Neutral Citation Number: [2022] EWHC 2746 (Admlty)

Case No: AD-2020-000089

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
ADMIRALTY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 2/11/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

MSC MEDITERRANEAN SHIPPING COMPANY S.A.	**Claimant**
- and -	
(1) STOLT TANK CONTAINERS B.V.	**Defendants**
(2) STOLT NIELSEN USA INC.	
(3) CLAIMANTS IN ACTION CL-2017-000540 (except the first and second defendants above)	
(4) CONTI 11. CONTAINER SCHIFFAHRTS-GmbH & CO. KG MS "MSC FLAMINIA"	

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Julian Kenny KC and Michal Hain (instructed by **Mills & Co Solicitors Ltd**) for the **Claimant**
Christopher Smith KC and David Walsh (instructed by **HFW LLP**) for the **Fourth Defendant**
The **First to Third Defendants** did not appear and were not represented

Hearing dates: 10, 11, 12, 13 October 2022

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. On 12 April 2022, I handed down a judgment dealing with a number of issues in this Claim: [2022] EWHC 835 (Admlty). One of those issues was whether the fourth defendant, Conti, the registered owner of the container ship *MSC Flaminia*, had a viable defence under Article 4 of the Amended 1976 Convention to this limitation claim brought by the claimant time charterer, MSC. That is to say, did Conti have a proper basis for alleging that the loss it suffered, and in respect of which it has pursued MSC in arbitration, resulted from MSC's personal act or omission committed recklessly with knowledge that such loss would probably result, so that MSC could not have a right to limit under the Convention in respect of Conti's claim.

2. I concluded that Conti had no viable Article 4 defence, (a) because it had been finally determined in the arbitration, so as to bind Conti as against MSC, that MSC was not even negligent in respect of the events giving rise to Conti's loss, and (b) because in any event Conti had neither pleaded nor shown there to be a realistic prospect of pleading any arguable case that anything was done by MSC with knowledge that a casualty would probably result: see at [68] and [77]-[78].

3. I noted (at [13]-[14]) that Conti also defended the limitation claim on the basis that its claim against MSC does not fall within the scope of Article 2 of the Convention, with a trial of that defence listed for October 2022. This is my judgment following that trial. Parts of this Introduction repeat what I said in the equivalent section of my April judgment.

4. On 14 July 2012, *MSC Flaminia* was in the middle of the Atlantic Ocean *en route* from Charleston, South Carolina, to Antwerp when an explosion occurred in her no.4 cargo hold leading to a large fire on board. Three of her crew lost their lives: one was never found, the other two were grievously injured and died of their injuries shortly afterwards. Hundreds of containers were destroyed and extensive damage was caused to the ship. As the arbitrators in the reference between Conti and MSC have observed, this was on any view an horrific tragedy.

5. The explosion was caused by auto-polymerisation of the contents of one or more of three tank containers laden with 80% divinylbenzene ('DVB'). Those tank containers had been shipped at New Orleans on 1 July 2012.

6. In July 2012, *MSC Flaminia* was operating under a period time charter dated 3 November 2000 between MSC as charterer and Conti as owner.

7. The time charter provided for London arbitration. An arbitration was started by Conti in 2012 but it was actively prosecuted only much later, after the US proceedings to which I refer below had been commenced. There had been three awards by the time of my April judgment, namely:

    (i) A first award dated 8 February 2021 ('Award 1') dealing with clause 62 of the time charter. The arbitrators dismissed a claim by MSC that clause 62 provided an indemnity in its favour.

(ii) A second award dated 30 March 2021 ('Award 2') dealing finally with all other liability issues. MSC was held liable to Conti in respect of the casualty.

(iii) A third award dated 30 July 2021 and corrected on 1 September 2021 ('Award 3'), by which Conti was awarded damages of c.US$200 million on a quantification by the arbitrators of its recoverable losses.

8. There has now been a fourth award dated 8 June 2022 dealing with certain issues as to costs in the arbitration.

9. MSC sought to appeal against Award 1 pursuant to s.69 of the Arbitration Act 1996, but leave to appeal was refused, and so that Arbitration Claim was dismissed, by Order of Butcher J dated 19 April 2021.

