onus lies upon Hellenic to bring itself within such exclusion. However, it is accepted that that is not the end of it, given the need to consider, central in this case, what *ordinary judicial process* amounts to, and/or whether the facts of a given case can satisfy that definition. Lord Denning MR in **The Anita** [1971] 1 WLR 882 spoke at 887E-F of what he called the shifting of the *legal* burden of proof, which arose on the facts of that case. Whatever may have been the fashionable jurisprudential approach at that time (and Lord Denning was himself a writer of learned articles as well as a very eminent judge), it seems to me that the modern approach, one not in the event dissented from by the parties, would be to regard the position rather as being one in which the *evidential* burden shifts. That has been my approach in this case.
- ii) Although there has been some analysis of the precise meaning and role of the subrules 3.6.3 and 3.6.4, it was in the event conceded in closing by Mr Moriarty (and rightly so) that, on the facts of this case, if he failed to establish the exclusion in 3.6.1, then the other two subrules would not avail him.

The 1996 Judgment

5. The arrest of the SILVA by the Port Suez Court on 24 December 2008 was an executory (i.e. not conservatory) arrest, said to be justified by reference to a 1996 judgment in the Port Said Court of First Instance (“the Port Said Court”). This arose out of an incident in September 1989, when another vessel, the SAFIR, grounded on coral reefs off Tiran Island off the coast of Egypt. It apparently spilled its cargo of phosphate into the sea in that area, causing substantial environmental damage. The SAFIR was in the registered ownership of a company called Fonderance Overseas Inc (“Fonderance”), apparently a Norwegian company, and managed by Seama International Shipping Ltd (“Seama”), a UK registered company, which has in some documents been described as the ‘beneficial owner’ of the SAFIR. Its Companies House Annual Returns identify the name of a British director and a Pakistani director, and that latter director and another Pakistani as shareholders, all three living at London addresses.
6. Proceedings were brought in the Port Said Court by various government entities, which can, it is common ground, best be identified by reference to the Egyptian Environmental Affairs Agency (“EEAA”), against five defendants, the Cairo Shipping Agency (1), the named Master of the SAFIR (2), Seama (3), Fonderance (4) and the Crew, Cargo and Compensation for Pollution Insurers of the SAFIR (5). The five defendants were held liable in those proceedings (although there was subsequently (immaterial for our purposes) a limited but successful appeal by the Cairo Shipping Agency) and on 22 December 1996 they were found jointly liable to EEAA for the sum of 300 million Egyptian pounds (LE 300m). This is the approximate equivalent of US\$ 51,650,000. No part of that sum, it appears, was ever paid by any of the defendants. For our purposes, the only relevant defendants (and thus judgment debtors) in the 1996 Port Said proceedings were Fonderance and Seama.
7. Fonderance and Seama, as unsuccessful defendants, were also made liable for two forms of ‘court dues’. Unsuccessful defendants in Egyptian court proceedings are made liable in addition to any judgment debt for a sum of up to 7.5% (in this case 5%) of the judgment debt for transmission to the Egyptian National Treasury (“proportional court dues”) and, additionally, a further one half of the amount of the proportional court dues (hence 2.5% of the judgment debt in this case) to the “*Health and Social Services fund of the members of the Judicial Authorities*”, called the “Judges’ Fund” or the “Judicial Services Fund” (“the Judges’

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Fund"). Sums paid into the Judges' Fund are used to pay for the health and welfare of judges and other "*present and former members of the judicial corps*", state lawyers, and their families. The benefits paid to judicial officials and their families out of the Fund are not fixed, but vary according to the amount of money available in the Fund.

8. Both the Egyptian law experts instructed by the parties (to whom I shall refer further below) agreed that the collection of such funds for the benefit of the judges, judicial officials and their families is inconsistent with the Egyptian constitution: that opinion is held by two such distinguished Egyptian lawyers notwithstanding two decisions by the Egyptian High Constitutional Court that the Judges' Fund is compatible with the Egyptian constitution, and it continues to be collected by the Egyptian courts.
9. On 30 December 1996, court dues were imposed on the unsuccessful defendants in the SAFIR proceedings (for our purposes Fonderance and Seama) as debts owing to the Port Said Court, being 5% proportional court dues in the sum of LE 14,999,937.50 (approximately US\$ 2,587,500) and Judges' Fund dues of 2.5% of the judgment debt, i.e. LE 7,499,968.75 (approximately US\$ 1,293,750). No part of these dues has, it appears, ever been paid by any of the defendants in the SAFIR proceedings.

The Arrest

10. The arrest of the SILVA on 24 December 2008 by the Port Suez Court (at the instance of the Port Said Court) was a purported executory arrest in respect of the judgment debt owed by Fonderance and Seama, not that to the EEAA (LE 300m) but that owed to the Port Said Court in respect of the proportional court and Judges' Fund dues (a total of approximately LE 22.5m). As will appear, I am entirely satisfied, having considered the evidence, that there was no connection whatever between the SAFIR, Fonderance, Seama (and their beneficial owners if relevant) and the SILVA or Melinda or the beneficial owners of Melinda (the Gialozoglou family), such as to justify an arrest of the SILVA, whether in respect of the unpaid judgment debt owed by Seama and Fonderance to EEAA (which, as I have said, did not in any event form the basis of the arrest) or the unpaid proportional court and Judges' Fund dues owed to the Port Said Court.
11. The ex parte arrest led automatically to 'sale proceedings' (Case 1 of 2009) in the Port Said Court. The arrest was challenged by Melinda by the issue of a writ of summons on 14 January 2009 (Case 11 of 2009) by way of what are called *nullification or revendication proceedings* ("*nullification proceedings*"). This is provided by Egyptian law to have the effect of suspension of the sale proceedings, although it seems to have required an order adjourning the sale proceedings on 18 January 2009 by Judge Hegazi, a judge in the Court of Execution of the Port Suez Court, on 18 January 2009, to achieve that effect. After a number of adjourned hearings of the *nullification proceedings*, Judge Hegazi dismissed them on 26 April 2009 (reasons being given subsequently on 4 May), thus upholding the arrest. Melinda put in an appeal (Appeal 39 of 2009) on 3 June 2009, which, again after a number of adjournments, has not yet been heard. The vessel has remained since December 2008, and is to date, detained in Port Suez, with the Master not permitted to leave the vessel. The proportional court and Judges' Fund dues owed by Fonderance and Seama to the Port Said Court still remain unpaid, and Melinda's vessel detained in respect of them.

The Issues

12. The issues are as follows:
 - i) Issue 1. Does the *ordinary judicial process* exclusion arise? Is what has occurred *ordinary judicial process*? Melinda's case is that what has occurred is quite extraordinary and unjudicial, and is concluded by the Claimant's Egyptian law expert to be improper. The Defendant's expert agrees that, if events have occurred as claimed by Melinda, then the process has been, as he accepted, shameful and improper.

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- ii) Issue II. Was there a breach of the sue and labour clause? A number of sub-issues are raised, to which I shall return:
- a) Whether any breach must be the *proximate cause* of the loss.
 - b) Whether there can be breach by Melinda's Egyptian lawyers as its agents.
 - c) If so, whether the test in **The Talisman** [1989] 1 Lloyd's Law Rep 535 (HL) applies or is satisfied.
 - d) Whether any (and if so what) steps would have made any difference.
 - e) What if any is the effect of the second sentence of Rule 3.15 by reference to an apparent discretion of the directors to reject a claim in the event of such breach.