10. By this Admiralty limitation claim, commenced by MSC by Claim Form dated 21 July 2020, MSC claims to limit its liability for claims arising out of the casualty pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims as amended by the Amending Protocol of 1996 and enacted under English law by the Merchant Shipping Act 1995 ('the Amended 1976 Convention'). The scope of the Amended 1976 Convention is stated in these terms by Article 15.1, namely:

"*This Convention shall apply whenever any person referred to in Article 1 [i.e. a shipowner or salvor, but where 'shipowner' includes charterer: see Article 1.2] seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State.*"

This case does not concern the release or discharge of property or security in this jurisdiction. So the pertinent scope of the Convention is MSC's claim to limit its liability before this court. The limitation claim does not concern claims in respect of loss of life or personal injury, although sadly there were fatalities as I have mentioned. The value of all fatality and personal injury claims in this case was within the separate limit provided for such claims under the Amended 1976 Convention.

11. Because of the extended meaning given to "*shipowner*" by Article 1.2 of the Amended 1976 Convention, I shall avoid that word and use 'owner' when I mean to refer to the owner of a ship as opposed to, for example, a charterer or operator. By Article 1.4, if a claim of a type that is limitable under Article 2 is brought against a person for whose act, neglect or default a "*shipowner*", as defined by Article 1.2, is responsible, that person is also entitled to avail themselves of tonnage limitation under the Convention. It will be convenient shorthand for considering some of the points that arise to refer to a "*shipowner*" or person for whose act, neglect or default a "*shipowner*" is responsible as an 'insider'; and to refer to any other person as an 'outsider'.

12. MSC claims a general limitation decree and such directions as may be necessary and proper for a limitation fund and the distribution thereof. A limitation fund has been established pursuant to an Order dated 5 October 2021 by way of a Letter of Undertaking from the Standard Club UK Ltd. The tonnage limitation amount is 25,318,000 SDRs (equivalent today to c.£28.2 million).

13. MSC has not named as defendants all parties that might have or might have had a claim against it arising out of the casualty, but only:

    (i) two Stolt companies (the first and second defendants, 'Stolt'), Stolt having been the road carrier of the DVB tank containers to New Orleans, and *vis-à-vis* MSC the shippers of those containers onto *MSC Flaminia*;

    (ii) the claimants (other than Stolt) in Claim No. CL-2017-000540 (collectively named as third defendant), a Commercial Court claim brought by cargo claimants whose bill of lading claims against MSC were subject to English law and jurisdiction. In that claim, Stolt appear to be the only effective claimants, as they are assignees of the bill of lading holders' claims against MSC pursuant to a settlement by Stolt of those bill of lading holders' claims against them; and

    (iii) Conti.

14. Other cargo claimants sued MSC, Conti, the New Orleans Terminal, Stolt and the DVB manufacturer, Deltech, in the US District Court for the Southern District of New York. Those proceedings were tried by US Federal District Judge Katherine B Forrest. In a Phase 1 Judgment dated 17 November 2017, Judge Forrest found that the auto-polymerisation that resulted in the explosion on board was caused by:

    (i) the decision to ship the DVB from New Orleans, which necessitated a longer voyage than a shipment from a port in the Northeastern US and exposed the DVB to undesirable conditions (essentially, warm ambient temperatures for a prolonged period);

    (ii) the fact that the DVB was left on the dock in New Orleans for 10 hot days in the sun, next to a number of tank containers of heated diphenylamine ('DPA');

    (iii) the stowage of the DVB tank containers in no.4 hold next to tank containers of heated DPA and near the ship's heated bunker tanks; and

    (iv) a lack of ventilation in no.4 hold leading to hotter than normal ambient hold temperatures.

15. Judge Forrest found in addition that the DVB was adequately oxygenated and chilled when it left Deltch and did not auto-ignite. Ignition, she found, came by a spark caused by the opening of an access hatch to no.4 hold during the laden voyage.

16. By her Phase II Judgment dated 10 September 2018, Judge Forrest concluded that all claims against *inter alia* Conti, MSC and the New Orleans Terminal failed. None of those, in Judge Forrest's opinion, was shown to have been at fault. By contrast, she held Deltech and Stolt to be at fault in various respects and liable as a result on various bases. She held further *inter alia* that MSC, and Conti as its sub-contractor, was entitled to a full indemnity from Stolt and Deltech in respect of the shipment of the dangerous DVB cargo; and that responsibility was to be apportioned *inter se* 55% to Deltech and 45% to Stolt.

17. As things stand, therefore, it would seem that Stolt would be obliged to indemnify MSC against any liability MSC might otherwise have in the cargo claim brought by Stolt as

assignee to which I referred in paragraph 13(ii) above. On that basis, Mr Kenny KC indicated that MSC will say that claim must fail for circuity of action. If that is right, it may be that Conti would be the only claimant against MSC's limitation fund, if its claim is subject to limitation under the Convention and if it chose to make a claim on the fund.