The Evidence

13. Factual evidence was called only by Melinda, and Hellenic simply put Melinda to proof. Mr Y, an Egyptian lawyer, was called as an expert witness on behalf of Melinda. Mr Z, another Egyptian lawyer, was called to give expert evidence on behalf of the Defendant. I shall address these two Egyptian lawyers further when I come to deal, as I shall, with the expert evidence.
14. I entirely accept the evidence of Mr Nicolaos Grigoriou of Melinda's Managing Agents (Delfi SA). He was indeed, as Mr Butcher described him, "*impassioned*" at what he felt was the treatment that Melinda had received, first at the hands of the Egyptian authorities, and subsequently, as he saw it, at the hands of Hellenic. I am satisfied, as I have stated in paragraph 10 above, that the Owners, legal and beneficial, of the SILVA have no connection whatever with the judgment debtors in the SAFIR proceedings, and that the evidence, both before the Egyptian court and now before me, gives no support whatever for any suggestion to the contrary.
15. The factual evidence given to me was helpful, persuasive and convincing. As will be seen, where factual evidence was given as to what had been seen to occur in Egypt, I accept it. Where Melinda depends upon inferences from the events that had been seen to occur, then, although I accept the accuracy of the evidence, I shall not accept every inference which it was sought to draw.
16. As to the expert evidence, I have already referred to Mr Y. He is plainly very experienced indeed, both as a senior and influential lawyer in Egypt, and in regularly advising a number of major shipping companies and P&I Clubs in Egypt and internationally. He has also provided expert witness evidence on several occasions. Mr Z, Hellenic's expert, is also a senior and extremely experienced Egyptian lawyer, and has been admitted to the Supreme Court of Egypt for many years. He has advised and represented a large number of P & I associations internationally and advised and litigated on behalf of many substantial companies and associations before the Egyptian courts and, although he has not spoken of having been a court expert before, he has acted regularly on behalf of many leading law firms.
17. There is no material dispute between the experts in respect of issue I, if the facts alleged are proved. Mr Y says that he has never seen anything like what has occurred here in his many years as a lawyer in Egypt. Mr Z accepts that, if the facts are proved, then "*a number of errors and/or improprieties have taken place in the Egyptian proceedings*", and, as I have set out in paragraph 12(i) above, in a number of respects, with which I shall deal, both relating to Mr Mosaad and otherwise, he accepts that the facts, if proved, would establish that the process was improper and quite extraordinary. Although he suggests that a (successful) appeal would or should be available, that would plainly depend upon precisely what the appeal court would be prepared to find or order; and of course (despite what I have already described as the patent absence of any evidence of connection between Melinda and the judgment debt owed

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to the Port Said Court) the Egyptian proceedings still remain unresolved by appeal or otherwise: and Mr Z is in the difficulty of any expert witness who has played no part in the underlying events, of not being in a position to know what this court will find as to what occurred. Most of his time in evidence before me was accordingly spent, not in seeking to defend what may (or may not) have occurred, but rather in giving his opinion as to issue II.

18. It is in relation to issue II that the difference between the two experts comes, as Mr Z might have said (it is an expression he used more than once) under the *spotlight*. Mr Moriarty did a careful job in closing of cataloguing some alleged inconsistencies by Mr Y in his evidence, but I am unpersuaded that there were any material differences in his answers or as between his written and oral evidence, or indeed any actual material difference between him and Mr Z as to the law or procedure. The real difference between them was as to approach. I pay due regard to the fact that Mr Z was totally independent, while Mr Y was, on Mr Moriarty's case, not. But I was impressed by Mr Y's extraordinary thoroughness and dignified approach, and I found it difficult to accept that Mr Z, after many years of distinguished practice in Egypt, would indeed have acted in accordance with the views he sought to give in the witness box. Mr Butcher sought to characterise Mr Z as over-aggressive, but I am not convinced that Mr Z in fact would have adopted the approach to which he refers. On more than one occasion he gave evidence that, in the circumstances described, any reasonable Egyptian lawyer would have issued what seemed to me to be a whole clutch of claims, all at the same time, because "*you have to attack from all its aspects and to save time: in the same time you use all these methods together*". I do not accept that he was really concluding that that was what he would – or at any rate should – have done in all the circumstances; or that, having accepted that Judge Hegazi in his 4 May judgment in the nullification proceedings wrongly ruled out all the documents relied upon by Melinda (notwithstanding the absence of objection by the state lawyers to their admissibility) he really felt it was a criticism that Melinda had not itself (impermissibly, by his own account) objected to the admissibility of what he called "*documents of the government*": or that he was really advising that an application for recusal of Judge Hegazi should have been brought, even before his 4 May judgment, "*just to put him under trouble*" or pressure. In my approach to the expert evidence, I much prefer that of Mr Y.

The Facts

19. I deal first with the position of the Port Suez Court. Counsellor Esheiba was at that time the President of that Court, and was responsible for all departments, and thus for the Claims Department (including the Court Dues Department) and the Execution Department. He was appointed by the Ministry of Justice (as were all the others for whom he was responsible). Although a judge of Court of Appeal status, Counsellor Esheiba was primarily an administrator. In his position in overall charge of the Claims Department, he had the power to grant a conservatory arrest (i.e. an arrest to preserve assets with a view to a subsequent judgment): however, although in overall charge of the Execution Department, he had no power to grant an executory arrest (i.e. an arrest to enforce an existing judgment with a view to execution): there were (at least) two judges, junior to him, in the Execution Department, who were responsible for granting executory arrests, Judge Nadeem (who made the original ex parte arrest order on 24 December 2008) and, as President of the Court of Urgent Matters and Head of the Court of Execution, Judge Hegazi. I find that, at the material time, the Head of the Claims Department (and thus the Court Dues Department) was Farhan Beg, and the Head of the Execution Department was Counsellor Sameh, both subject to the overall control of the President, Counsellor Esheiba.
20. The arrest was, as set out above, at the instance of the Court itself (the Port Suez Court on behalf of the Port Said Court). I accept the evidence adduced on behalf of Melinda that there is a "*real eagerness in the Ministry of Justice to collect court dues, and this puts pressure on the Presidents of the First Instance Courts to pursue court dues aggressively*", and that Counsellor Esheiba has a reputation for impressing on court officers the importance of executing orders for the payment of court dues, especially Judges' Fund dues.
21. The EEAA did not attempt to enforce its judgment against the SILVA. It was the Court which sought to enforce the proportional court/Judges' Fund dues judgment in favour of the Port Said Court, and that came about, I am satisfied, as a result of a financial arrangement

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between the Ministry of Justice and/or the Port Suez Court and a ship chandler, the Owner of Al-Burj Shipping Services Company, known as Mr Mosaad: his full name was actually Mr Saad Abdelhamid Youssif. I am satisfied, from the (unchallenged) evidence before me, that Mr Mosaad has admitted, indeed asserted, his connection with the Court, and that it was the case that he had an arrangement with the Ministry of Justice and the Claims Department of the Port Suez Court that he would assist them in return for reward to collect court dues owing to the Court: and that he did so on this occasion, i.e. that he was the man who supplied documents to the Claims Department, on the basis of which the SILVA was arrested. I also accept that Mr Mosaad had a notorious reputation for fabricating invoices against ships for services and provisions and then seeking to obtain an arrest on the basis of such non-existent debts, and that Mr Mosaad had a number of criminal convictions prior to 2008 at the Suez Court (the Faisal Misdemeanours Court and the Suez Misdemeanours Appeal Court) for falsifying accounts and misappropriation, which was plainly known to the Ministry of Justice and the Suez Court.

22. I find, on the evidence I have heard and seen, and in particular by reference to a transcript of a conversation with Mr Mosaad, that Mr Mosaad produced the documents said to relate to the SILVA to Farhan Beg, the Head of the Court Dues Department, which were then taken by Farhan Beg to the Assistant Minister at the Ministry of Justice, and subsequently passed to Counsellor Esheiba under cover of a *Memorandum for Presentation*, to which I shall refer below, and which, although of uncertain authorship, was signed off by a Manager in the Claims Department, a Miss Amal. I accept the evidence given to me that Mr Mosaad had continued access to the documents he had supplied to the Court (even when Melinda's lawyers had not yet been given access to them) and to Counsellor Esheiba. Most significantly, I conclude, by reference to the taped transcript, whose accuracy and genuineness I accept, that Farhan Beg returned to Mr Mosaad to point out that a document such as could connect the SILVA to the SAFIR was *missing* from those which Mr Mosaad previously supplied, and that he subsequently provided such purported missing link by way of documents which, as will appear, I am satisfied were forged, and that the Court and the Ministry of Justice must have known that these subsequent documents, emanating from a known forger, were not likely to be genuine.
23. Even leaving aside such knowledge on the part of the Ministry of Justice and/or the court of the likelihood of forgery, evidence was given to me to the effect that it was wrong for the Ministry of Justice to have an arrangement to pay someone to help them in arresting vessels who was not a registered expert with the courts: Mr Y said that he had never heard of anything like it before, and that the Ministry of Justice could not have justified what had occurred nor should state lawyers involve themselves with a ship chandler with Mr Mosaad's history. Mr Z did not seek to defend the arrangement, certainly not a financial agreement between the Court and a man known to be a convicted forger.
24. I have already set out in paragraph 10 above my conclusion that the owners of the SILVA had no connection with the owners of the SAFIR. The SILVA was a crude oil tanker built in 1986, owned between 1986 and 2005 by Scan Tank Inc of Monrovia, and sold by Scan Tank to Melinda in 2005; Melinda was incorporated in Liberia in November 2004 for the purpose of acquiring the vessel, its shares being held on behalf of the Gialozoglou family. It has since been managed and operated by Delfi S.A., a Greek corporation operating out of Piraeus. Mr Grigoriou has been employed by companies owned by the Gialozoglou family since 1989. The Gialozoglou family also beneficially owns the I.M.S. Group of companies, which are involved in chartering the vessels managed by Delfi S.A., for which Mr Grigoriou has worked since 2002. Mr Grigoriou confirmed, and I accept, that no I.M.S. Group company has ever owned the SILVA, or indeed the SAFIR. The documents got together by Mr Mosaad and supplied by him to the Ministry of Justice and the Port Suez Court Claims Department (leaving aside the (two) fabricated documents to which I have referred in paragraph 22 above, and to which I shall return below) emanated from an entity called Lloyds MIU (which has no connection with the authoritative Lloyd's Register of Shipping, which the *Memorandum for Presentation* misdescribed as the source of the documents), and showed as follows:
- i) According to a sheet headed "*Vessel Casualties for Beneficial Owner*", there had been two vessels in the beneficial ownership of an unidentified company, both of

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which had been casualties, and which had amounted to the total casualties suffered by that beneficial owner: these vessels were the SAFIR and another vessel called the ARIA.

- ii) The SILVA was recorded by way of “*Owner History*” as of 12 June 2005 as having had Melinda as its registered owner (previously Scan Tank of Monrovia) with its commercial operator recorded as Delfi S.A., and its beneficial owner recorded as I.M.S. Group.
 - iii) I.M.S. Group was recorded in a “*Company Overview*” as being the beneficial owner of 21 vessels which had been casualties: thus on the face of it not being the unidentified beneficial owner referred to in (i) above.
 - iv) A 2-page schedule was provided headed up “*Lloyd’s MIU Fleet Details: I.M.S. Group*”. The SILVA was listed as still being “*live*” with date *from* 12 June 2005 and ‘*Contact*’ Delfi S.A. ARIA was included as “*dead*” and as having been in the fleet between 7 November 1991 and 24 July 1998 (i.e. 7 years before the ‘*date from*’ of the SILVA) with ‘*Contact*’ International M.S.L. Very significantly, in this list, the SAFIR is not included.
25. The evidence of the transcript to which I referred in paragraph 22 above, that the two fabricated documents were provided subsequently, is corroborated, not only by the fact that at the bottom of those 2 pages is an imprinted date of 14 January 2009, but crucially in the Index of documents filed with the Port Suez Court which (in the original Arabic version) shows that the state lawyers acknowledged that these two documents were dated 14 January 2009 (and obviously could not have been lodged with the Court before then). Quite apart from the fact that the two documents, in my judgment, do and did not improve, but indeed, because of their obviously tainted origin, detracted further from, the existence of any case against Melinda (to which I shall return), that date makes it clear that the *ex parte* arrest order of 24 December 2008 must be judged without them, and by reference only to the documents whose purport is set out in paragraph 24 above.
26. It is common ground that for an executory arrest in Egyptian law there must have been an arguable case that the SILVA was, at the date of the arrest, an asset of the judgment debtors (Fonderance and Seama). Plainly the documents referred to in paragraph 24 above show nothing of the kind. The most that they showed was that at some stage the ARIA and the SAFIR had been in the same beneficial ownership, and that the I.M.S. Group of companies, which was now said to be the beneficial owner of the SAFIR by Lloyds MIU, had once owned the ARIA (but not the SAFIR). This must have been obvious to the Port Suez Court, experienced as it plainly was and is in maritime cases. There was manifestly no arguable case for the making of the arrest. Mr Z accepts that, if there is no evidence of a link between the owner of the SAFIR and the owner of the SILVA, it would be improper for the Court Dues Department to apply for an arrest, or for the Court to grant one, and Mr Y confirms his opinion that, based on the documents presented, there was no link between Seama and Fonderance, or the owners/managers of SAFIR, and the SILVA or her owners or operators, and that the arrest should not have been allowed.
27. The documents were presented (apparently by the Claims Department) it seems together with the *Memorandum for Presentation*, to which I have referred in paragraph 22 above. This document asserted that it had come to the Claims Department’s attention “*after researching and investigating about the owners of the debited vessel*” that they “*have shut down the premises of the company owned by them in London and Sweden and established other companies in Greece under the name (I.M.S. Group) owned by them and the vessels have been registered at these new companies among which is the vessel which is required to be arrested ... the owners of the vessels have resorted to tricks to avoid the payment of debts through shutting down the debited companies and opening new companies under new names to register the vessels they own at these companies ... it becomes clear from the documents that they are owned by the same owners and that the companies in the documents are also owned by them.*” The “*researching and investigating*”, such as it was, was plainly not carried out by the Claims Department, but by Mr Mosaad, if at all; but the documents attached do not

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begin to justify these wild assertions, and indeed (so far as concerns the I.M.S. Group) are inconsistent with them. Mr Z expressed the view that it was not proper for the Claims Department to have made the allegations that they did in the *Memorandum for Presentation* in order to obtain the order.