18. I said "as things stand" for the preceding paragraph because it is common ground that there is an appeal against the Phase II Judgment. I was told that the appeal argument was heard in May 2020, but judgment is still awaited.

19. Conti has defended MSC's limitation claim here on the merits, disputing that MSC has any limitation right under the Amended 1976 Convention in respect of Conti's recoverable losses, now quantified by Award 3, on the basis that either:

    (i) Conti's loss "*resulted from [MSC's] personal act or omission, committed … recklessly and with knowledge that such loss would probably result*" within the meaning of Article 4 of the Amended 1976 Convention, or

    (ii) Conti's claims do not fall within the scope of Article 2 of the Amended 1976 Convention.

20. I dismissed the Article 4 defence pursuant to my April judgment, and as I have said already this now is my judgment on the Article 2 defence following trial last month.

Common Ground and Issues

21. The parties agreed a List of Common Ground and Issues in Relation to Article 2 for the purpose of this trial, which I now set out in full (but with 'Owners' or 'the Owners' changed throughout to 'Conti', and 'Vessel' to 'ship', to match the rest of this judgment). I have interpolated some findings or observations of my own, <u>underlined</u>. References in later parts of this judgment to the 'Common Ground' (with capitals) will be to this statement of agreed facts.

QUOTE

1. Between around 1 July and 14 July 2012, one or more tanks of DVB suffered loss and damage whilst on board the ship. In particular:

    1.1. During this period, substantial auto-polymerisation of the DVB occurred, impairing both the quality and value of the DVB.

    1.2. The auto-polymerisation caused a build-up of heat and pressure inside the relevant tank or tanks.

    1.3. That resulted, on the morning of 14 July, in a venting or escape of the cargo from the tank, a process that caused part of the cargo to be lost.

2. The matters described in paragraph 1.1 and 1.2 above constituted *"damage to property"* for the purposes of Article 2(1)(a); the matters described in paragraph 1.3 above constituted *"loss of property"*.

3. The vented DVB in the atmosphere of hold 4 formed an aerosol – i.e. a suspension of droplets

– which was ignitable and, at around 8am that day, 14 July, the aerosol was accidentally ignited, causing an explosion in hold 4. Following the explosion, the crew abandoned the ship.

4. The explosion ignited a fire in the cargo, which then spread into the other cargo stowed in and over holds 3-7. That fire continued to burn until around 20 July. The explosion and subsequent fire burned, destroyed, damaged or contaminated the majority of the cargo stowed in and over holds 4, 5 and 6 as well as a number of containers in or over other holds (and this burning, destruction, damage and contamination was "*damage to property*" for the purposes of Article 2(1)(a)).

5. In addition, the explosion and subsequent fire caused damage to the ship, principally causing damage to the ship's structure – i.e. shell plating, bulkheads, cargo hatches, fittings – surrounding holds 4, 5 and 6.

6. Conti engaged salvors, Smit Salvage BV ("Smit"), to bring the fire in the cargo under control and salvage the ship and her cargo. Smit arrived at the ship on 17 July and then brought the fire in the cargo under control by spraying seawater into it (one result of which was that around 30,000mt of firefighting water remained in the ship's holds after the fire was brought under control). Smit subsequently towed the ship first to a position off the south coast of Britain and then to Wilhelmshaven.

7. Conti made a claim against MSC for Conti's pro rata share (as owner of the ship) of the cost of engaging Smit, which was approximately €935,000, and succeeded in that claim in arbitration. (The total salvage award was for US$21 million, of which the largest part was paid by the owners of the sound cargo. MSC also paid a share of the award, in its capacity as the owner of the container shells and of the bunkers on board.)

8. As a result of the casualty, the ship could not complete her voyage. It was necessary to arrange her passage to a port of refuge, which, in the event, was Wilhelmshaven. Indeed, Wilhelmshaven was the only available port of refuge.

    8.1. There is a dispute about exactly how the casualty affected the ship's ability to complete the voyage. MSC's case is that the ship's inability to complete her voyage was both because of (i) the damage to the cargo and (ii) the damage to the structure of the ship caused by the fire in the cargo. Conti's case is that the ship was unable to complete her voyage because of the damage to the structure of the ship caused by the fire in the cargo and that the damage to the cargo was not, as such, causative of the inability.