28. The next matter to be considered is what happened to the *Memorandum* and the documents. They were it seems referred by the Claims Department to Counsellor Esheiba. Although President of the Court, he had, as set out in paragraph 19 above, no power to issue an executory arrest, and hence Mr Y's opinion is that the document should not have been put before him at all, but should have been referred straight to the Execution Department. In the event it went before Counsellor Esheiba and he endorsed the *Memorandum* "*to be presented to the Execution Department to take the necessary legal action*". Mr Y considers that this was most unusual, and regards it as a direction to the judge in the Execution Department to "*proceed based on the information contained in this document*". Mr Z does not regard it as a direction, but simply as a referral to the correct department. However, he says that he thinks "*they submitted it to Esheiba because the name of SILVA is not indicated at all in these documents at all and they would like to arrest the vessel on the assumption or allegation that they are two sister ships*". It is clear that, on any view, there was uncertainty and doubt arising from the lack of evidence in the document and:
- i) Counsellor Esheiba should not in those circumstances in my judgment have referred it at all, even if such did not amount to a direction, if that is what he did.
 - ii) Similarly he should not have acted as he did at the meeting on 30 December 2008, to which I refer below, when he said that there was no doubt as to the liability of Melinda, and gave the impression that the arrest had been correct and wished to know "*when the owners of the SILVA were going to pay*".
29. It seems clear, and I conclude, that, in the light of the doubt about the lack of evidence, Farhan Beg went back to Mr Mosaad for more documents, and that two more documents were then produced by Mr Mosaad.
- i) The first was a document, again on the face of it from Lloyds MIU, relating to "*Owner History: SAFIR*" showing Seama as "*beneficial owner ... from after 01 Jan 1984 until before 01 Aug 1988*" and Fonderance (misdescribed as *Fondarene*) as "*Registered Owner ... from after 01 Jan 1984 until before 01 Aug 1988*". This is of course inconsistent with the judgment which was being sought to be enforced in respect of the incident in 1989. The Commercial Operator was shown as "*Ambrosia Group Inc from after 01 Jan 1986*".
 - ii) The second document, again purportedly emanating from Lloyds MIU and again headed up "*Owner History: SAFIR*", showed, inconsistently with the first document, *Fondarene* as "*Commercial Operator ... from after 01 Jan 1984 until before 31 Dec 1989*". Seama was now (inconsistently with the judgment) "*Registered Owner ... from after 02 Aug 1988 until before 31 Dec 1989*". The Beneficial Owner was now said (inconsistently with the other documents which had been presented with the *Memorandum for Presentation*) "*I.M.S. Group from after 02 Aug 1988 until before 31 Dec 1989*". There was then an additional entry for "*Third Party Operator*", namely "*International Marine Services S.A. from after 01 Jan 1989 until before 11 Sep 1989*." This company, as it happens, was not incorporated until 11 March 1997.
30. As will appear, it is accepted, even by Hellenic, that these documents were forged, but their internal inconsistency, their inconsistency with the judgment, and their inconsistency with the other documents, are really only secondary to the primary fact that they were known by the Claims Department to have been produced as afterthoughts by a convicted forger, and in my judgment they knew that they were not likely to be genuine or to contain true information. In any event, they post-dated the grant of the arrest order on 24 December 2008.
31. The events between 24 December 2008 and 18 January 2009 are of some significance. On 30 December, at a time when the evidence supporting the arrest was plainly on any view

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insufficient before the arrival of the two further forged documents, and at a time when, if Mr Z's view be correct, the Claims Department had its own doubts about the order which it had consequently submitted through Counsellor Esheiba, I heard evidence that a meeting with Counsellor Esheiba took place to see if Counsellor Esheiba might be able to assist in what was believed to be a serious error. A memorandum and accompanying documents were taken to show that the owners of the SAFIR were not the owners of the SILVA. Counsellor Esheiba was accompanied by Farhan Beg. I accept the evidence given to me as to what occurred. On the evidence I heard, two things are clear to me:

- i) Counsellor Esheiba was "*orchestrating*" the matter.
 - ii) He was in effect negotiating with Melinda on behalf of the Claims Department to attempt to obtain payment, or at least security, in respect of the judgment debt for the proportionate court/Judges' Fund dues. As set out in paragraph 28(ii) above, Counsellor Esheiba said that the information that the Court had (which of course Melinda had not seen) left no doubt that the SILVA was under the same beneficial ownership as the SAFIR, and was giving the impression that he believed that the arrest was correct. He was seeking to negotiate a compromise, on behalf of the Court, whereby the fund due would be paid, if necessary by instalments, and, when he was asked to see the documents on which the Court was relying, Counsellor Esheiba's response was along the lines of "*even if, as you say, there is no relation, you will be able to bring the debtor to us*". He also suggested the provision of security pending resolution of the alleged dispute as to ownership (I shall return to this below). In the end, Counsellor Esheiba agreed that the documents could be seen, and asked Counsellor Sameh to show them to Melinda's representative, although, in the event, their lawyers were only given a very short time indeed to look at the documents, and they were not allowed to take photocopies. I accept the evidence that it is extremely unusual that Melinda's lawyers were not allowed to do so. I was told that two or three people from the Claims Department were standing by and that Melinda's lawyers were allowed only to turn the pages very quickly, and not permitted to take notes or write any observations. In such short opportunity, Melinda's lawyers were only able to notice a reference to the ARIA and to I.M.S. Group, but also to note that the file was not signed by a lawyer permitted to plead before the Court, contrary to the established practice which required the signature of such lawyer in support of an ex parte order. Despite further applications, Melinda was not permitted to access the file or see the documents until 17 January 2009, the day before the hearing on 18 January, by which time, of course, the two further documents had been added.
32. Melinda issued the nullification proceedings on 14 January 2009, which ought to have led to the automatic suspension of the sale proceedings. However, at the hearing on 18 January 2009, rather than make an immediate order, Judge Hegazi reserved his decision until after the end of the Court list. I accept the evidence given to me that this is most unusual in respect of an order which ought by Egyptian law (as referred to in paragraph 11 above) to have been automatic, and that all or most of the other cases in the list were not dealt with by such reservation. One of Melinda's lawyers had to remain at Court until well into the afternoon, long after the rest of the list had been completed, before the decision was given to him adjourning the sale proceedings. I heard evidence, which I accept, that, after the end of the Court list, Judge Hegazi went to Counsellor Esheiba's room, which was on the first floor, Judge Hegazi's own room being on the ground floor, and that he was told by the secretary that the Judge had gone up to see the President, and indeed he had himself seen Judge Hegazi walking in the direction of the President's office. This he found very unusual. I am not prepared to draw the inference that Judge Hegazi was told what to do by Counsellor Esheiba, and then acted under his direction, but I am quite satisfied that, as a junior Judge, subordinate to Counsellor Esheiba, he was reporting to the President what was happening, in relation to a case significant to the Court because of the hoped-for recovery of proportionate court/Judges' Fund dues, and that he would not have taken any step in the case without first informing Counsellor Esheiba. I accept that this remained the case in respect of the subsequent adjourned hearings.

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33. I also accept the evidence I was given that, when one of Melinda's lawyers attended on Counsellor Esheiba in his office in relation to the SILVA case at the very end of January or early February 2009, Counsellor Esheiba said that, if the Owners of the SILVA were to settle the Judges' Fund part of the Court Dues, the SILVA would be released and no issue would be made of the remaining amount outstanding to the Ministry of Finance. This was once again plainly a case of the President negotiating on behalf of the Court. Melinda's lawyer promised him to convey such proposal to the Owners. It was explained vividly why such a proposal would not have been acceptable to Melinda and to Delfi (as it had not been when mentioned earlier to Melinda's lawyer). First, at the time the offer was made, the SILVA had not been under arrest for very long, and the evidence before me was that they were optimistic that it could be released without the Judges' Fund dues having to be paid. Secondly, if security were provided, it would be far easier to enforce against. Thirdly, there was concern that, if the Owners of the SILVA showed any willingness to settle even the Judges' Fund Dues, this could be seen as an admission that there was a relationship between the SILVA and the SAFIR, which might result in the SILVA being re-arrested for the underlying environmental liability judgment owed to the EEAA (a very much larger sum); and fourthly, for the same reasons, there was a concern that other vessels managed by Delfi might then be arrested on a similarly flimsy basis.
34. By 8 February, Melinda's evidence was prepared and was lodged. It showed beyond peradventure that there was no case that supported the grant (or continuation) of the arrest. Lloyds MIU confirmed in great detail that "*it does not appear from our records in any way that the Owners and/or Managers of the M/V SAFIR in 1989 or at any other time are linked or related to ... Scan Tank ... who were the registered Owners of the M/V SILVA from the date of its construction in 1986 until 25 May 2005 or ... to the companies Melinda ... or Delfi S.A. who have been the registered Owners or Managers respectively of the M/V SILVA since 5 May 2005 to present. Furthermore it does not appear from our records in any way that the Owners and/or Managers of the M/V SAFIR in 1989 or at any other time are linked or related in any way to any entity that may be referred to as the IMS Group.*" Full particulars were given as to the SAFIR and its registered owner Fonderance and beneficial owner Seama, as to the history of the ARIA, confirming the absence of any link in that regard either, and similarly so in relation to I.M.S. Group, with regard to which it clarified any misconceptions as to its having been described as a beneficial owner. Lloyd's Register confirmed that it had no connection whatever with Lloyds MIU, and Lloyd's Register Fairplay confirmed that "*according to our records, we can find no basis for any published connection between the SILVA ... and the SAFIR*".
35. It must have thus been clear (if not already known, as I conclude it was, because of their provenance from Mr Mosaad), that the two extra documents did not emanate from, and were inconsistent with, the records of Lloyd's MIU. Although Mr Z opined that claimants, in Egypt or elsewhere, even if they are the Ministry of Justice, can say whatever they would like, he accepted, in answer to me, that he would expect the Court Dues Department if, having made an application, it realised afterwards that there was no evidence to support it, to abandon it.
36. Although it was explained that Melinda's lawyers were reluctant to produce to the Port Suez Court an expert's report which might embarrass the Claims Department, in the hope that such abandonment might occur, a report was obtained from Professor Selim, the Head of Computer Engineering and Computer Science Department at the College of Engineering and Technology in Cairo, concluding that the two documents were not downloaded from a website and were not printed from the Internet and were "*in position of great doubts and cannot be taken for grant[ed] in this case*", which was lodged and served on 22 March. The arrest and the proceedings nevertheless were persisted in.
37. As set out in paragraph 11 above, Judge Hegazi gave judgment on 26 April, with Reasons delivered on 4 May, dismissing the nullification proceedings, and hence upholding the arrest. His judgment, which is criticised in detail by Mr Y, is also accepted by Mr Z to be wrong on every material point. Significantly however:
- i) the judge concluded, on a basis which, as I have said, both experts say cannot be supported, that Melinda had no locus standi to make the application:

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- ii) he did not even look at the documents adduced by Melinda to establish its case and to disprove (as they do beyond doubt) the case for the Court Dues Department. He did this on a basis (again condemned by both experts) that the documents adduced by Melinda were not admissible, because not accompanied by officially certified translations, even though no objections to the translations actually supplied had been made, and because not certified by Egyptian officials under requirements which are in fact inapplicable to non-Egyptian documents. The same complaint of course would have applied to the documents relied upon by the Court Dues Department, but those the judge admitted and relied upon.
38. Judge Hegazi is a relatively junior and young judge (in his thirties). He was certainly junior to both Counsellor Esheiba and Counsellor Sameh, the Head of the Execution Department. This was an important case, and one in which sums, if recovered, would be paid, as to one third, to the Judges' Fund. I heard evidence of a subsequent appearance before Judge Hegazi in his room in the summer of 2009, when Judge Hegazi made comments (until interrupted by the arrival of the state lawyer representing the Court Dues Department) that Melinda said amounted to an acceptance by Judge Hegazi that he had been under coercion to reach the judgment he gave. On analysis of the conversation which is said to have occurred, I do not draw the inference that the Judge was doing anything more than apologising for the judgment that he had given. I would read it as simply an acceptance by this junior judge that he had not felt able to reach any other conclusion, while recognising that the reasons he had given did not support the conclusion which he had reached.
39. Towards the end of May 2009, probably on 28 May, there was evidence of a much less elliptical conversation, which I entirely accept. I was told that one of Melinda's lawyers had attended the office of Counsellor Sameh, the Head of the Execution Department, pursuant to a request he had filed to obtain documents from the Court file, and found Counsellor Sameh together with Farhan Beg, the Head of the Court Dues Department. They said that they had spoken to the Assistant Minister at the Ministry of Justice, who was dealing with the court dues claim, who had told them the detention of the SILVA appeared to be a bad mistake, and would lead to a large claim for wrongful arrest, but that the Ministry of Justice needed the money, with the result that the SILVA case must continue through until completion of execution.
40. The appeal has not yet been heard, but has been adjourned on a number of occasions, most recently until 6 February 2011. It will be heard by a bench of three judges. Melinda does not complain of such delay of itself, but the fact remains that (i) the appeal has not yet been heard (ii) the SILVA remains in detention, together with its Master, now for more than 2 years (iii) the claim has not been abandoned or discontinued whether by the Claims Department or by the Court, notwithstanding what I have concluded to be the total absence of any case to support it and the forgeries, upon which, as Hellenic itself has now accepted, the continuation of the arrest has in substantial part relied. I have referred, in paragraph 17 above, to Mr Z's suggestion that the existence of an appeal is of relevance. It seems to me clear that, on the facts of this case, if there has not been ordinary judicial process, the existence of such a delayed appeal – and one which, on the facts of this case, has in fact coincided with the passage of the 12 months (indeed twice that period) which led to the vessel becoming a constructive total loss by virtue of Clause 3.13.2 of Hellenic's policy – cannot cure the position.

Conclusions on Issue I

41. I am rightly reminded by Mr Moriarty that:
- i) although there is, as Lord Hoffmann said in **Re B (Children) (Care Proceedings: Standard of Proof)** [2009] 1 AC 11 at 21 "*only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not*", and, although in the same case, at 35, Baroness Hale said that "*neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts*",

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nevertheless, as they both there advise, regard should be had to inherent probabilities:

- ii) I should not, in the interests of comity, lightly reach unfavourable conclusions as to the judicial decisions of another country (**Agbaje v Agbaje** [2010] 1 AC 628 at 671 per Lord Collins of Mapesbury):
 - iii) although the legal onus is on Hellenic to establish its entitlement to the exclusion in the policy, the evidential onus may shift (as discussed in paragraph 4(i) above) and that, if I conclude that, on the face of it, there was *ordinary judicial process*, I should need to be persuaded that what occurred fell without it: e.g. per Fenton Atkinson LJ in **The Anita** at 889 such that the Court “*was not acting bona fide as an independent judicial body, but merely acting as a puppet court, following directions of the Government, or knowingly exceeding its powers.*”
42. Mr Butcher refers to the words of Mocatta J at first instance in **The Anita** [1970] 2 Lloyd’s Law Rep 365 at 377: “*In my opinion the words “ordinary judicial process” ... refer to the employment of Courts of law in civil proceedings. If a rationale be required for this, it is that in such cases the State is merely providing a service to litigants, rather than exercising its own power through the Courts for its own purposes.*” He also draws attention to the justification for the exclusion in **Miller: Marine War Risks (3rd Ed 2005)** at paragraph 25.3 by reference to arrest or detention in actions for civil debts, namely “*These being civil actions, there is no suggestion of any harmful or vindictive action being taken against the insured ship*”. The starting point here is that the purpose of the claim, and the involvement of the Court, is to enforce and recover (inter alia) the Judges’ Fund for its benefit. The basis upon which both experts accept (notwithstanding the two decisions of the Egyptian High Constitutional Court) that collection by the Egyptian Courts of the Judges’ Fund is unconstitutional can only be that expressed by Mr Y: Mr Z does not specifically address this reasoning, although he accepts and agrees with Mr Y’s conclusions. Albeit indirectly – Mr Z points out that no judge sitting on this case will directly receive any money – by virtue of the supplementation of the Judges’ Fund from which all judges and their families benefit, the judges are being judges in their own cause, so that their independence is inevitably in question. In those circumstances, albeit that it is the Claims Department of the Court which actually does the collection, that Claims Department depends upon orders being made by the judge of the same court, and if the system is to be permitted at all, it must be on the basis that the Court should be all the more careful before it takes steps to execute against innocent third parties in order to recover such sums, and in this case the very reverse has occurred.
43. I have no need to repeat the findings of fact I have set out at length in this judgment. I am entirely satisfied that this was not an *ordinary judicial process*, but was an exercise of extortion from owners of an innocent and unconnected sea-going vessel of sums owed in respect of another entirely unconnected vessel, in the expectation that sums would be paid out, or at the very least secured (with judgment or compromise likely to follow), so that the court’s purpose of recovering the monies could be achieved. I do not consider in this case that the Claims Department of the Port Suez Court and the Execution Department of that same Court can be seen as independent of and separate from each other, particularly as both are presided over by Counsellor Esheiba and manned by the Ministry of Justice. In any event, Counsellor Esheiba was plainly acting on behalf of both Departments in attempting to negotiate, or extort, a settlement, as I have described in paragraphs 31 and 33 above.
44. I conclude that:
- i) The employment of Mr Mosaad was improper and inappropriate: a fortiori the return to Mr Mosaad by Farhan Beg to obtain improved evidence, after the grant of the arrest.
 - ii) There was no arguable case for an arrest at the outset.
 - iii) The Court and the Claims Department knew by 18 January that the original arrest could only (if at all) be supported by forgeries, subsequently obtained from its ‘commission agent’ Mr Mosaad.

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- iv) The Court and the Claims Department knew by 8 February (before the adjourned hearings of 8 February, 1 March and 22 March before Judge Hegazi) that the forgeries had been revealed and the case could not in any event be supported.
- v) There was no alternative but to discharge the order by 26 April, but yet a way was somehow found to continue the arrest – bearing in mind the consequence in damages for wrongful arrest if the arrest were now to be discharged.

One test that I suggested to the parties, and have found helpful, is that it could be asked whether any reasonable Court could have acted as the Port Suez Court did, and I am satisfied that the answer is no.

45. At each stage it can be said (by reference to the words of Mocatta J and Fenton Atkinson LJ) that the State and/or the Court were exercising their own power through the Courts for their own purposes, that the Court was not acting bona fide as an independent judicial body. There was effectively extortion by the State under a veneer of court process. The Port Suez Court, through its judicial and quasi-judicial powers, was acting piraically: just the risk that is intended to be covered by this insurance. As for **Re B**, although it may be inherently improbable that a court system should act as I have found the Port Suez Court acted – from employing Mr Mosaad onward – I am quite satisfied that it did so and that this was not *ordinary judicial process*. It was neither ordinary nor judicial.

The Other Exclusions

46. I can take very shortly the other two exclusions, 3.6.3 and 3.6.4, set out in paragraph 2 above. I have referred in paragraph 4(ii) to Mr Moriarty's concession that, given the way the case is put by the Claimant, the other subrules take him no further.
- i) As to Subrule 3.6.3, it is quite plain that this exclusion refers to lawful and reasonable action taken for the purposes of enforcing or securing payment of a genuine or bona fide claim. In the light of my conclusions as to how the claim arose, by reference to Mr Mosaad, and to the absence of belief in its existence, the case appears to me to fall squarely within what Lord Denning had in mind in **The Anita** at 888A, namely that "*the seizure was a put-up job*".
 - ii) As to Subrule 3.6.4, although the words "*any financial cause of any nature*" appear wide, they must be construed in their context, namely as an exemplar of "*Exclusions of claims arising out of ordinary judicial process etc*", and, so far as necessary, both eiusdem generis to the other exceptions, and contra proferentem. Lord Denning's words above would appear to be applicable. The words of Lloyd LJ in **The Wondrous** [1992] 2 Lloyd's Law Rep 566 at 573 emphasise that, wide as the words are, the "*financial cause must, of course, affect the ship*" – which this did not. Potter LJ in **The Aliza Glacial** [2002] 2 Lloyd's Law Rep 421 at 432 quoted with approval words of Toulson J at first instance, namely that the detention of a vessel for ransom by a terrorist organisation could not be detention for a *financial cause*, because "*no-one would suggest that such a conclusion would accord with the spirit of the policy*": Professor Bennett in **The Law of Marine Insurance (2nd Ed)** at 13.76 stated (in part by reference to **The Aliza Glacial**) that "*the exclusion has to be understood as subject to an implied limitation that the financial issue must be triggered by a reasonable and legitimate claim against the vessel*".

Issue II

47. I referred in paragraph 12(ii) above to the various sub-issues that have arisen in relation to the sue and labour clause. The fundamental decision that I have had no difficulty in reaching, and which I shall explain in due course, is (i) that there has been no breach of the sue and labour clause (ii) that nothing that Melinda could have done over and above, or in the alternative to, what they did do would have made any difference. There was, as explained above, an exercise of continuing extortion, followed by unwillingness – but then by the perceived impossibility – to let go and undo what had been done.

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48. Hence I can set out my conclusions on the sub-issues concisely. I deal first with proximate cause. Phillips LJ in **State of Netherlands v Youell** [1998] 1 Lloyd's Law Rep 236 at 238ff made clear that, by virtue of the interplay between s78(4) of the Marine Insurance Act 1906 ["the 1906 Act"], the statutory formulation and imposition of the sue and labour duty, and s55(4) of the same Act, an insured could not be found in breach of it so as to forfeit his cover, unless the breach was the proximate cause of the loss. Potter LJ extended this interpretation to cover contractual sue and labour clauses in very similar terms to the statutory obligation at 433, in his judgment, delivered on 30 April 2002 (with which Lord Phillips MR agreed) in **The Aliza Glacial**. On 25 March 2002, in his judgment in **The Grecia Express** [2002] 2 Lloyd's Law Rep 88, which, for obvious reasons, was not referred to by Potter LJ, nor itself could refer to Potter LJ's subsequent judgment, Colman J reached the opposite conclusion in relation to Rule 3.14 of the then Hellenic Rules. He said that, unlike the position under s78(4), he was dealing with a contractual condition: "*as such its construction is at large and does not need to be identical to that of similar words in the statute, unless there is some compelling reason for the meanings to coincide.*" Mr Butcher says that the Court of Appeal trumps Colman J. However, the Hellenic clause, with which Colman J was dealing, appears to have been in identical form to that before me, and that contains what the clause being dealt with by Potter LJ did not, namely the additional sentence relating to the directors' discretion, set out in paragraph 2 above, and referred to in paragraph 12(ii)(e) above. Although Colman J did not explain in detail why he differed from the statutory construction, and in particular did not refer to this second sentence, Mr Moriarty submits that the addition of the second sentence does indeed make all the difference. Whereas, if there is a breach of the sue and labour clause, it is understandable for the courts to protect an insured against the rigours of loss of cover by interposing a proximate cause provision, that is not necessary where there is an express provision to deal with the situation if there is a breach, namely a contractual agreement that the directors may then exercise a discretion. Mr Moriarty submits that that must be what the second sentence is addressing, because, if there were no breach (e.g. because of the application of the proximate cause test), then there would be no call for the exercise of the discretion. The discretion is intended to take the place of the proximate cause test. This seems to me to be at least strongly arguable, but I do not need to resolve it, as I find that there is no breach.
49. Similarly, were I to find that there was a breach, I would have concluded that, on the face of it, there would be a discretion for the directors to consider, but I would have been easily persuaded that, if the breach were such that no reasonable board of directors could have relied on it to oust or limit recovery, I would not have granted a declaration in the terms sought by Hellenic.
50. Mr Butcher has also relied upon Phillips LJ in **Youell** for another proposition, namely that the *agents* referred to in the sue and labour clause, by whose failure the Owner would be bound such as to render him in breach of obligation, is not intended to refer to such agents as lawyers, but only those agents to whom the shipowner delegated for the purposes of a maritime adventure (see pp241-243), in essence the Master and crew. Thus, he submits, if, contrary to Melinda's contentions, their Egyptian lawyers could be said to have so acted that, if they were their agents, there has been a breach of the sue and labour clause, they are not responsible for the acts or defaults of such properly selected and qualified lawyers. Mr Butcher further relies upon the express mention in Rule 39 of the Hellenic Rules of the power to appoint and employ "*lawyers, surveyors or other persons for the purpose of dealing with any matter which may give rise to a claim by an Owner upon the Association*" which, Mr Butcher submits, suggests that lawyers are not otherwise intended to be covered by references to agents such as in Clause 3.15. I would not be persuaded by this argument, subtle as is the logic of Phillips LJ, not least because Buxton LJ did not agree with him in **Youell** (see pp246-7), albeit agreeing with the result, because he found that, on the facts, shipbuilders and their subcontractors could not be agents of the navy for the purpose of suing and labouring: the third judge, Butler Sloss LJ, while agreeing that the appeal should be dismissed, did not resolve that difference. Not least because of the possible comparability of cases as to mitigation of loss, I would find it difficult to be persuaded by Mr Butcher's argument. However I do not need to resolve this point either, because I am satisfied that, even if Melinda were responsible for defaults of their Egyptian lawyers, there were none such, and neither Melinda nor their lawyers/agents were in breach of the sue and labour clause.