    8.2. The damage to and loss of cargo constituted by auto-polymerisation and venting that led to the explosion (see paragraph 2 above) was a cause of the ship's inability to complete the voyage, of course, so in that sense cargo damage and loss resulted in that inability. However, that is not the point raised here, which concerns why the ship could not complete her original voyage.

    8.3. On that, it seems very artificial, given the nature of the cargo explosion and fire, to posit the cargo being damaged as severely as it was without the ship being as damaged as she was, but if it matters my conclusion and finding on the evidence is that: on the one hand it was only the (extent of the) damage to the ship that meant she could not complete her voyage; on the other hand, even if the ship had been undamaged or much less damaged, diversion to Wilhelmshaven to deal with wrecked or badly damaged cargo, and the by-products of the firefighting effort, rather than

direct progress to Antwerp, would surely have been required.

9. The ship's passage involved making payments to public authorities in Belgium, France, the UK and Germany.

10. Conti made claims against MSC in respect of the sums paid, totalling (in €) approximately €1.9 million, and succeeded in those claims in arbitration.

11. Because the ship was unable to complete her voyage, Conti arranged to discharge her cargo at Wilhelmshaven. The salvageable cargo then had to be decontaminated and either transhipped or released directly to cargo interests. (The cargo on board the ship was all carried under bills of lading or sea waybills issued by MSC as carrier.) The unsalvageable cargo, and the salvageable but unclaimed cargo, had to be destroyed.

12. The ship arrived at Wilhelmshaven on 9 September 2012, where she berthed at the Jade Weser Port ("JWP") terminal. Shortly afterwards, Conti engaged the operators of the terminal, Eurogate CTW ("Eurogate"), and a local waste management company, Nehlsen GmbH & Co. KG ("Nehlsen"), to discharge and decontaminate the undamaged and salvageable cargo and destroy the unsalvageable cargo.

13. The discharging was completed on 18 December 2012. Onshore, the processes of decontaminating cargo, releasing the sound cargo and destroying unsound cargo continued during 2013 and even after that.

14. Conti made claims against MSC in respect of the costs of the discharge of the ship, the decontamination of the cargo ashore, the handling and release of the salvageable cargo and the destruction of unsalvageable or unclaimed cargo. Those claims comprise:

    14.1. Berth dues, quayside space rental and services charges paid to JWP and Eurogate, totalling approximately €18.3 million.

    14.2. Cargo handling and disposal costs, totalling approximately €9.2 million.

    14.3. Customs agents' fees, totalling €210,000.

    14.4. Disbursements and bunkers supplies, totalling (in €) approximately €4.2million.

    14.5. Fire experts' fees, totalling approximately €880,000.

    14.6. Additional services and miscellaneous expenses, totalling approximately €6.1million.

14A. There are three comments to add on that:

(i) by a pleading amendment in June 2022, Conti averred that some 47 invoices included by MSC here should not have been, because they were not invoices for cargo handling operations, so that MSC had over-stated the cargo handling costs within Conti's claim by c.US$2.2 million. Mr Kenny KC confirmed at trial that MSC agrees. The statement of common ground in paragraph 14 above must be treated as qualified by that;

(ii) by a draft re-amendment to that amended plea, put forward during the trial to reflect observations by Mr Smith KC in opening, Conti sought to make the same averment in relation to a large number of other items included here by MSC. Mr Kenny KC confirmed

that MSC is not seeking to have matters dealt with on a false factual basis, and would not object, without more, on the basis that this point had arisen only at trial. I shall either grant permission to re-amend or deal with any objection arising on the detail, as may be required, as part of the Order to be made following the handing down of this judgment;

(iii) in any event, the sense in which it is common ground that Conti made "*claims against MSC in respect of*" cargo handling costs is that Conti claimed that their amount should be included in any arbitration award in their favour. The use of the phrase "*claims … in respect of*" in the statement of common ground must not be taken to beg the question of claim characterisation whether Conti made a claim of a type covered by Article 2.1 of the Amended 1976 Convention, which uses the same language ("*Claims in respect of …*"). In case that might have been in doubt, Mr Kenny KC helpfully confirmed the position in his skeleton argument for trial – on this aspect, the statement of common ground was no more than confirmation that the costs in question were, as a matter of fact, costs invoiced to and paid by Conti for cargo handling activities of the kinds mentioned.

15. Conti succeeded in these claims in arbitration.

16. Smit brought the fire in the cargo under control by spraying it with seawater. One result was that around 30,000mt of firefighting water was left in the ship's holds after the fire was brought under control. That water was contaminated with dangerous and toxic residues of the cargo and of the fire. Consequently, Conti was under an obligation under German and EU law to ensure that the firefighting water was disposed of lawfully, meaning, specifically, in an environmentally sustainable way without causing pollution.