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51. Finally I was addressed as to the precise standard to be expected before it could be concluded that Melinda and its agents were in breach of the sue and labour clause. Although Mr Moriarty was anxious to emphasise that, insofar as the Egyptian lawyers were agents, it is not necessary for me to find that they were negligent before I could find a breach of the sue and labour clause, I am entirely satisfied that the test is now clear from the decision of the House of Lords in **The Talisman** [1989] 1 Lloyd's Law Rep 535. Lord Keith (with whom the rest of the House agreed) assessed the position clearly at 540: "*I do not for my part find it possible to hold firmly that any ordinary competent skipper would have acted differently from the pursuer.*" I need in order to find a breach accordingly to conclude that any ordinarily competent Egyptian lawyer would have acted differently. In any event, Mr Moriarty rightly accepted that the test would include what should have been done "*in all the circumstances*", and it makes it essential therefore to consider whether any other suggested action would have had any realistic prospect of success in achieving a different result: and it also means that the Court must take into account the reason why the agent did not take such a step.
52. Before considering the steps which it is suggested ought to have been taken, in the context that I am invited to conclude that any ordinarily competent Egyptian lawyer would have taken such steps rather than the steps that were taken, it is important to bear in mind that Melinda and its agents here were responding to what I have found to be extraordinary and unexpected *non-judicial* process. Whether or not it is still apt, I do not know, but Phillips LJ in **Youell** in 1998 pointed out (at 238) that it was "*noteworthy that in the 91 years that have elapsed since the [1906] Act, there has been no recorded case where underwriters have successfully invoked ... a breach of the duty referred to in s78(4)*", and David Steel J gave short shrift to such an argument in **Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd** [2002] 1 Lloyd's Law Rep 652; but it is fair to say that Mr Moriarty concentrated almost his entire fire, both by way of cross-examination and in closing submissions, on this issue. In the event, as I have indicated, I am satisfied that he did not succeed. I have already given an indication above as to my views of the respective experts. Even apart from my preference for Mr Y's evidence, and my critique of some parts of Mr Z's evidence, the overwhelming picture I have is as to a difference of tactics between Melinda's lawyers and Mr Z. Melinda's lawyers' tactics were not only in my judgment well chosen, and indeed ought to have succeeded but for the intransigence of the Port Suez Court and Claims Department, but, at least at the outset, were the subject of discussion and agreement with other lawyers, including representatives of Melinda's P & I Club, at a meeting in Alexandria on 9 January 2009. In any event, I incorporate below, where appropriate, and am persuaded by, the reasons it was said Melinda's lawyers did not take certain steps. As to Mr. Y's evidence, having considered Mr Moriarty's catalogue, referred to in paragraph 18 above, I do not consider this to have been inconsistent, but to have been, notwithstanding his vigorous cross-examination, entirely convincing.
53. I now deal in turn with the suggestions that were made as to alternative or supplementary courses. One such suggestion, that of using diplomatic avenues, was misconceived, because, in any event, as I accept, diplomatic routes were pursued according to the evidence of Mr Grigoriou, without any success, and no cross-examination was pursued in that regard. For the rest I deal with them in turn:
- i) The provision of security.
 - ii) The launching of a quit claim.
 - iii) The issuing of a claim for damages for wrongful arrest.
 - iv) The issue of a forgery report.
 - v) The time-bar point.
 - vi) Additional grounds of appeal.
 - vii) An application for recusal or judicial investigation of Judge Hegazi.

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54. I now deal with these in turn, all on the assumption (unresolved, as appears in paragraph 50 above) that acts or defaults by the Egyptian lawyers are to be taken as relevant in the context of breach of the sue and labour clause:

- i) Security. Obviously, in the ordinary course, the provision of security, usually by the Owners' P & I Club, is the sensible way out of the ordinary arrest. But this was not an ordinary arrest. It was an arrest in respect of a judgment against a company and in respect of a vessel which had no connection whatever with Melinda. At the meeting of 30 December 2008, referred to in paragraph 31 above, Counsellor Esheiba was himself pressing for Melinda to provide security. Melinda decided, and the lawyers advised them, against taking such a course. The reasoning is similar to that which I have set out in paragraph 33 above, when, at a later date, Counsellor Esheiba offered the compromise of paying the Judges' Fund only.
- a) The arrest was seen as wholly unjustified and the claim unsupportable, and it was believed – and believed in my judgment on wholly reasonable grounds had it not been for the extraordinary *non-judicial* process – that it would be speedily discharged.
- b) Quite apart from the fear that, given that the guarantee would be unconditional, there was no certainty that the ship would in any event be released, there was the more important factor, which became more and more significant as time went on (and still remains significant) namely that the guarantee would be put up, and the judgment would then be enforced against a bank guarantee, which would be a far easier task than that with which the Port Suez court was faced, namely ordering and effecting the sale of a vessel. Mr Moriarty rightly pointed out that, on the face of it, Counsellor Esheiba was, on 30 December, offering the granting of security until the issue was decided; but of course if the issue were decided against Melinda, enforcement would then be immediate.
- c) While it was bad enough that there was an arrest in relation to a judgment in favour of the Court of some LE 22m, there was inevitably the risk that, if Melinda showed any weakness by way of implicitly recognising some validity to the claim – or actually managed to secure the release of the vessel through that route – then there would immediately be an incentive for the EEAA to seize some chance of enforcing its judgment for LE 300m, and that was too great a risk to take.

In my judgment it is clear that the right (or at any rate a perfectly sensible) course was to follow the route of challenging the arrest, rather than to provide security, and in any normal circumstance that route would have been successful.

- ii) The Quit Claim. This is an alternative form of proceeding, which, Mr Z points out, has the advantage of going before a 3-judge court, which might be less influenced by Counsellor Esheiba, although, as I understand it, still appointed by him. Not only am I satisfied that it was not unreasonable of Melinda's Egyptian lawyers not to take that step (but to take the course agreed on at the Alexandria meeting of the legal representatives, referred to in paragraph 52 above), but it seems to me that the suggestion is utterly pointless:
- a) The issue of a quit claim does not have the effect at Egyptian law, unlike the issue of nullification proceedings, of automatically suspending the sale proceedings and execution pursuant to the arrest. Thus at best the suggestion must be, as Mr Z accepted, that the quit claim should have been issued as well as the nullification proceedings. It is part of Mr Z's preferred tactic of the issue of a panoply of proceedings, which in Mr Y's view, and I agree with him, would have gained nothing.

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- b) The quit claim is, it is common ground, not an urgent process, such as is that of the nullification proceedings. Although Mr Z had himself estimated in his expert's report that such a claim could take an average length of 3 years, he did not recall that, when he gave his evidence that the issue of such a claim would "save time", and had to be reminded of it. But in any event he accepted that the nullification proceedings would in fact, even if commenced together with the quit claim, have come on first, so that any adjudication of the quit claim - even if unaffected, as Mr Y said it would not have been, by the outcome of the nullification proceedings - would have been heard subsequently, and on any basis considerably later than the 4 months in which the nullification proceedings, being an urgent matter, were heard by Judge Hegazi, the Urgent Matters Judge. Within 12 months (which would plainly have been exceeded) the SILVA would have become a constructive total loss, pursuant to the Rule referred to in paragraph 1 above, in any event.

I am entirely satisfied that there was no breach of the sue and labour clause by virtue of the absence of a quit claim.

- iii) Wrongful arrest. As Mr Y pointed out, the nullification proceedings themselves necessarily included an assertion of wrongful arrest. Mr Z contended that a separate claim for wrongful arrest should have been part of his suggested panoply of proceedings, including a claim for compensation, which Mr Y agreed was not itself included in the nullification proceedings, but which would, he explained, have been capable of being brought at any time afterwards once and if the nullification proceedings were successful. Mr Z did not disagree with this, but asserted, as part of his suggested tactic, that the claim should have been made expressly upfront, and as part of the panoply of proceedings all together in January 2009. Mr Y did not agree with this tactic. Particularly at the early stage, when it was not apparent that there was going to be the long delay and the digging in of heels, the making of such a claim for damages would in his view have made the Claims Department and the Court more reluctant to discharge the arrest, and as time went on would have made them even more aggressive. In any event, the fear of such damages being claimed from them, the availability of which was well understood, was quite clearly in the minds of the Ministry of Justice, as was plain from the conversation set out in paragraph 39 above. Whether bringing an overt claim for damages for wrongful arrest would have made matters worse, I do not need to decide. I am however entirely satisfied that it was neither an action that any ordinarily competent Egyptian lawyer would have taken, nor one which would have made any difference to the outcome.
- iv) Forgery report. Mr Moriarty pointed out that at an early stage, in correspondence with Melinda, their own lawyer had himself pointed out that the strongest action would be to issue a forgery report, i.e. a separate proceeding dedicated to establishing that the two documents were forgeries. There was some dispute in the event between the two experts as to whether this could have been done. I have been shown rival Egyptian authority, which leaves me at the very least uncertain as to whether it is possible to bring a forgery action based upon photocopies. However the position seems to me to be clear:
- a) As described in paragraphs 34-36 above, Melinda put before Judge Hegazi, in the nullification proceedings, powerful evidence that the contents of the documents relied upon by the Claims Department were untrue and incorrect, and an expert's report which, at the very least, suggested fabrication of the two documents.
- b) It is unclear that in a forgery report Melinda could have done any more, particularly given the apparent requirement in Article 49 of the Egyptian Evidence Law to give full particulars of all "*points of forgery*" in a forgery report, and the difficulty of doing so in this case.

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- c) Given the clear case that was put forward by Melinda, it is difficult to see how the issue of a forgery report would have resulted in any more of Mr Z's "*spotlight*" being placed on the issue of fabrication, or doing so to any effect, given that, even as it was, Judge Hegazi simply ignored the evidence that was put before him in that regard, which should have led him to allow the nullification claim.
- d) Mr Y's evidence, which I accept, is that in fact the issue of a forgery report, even if otherwise available, would have placed a heavier burden on Melinda, and thereby raised the threshold, in a case which could have been satisfactorily dealt with simply by achieving a result in which the Claims Department failed to prove its case, by being unable to persuade the Court of the genuineness, reliability or credibility of the documents upon which it was relying.

I do not consider it can be said that the issue of a forgery report is a step which any ordinarily competent Egyptian lawyer would have taken, and in any event I am again satisfied that the issue of a forgery report, even if it could have been done, would have made no difference to the result.

- v) Additional appeal grounds. This is a very difficult one to fathom. It is suggested that Melinda should have included more grounds in its appeal, such as the assertion that Judge Hegazi had taken direction from Counsellor Esheiba. Mr Y says that this would not have been possible, both because it would not be a relevant ground of appeal, given that the challenge was to the substance of the judgment of Judge Hegazi, and because of the difficulty of being entitled to rely on oral evidence (Article 63 of the Evidence Law), which would be necessary for such purpose. However, whether that be right or wrong (and Mr Z does not agree), the real point in answer to this allegation is that it would plainly have made no difference whatever, because the appeal is strong enough as it is, and yet has still not come on for hearing, whatever its merits.
- vi) Recusal Application. Once again, in the immediate aftermath of Judge Hegazi's judgment of 4 May 2009, this is something that Melinda's own lawyer canvassed with his clients. However, by that time, even if otherwise soundly based, it was of no materiality, because the judgment had already been issued, and Judge Hegazi was not, in the event (because he was transferred to another court), to take any further part in proceedings – nor would recusal of the first instance judge have in any way impacted on the appeal, as is common ground. The case put forward by Mr Z does not relate to events after 4 May, but is part of his panoply of actions which he submits ought to have been taken in January, presumably after the events of 18 January, referred to in paragraph 32 above. It is this claim which, as I mentioned in paragraph 18 above, Mr Z concluded should have been made as part of the panoply of claims "*just to put [Judge Hegazi] under trouble*" or pressure. This is not a course of which Mr Y approved, not least because it might have backfired, by prejudicing other judges against Melinda. Mr Z concluded that there would be no such risk. I accept Mr Y's evidence that neither a recusal application in such circumstances nor a request for a judicial investigation, which was an alternative suggestion from Mr Z, would have gained anything, and certainly that it cannot be said that any ordinarily competent Egyptian lawyer acting on behalf of his client would have taken such a course.
- vii) Time-bar. Finally, Mr Z criticises Melinda's lawyers for not having expressly run the issue of time-bar before Judge Hegazi. The time-bar was pleaded in the complaint in the nullification proceedings which launched that action; however, the evidence was that Melinda's lawyers "*mentioned it, but...did not stress upon it*". Mr Y says, but Mr Z disagrees, that, given that it was so pleaded, the Judge could take the point of his own motion if he so chose. But the question appears to have been one of informed tactics so far as Melinda's lawyers were concerned: there was a risk that raising a time-bar defence, in a case where Melinda had no capacity, might lead the court to conclude, by reason of Melinda raising that defence, that Melinda had capacity in the proceedings. I heard evidence from Mr Y that he had himself had previous experience

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as a lawyer in a case in which this had occurred. Mr Z did not accept that that was a risk, although I have no reason to doubt Mr Y's previous experience. But set against the risk that it might actually prejudice the defence that was being put forward was the risk, which Mr Y explained, and which Mr Z was not able to rule out, that it might have availed nothing, because of the ease with which it might have been possible in Egyptian law to oust the time-bar. This was because of the doctrine that notification of the claim, even by a communication that does not reach the other party, may be sufficient to oust the time-bar, and Mr Y could not rule out the possibility that the Claims Department had at some stage given such notification, of which Melinda's lawyers would have had no knowledge, to one or other of the Defendants in the SAFIR proceedings. Given Melinda's lawyers' confidence that the nullification proceedings would succeed on their own merits without it - entirely justified had the Egyptian proceedings proceeded as they ought to have done - I conclude that the course they took was entirely sensible. In the event, in the light of what has happened, Melinda has now taken the time-bar point on the appeal.

Once again I conclude that the course taken by Melinda's Egyptian lawyers was entirely competent, and satisfied **The Talisman** test: and that, in any event, any alternative course would have made no difference whatsoever to the outcome.

55. I am satisfied, whatever the test, that no criticism whatever can be made of the way in which Melinda and its lawyers handled this difficult and intractable situation.

Conclusion

56. I accordingly conclude that Hellenic has failed to establish any of the exclusions in Rule 3.6 or a breach of the obligation to sue and labour within Clause 3.15, whether having any consequence in respect of the loss, or at all, with the result that Melinda is entitled to recovery against Hellenic in the agreed sum of US\$ 19,200,000.