17. While the ship was at Wilhelmshaven, on around 15 November 2012, Conti engaged Hydro Industries Limited ("Hydro") to decontaminate and remove the firefighting water from the ship's holds. Around the end of November 2012, Hydro installed equipment on board the ship. However, over the following weeks, it became apparent that Hydro were unable to decontaminate the water effectively. Conti terminated their contract with Hydro on 15 February 2013.

18. The same day, 15 February, Conti engaged Nordgroup a/s ("Nord") to remove the pumpable firefighting water from the ship and incinerate it. On 18 February, Nord started to remove the firefighting water and by 28 February, they had removed about 30,000mt of it into barges. The water was then taken to Denmark and destroyed.

19. Conti made claims against MSC in respect of the removal of the firefighting water totalling approximately €7.1 million, covering the payments made to Hydro and Nord and related costs. Conti succeeded in these claims in arbitration.

20. After the discharge of the majority of the firefighting water, there remained on the ship approximately 30,500mt of waste material, consisting of approximately:

    20.1. 14,800mt of fire-damaged solid cargo, i.e. the contents of the containers.

    20.2. 7,800mt of contaminated water, consisting principally of firefighting water, but mixed with some contaminated ballast water and rainwater.

    20.3. 5,400mt of steel scrap, the majority of which was damaged cargo containers, the rest

fire-damaged structural steel from the ship.

20.4. 2,500mt of mud or sludge, consisting principally of a mixture of small particles of burned cargo and water.

21. Accordingly:

21.1. The majority of the waste consisted of cargo or cargo containers damaged by the fire and explosion.

21.2. The majority of the water was the remnants of firefighting water, whilst the rest of the water was ballast water contaminated by fire-damaged cargo.

21.3. The remainder of waste was the ship's structural steel damaged by the fire in the cargo.

22. All of the waste contained or was contaminated by dangerous and toxic residues of the cargo and of the fire and the repairs could not be carried out whilst the waste remained on board. In the circumstances, Conti was under an obligation under German and EU law to ensure that it was disposed of lawfully, i.e. without causing pollution.

23. Conti arranged for the waste to be removed by Daewoo Mangalia Heavy Industries SA ("DMHI") at facilities arranged by DMHI in Romania. To that end:

23.1. From around 22 October 2012, Conti negotiated a contract with DMHI for the removal of the waste. That contract was ultimately signed on 19 February 2013.

23.2. Conti provided the required notification to NGS – the relevant German environmental authority – of their intention to move the waste on board the ship from Germany to Romania, thereby also obtaining consent for the movement from the Romanian environmental authority, NEPA. The process of producing and submitting that notification took a number of months, starting from around the beginning of December 2012. NEPA finally issued its consent for the movement on 15 March 2013.

24. The ship then left the same day, 15 March, and arrived off Constanta, Romania, on 30 March. By this time, DMHI had arranged for the waste to be discharged at a quay belonging to UMEX SA, a Romanian port operator.

25. When she arrived, the Romanian authorities barred the ship from proceeding to berth. As a result, she did not berth at UMEX's quay until 17 May. Discharge of the waste then did not begin until 27 July. From that date, discharge of the scrap steel started (but no other discharge was allowed). The discharging of scrap steel continued slowly thereafter.

26. In September 2013, DMHI was still discharging slowly and Conti started to look for alternative contractors to remove the waste on board the ship, obtaining quotations from, amongst others, Nord. On 16 October 2013, Conti instructed DMHI to stop discharging the ship immediately; on 18 October 2013, they signed a letter of intent with Nord; and on 8

November, Conti signed a contract with Nord for the removal and disposal of the waste and the ship sailed from Romania for Denmark.

27. Whilst the ship had been in Romania, DMHI had removed a total of 2,155mt of waste, all of it steel scrap.

28. On 22 November 2013, the ship arrived at Aarhus, Denmark, where she discharged approximately 6,800mt of waste. On 28 November, she moved on to Odense, arriving there on 30 November. At Odense, the remaining waste on board was removed. The work was completed on 1 February 2014.

29. Whilst the ship was in Denmark, Nord removed a total of approximately 28,400mt of waste comprising approximately 14,800mt of fire-damaged cargo, 3,200mt of steel scrap (comprising both cargo containers and structural steel from the ship), 7,800mt of contaminated water and 2,600mt of mud and sludge.

30. Conti made claims against MSC in respect of the costs of and associated with removing the waste from the ship, totalling (in €) approximately €24.8 million, comprising:

    30.1. Approximately US$7 million paid to DMHI for waste removal services.

    30.2. Other cargo handling and disposal services at Constanta, totalling €180,000.

    30.3. The ship's disbursements in Romania (which total about €1 million) insofar as they relate to 2013.

    30.4. Fees for transiting the Bosporus, totalling about US$535,000.

    30.5. Costs for disposing of waste in Denmark, totalling approximately €17 million.

    30.6. Additional costs incurred in Denmark of approximately DKK 35 million.

31. Conti succeeded in those claims in arbitration.

32. The explosion and cargo fire damaged the ship. As a result, Conti entered into a contract with DMHI for the removal of waste and repair of the ship on around 19 February 2013. After the waste removal operation was completed at Odense, on 3 February 2014, the ship left Odense for Mangalia. On 17 February 2014, she arrived at Mangalia, where she then underwent repairs. The repairs were completed on 12 July 2014 and sea trials were completed two days later.

33. Conti made claims against MSC in respect of the costs of repairing the ship, comprising:

    33.1. DMHI's charge for the repair, which was approximately US$21 million.

    33.2. The ship's disbursements in Romania.

34. Conti largely succeeded in those claims in arbitration.

35. Conti incurred various miscellaneous costs, which they claimed from MSC in the arbitration:

35.1. Crew expenses, totalling around €810,000.

35.2. Surveyor and expert expenses, totalling (in €) around €6.7 million.

35.3. Legal expenses totalling (in €) around €13.9 million, in particular in relation to proceedings: (i) in the US District Court for the Southern District of New York; (ii) in London arbitration; and (iii) in proceedings brought by Conti against the State of Lower Saxony.

35.4. Professional fees in relation to general average totalling (in €) around €400,000.

35.5. Insurance-related expenses and additional premia of approximately €1.2 million.

35.6. Loss of hire of up to around €9.3 million and US$11.3 million (insofar as it was held that the ship was off-hire at any stage).

36. Conti succeeded in those claims though, so far as the claim for loss of hire is concerned, it was held by the Tribunal that the ship was not off-hire at any stage. Accordingly, hire was awarded to Conti as a debt. MSC do not contend that this claim falls within Article 2(1)(a) and have now paid these sums, together with associated interest, to Conti.

I should add in relation to these miscellaneous costs that Conti said some line items were incorrectly included here by MSC as they related to fatality claims brought in respect of the loss of the three crewmembers who died. Mr Kenny QC in opening accepted the validity of the point, but the Common Ground was not updated as to the amounts involved.

Principal Matters in Dispute

1. What (if any) was the alleged impairment of the quality and value of the DVB between 1st and 14th July 2012?

2. Did the explosion and the subsequent fire in the cargo both constitute "*damage to property*" for the purposes of Article 2(1)(a)?

Meaning and application of Article 2(1)(a)

3. In Article 2(1)(a), does the phrase *"consequential loss"* refer only to loss suffered by a party claiming in respect of loss of or damage to property which is consequential on that loss of or damage to property?

4. What kind of causal connection is required by that phrase?

5. Where losses caused by damage to the cargo are (or are also) losses which Conti was required to incur in order to repair the ship, does it follow that (i) Conti's claims in respect of those losses are to be characterised as claims in respect of damage to the ship or consequential losses resulting from such damage and if so, (ii) does it follow that those claims cannot be limited under Article 2(1)(a)?

6. Does the fact that the damage to the ship and the losses that are set out at (a)-(g) below were consequences of the loss of and damage to cargo identified in paragraph 1 of the Common Ground and of the fire and explosion referred to in paragraphs 3 and 4 mean that those losses are "consequential" on the loss of and damage to any part of the cargo for the purposes of Article 2(1)(a)?

(a) The costs of engaging Smit to provide salvage services set out at paragraph 7 of the Common Ground;
(b) The sums paid to the relevant authorities identified in paragraph 10 of the Common Ground;
(c) the discharging, decontamination, handling and other costs set out in paragraph 14 of the Common Ground;
(d) the costs of removing the firefighting water at Wilhelmshaven set out in paragraph 19 of the Common Ground;
(e) the costs related to removing waste from the ship set out in paragraph 30 of the Common Ground;
(f) the costs relating to the ship repairs set out in paragraph 33 of the Common Ground;
(g) the miscellaneous costs set out in paragraph 35 of the Common Ground (i.e. survey costs, legal expenses, etc).

Meaning and application of Articles 2(1)(e) and (f)

7. For the purposes of Article 2(1)(e), are the claims identified in paragraphs 14, 19 and 30 of the Common Ground limitable as claims "*in respect of the removal, destruction or the rendering harmless of the cargo of the ship*"? Alternatively, are they limitable to the extent that the relevant costs related to the removal or destruction of cargo waste, burned or unburned? Or insofar as Conti are correct that these are (or are also) costs which they were required to incur in order to repair the ship, are Conti's claims for these losses to be characterised as claims in respect of damage to the ship or for consequential losses resulting from such damage, and if so, does it follow that those claims cannot be limited under Article 2(1)(e)?

8. Are the claims identified in paragraphs 7 and 10 of the Common Ground related to the work of Smit and payments to public authorities limitable under Article 2(1)(f) because the *"person liable"* is MSC and MSC is entitled to limit its liability under Article 2(1)(a)?

9. Are the claims identified in paragraph 19 of the Common Ground related to the removal of the firefighting water limitable under Article 2(1)(f) because they constitute "*further loss*" caused by measures that Conti took to avert or minimise loss to the cargo in respect of which MSC would be entitled to limit its liability?

UNQUOTE

22. Paragraphs 31 to 82 of Conti's skeleton argument for trial set out a more detailed statement of the facts summarised in the Common Ground. Mr Kenny KC confirmed in opening that save in one small respect (possibly immaterial, he said), MSC accepted that more detailed statement of facts as accurate. I have therefore set out those paragraphs of Conti's skeleton (stripped of matters of commentary rather than fact) as an Appendix to this judgment, and I have had regard to that fuller description of the facts in considering the points of argument that arise. In my judgment, the one disputed point is indeed immaterial, as Mr Kenny KC suggested it might be; but for completeness my conclusion on it is included in the Appendix (shown <u>underlined</u>).

Key Findings

23. Mr Kenny KC's submission for MSC was that the Common Ground provides a sufficient basis for the determination of all the issues that arise concerning the

applicability, if any, of tonnage limitation under the Amended 1976 Convention to Conti's claim against MSC as pursued and established in the arbitration. Mr Smith KC for Conti suggested that it might be necessary or helpful to take account of additional matters of fact.

24. To distil what Conti suggests are the most important aspects of the facts for present purposes, Mr Smith KC provided with his oral argument a document setting out the 'Key Findings of Fact' that Conti invited me to make and bear in mind. The document was referenced to sources in the evidence. Mr Kenny KC submitted in reply that while MSC did not challenge what was stated in any of the referenced evidence, some of the propositions formulated in the document involved 'spin' that went beyond the evidence and should not be accepted.

25. A revised version of Mr Smith KC's document was agreed between the parties following the hearing, for which I am grateful. As revised, the factual content was substantially agreed, but certain conclusions or further findings proposed by Conti and disputed by MSC remained, identified as such to assist me. Although it involves some measure of repetition of the Common Ground above or the Appendix below, to complete the factual basis of this judgment I now set out the content of that revised 'Key Findings of Fact' document, identifying the contentious points and stating my conclusions on them:

(i) As a result of the casualty, the ship could not complete her voyage.

(ii) Even before the ship arrived at Wilhelmshaven, Conti had intended to repair her and this intention continued throughout her time in Germany.

(iii) Conti wanted to get the ship back into service as quickly as possible.

(iv) As early as 7 September 2012, Conti was seeking advice on how best to prepare the ship to go to a repair yard. The Emergency Response Service ('ERS') of Germanischer Lloyd ('GL') proposed removing all firefighting water and all intact and damaged containers, save for cargo scrap in holds 4 to 6.

(v) At early meetings at Wilhelmshaven, there was discussion about how to determine what was in the ballast/firefighting water and what needed to happen to dispose of it. From Conti's point of view, it was difficult to assess what remained on board because there was an homogenous mixture of debris, cargo residue and firefighting water, the exact composition of which was difficult to describe or define with any certainty.

(vi) On 24 October 2012, GL issued ERS 27a and ERS 28. ERS 27a/28 explicitly advised that discharging the damaged containers in order to place other counterweights was to be avoided. The effect of this advice was that the remaining waste in hold nos.4-6 had to be discharged at the repair location.

Conti invited the conclusion and further finding that consideration of what might be removed at Wilhelmshaven was being driven by what needed to be done to put the ship in a fit state to go to a repair yard. I agree with that conclusion and make that finding. To be clear, however, this does not concern cargo, it concerns what was to be done with other materials on board. As regards cargo, the voyage

on which the casualty occurred was abandoned. How much more I can say about that is something to which I shall return. Come what may, the abandonment of the voyage meant that all cargo still identifiable as such was to be, and was, discharged at Wilhelmshaven.

(vii) Following a meeting on 24 September, Mr Johansson (at the time, a Senior Advisor at the Swedish Club, dealing with major casualties and the resulting insurance claims) told a group including Mr Scales's colleague Mr Bowles (Messrs Scales and Bowles being from Brookes Bell, retained as consultants by MSC) that there was a real possibility of Conti deciding to walk away. The factual evidence for trial, in addition to agreed facts, consisted of witness evidence from Messrs Scales and Johansson, and from Mr Steingröver, mentioned below, none of which was challenged. There was very brief cross-examination of Messrs Scales and Johansson on the first day of the trial (in the case of Mr Scales, by video link because he was still isolating after testing positive for Covid-19 the previous week), to clarify a few aspects of their written evidence or to draw out some additional points.

(viii) Ahlers & Vogel (acting for Conti) sent a letter on 3 December saying that the ship would be abandoned if the German authorities maintained their position that the ship was waste. This was designed to put pressure on the authorities to reverse their decision classifying it as such. In the letter dated 3 December 2012, Mr Steingröver (of Ahlers & Vogel) criticised the German Authorities' position and referred to the possibility that the Owners would limit their liability for the vessel, withdraw all cooperation with the authorities and leave it to others to deal with the situation.

(ix) Once at Wilhelmshaven, in late October 2012, all of the discussions with German authorities were predicated on the understanding that the ship was going to be repaired.

(x) The attitude of the German authorities made it likely that the waste discharge and disposal would need to be completed in an EU country. Conti negotiated terms with the Romanian yard for the waste on board to be discharged as part of the repair process. It was expected that the "sound" and "easy to discharge" damaged containers would have been discharged by mid-December 2021, after which Conti's intention was to take the ship to Romania and have the remaining cargo residues and container scrap discharged there.

(xi) In around October 2012, Conti considered water disposal proposals from Nehlsen, Zublin and Ascalia, and GL provided advice on how the weight in the ship should be distributed. GL were assessing how much water and how much waste should remain on board to ensure stability, taking into account available drafts at the repair yard. Initially GL recommended that a substantial part of the water should remain on board, but a certain amount needed to be discharged to reduce the ship's draft. Conti followed GL's advice.

(xii) This advice from GL fitted with the Hydro 'concept' of treating the water during the voyage to the repair yard and pumping it over the side.

(xiii) In November 2012, Conti was hoping that subject to successful treatment of the firefighting water the ship would be able to leave for the Romanian repair yard by mid-December.

Conti invited the conclusion and further finding that, either way, the time spent at Wilhelmshaven was dictated by what did or did not need to come off the ship to permit a voyage for repairs. I am not certain what that proposed further finding means or involves. There was a need to discharge all cargo, since the original voyage was abandoned, and I have made the finding that, cargo aside, decisions on what was or was not taken off the ship at Wilhelmshaven were driven by what was required to get her safely to the repair yard. If the intent was that I reach conclusions and make findings about how cargo operations and preparations for a voyage for repairs impacted on the length of time ultimately spent at Wilhelmshaven, I do not consider that I am in any position to do so; and nor was any case of that kind presented at trial.

(xiv) Between September and November 2012, the relevant German body coordinating operations was the Havariekommando, which is a joint institution of the Federal Government and Coastal States. There were other marine and other authorities involved including the NMU (the Lower Saxony Ministry of the Environment), NGS (the Lower Saxony Corporation for the Disposal of Special Waste) and GAA Oldenburg, which was involved in all aspects of waste handling.

(xv) No one from the Lower Saxony authorities was saying that Conti had to discharge the waste in Germany. Insofar as it was discharged in Germany, they gave directions as to how it was disposed of. At a meeting on 18 September, the German authorities required further samples, testing and a proposal for disposal of the contaminated water.

Conti invited the further finding that the Lower Saxony authorities' concern was with how the waste was disposed of if it was discharged, i.e. that the concern was about disposing of what was discharged, not about what would or would not be discharged in Germany. I consider that further finding is justified by the evidence and is correct.

(xvi) By 16th October 2012, a contract for the disposal of the fire-fighting water had still not been concluded, and there were still unexplained delays in obtaining analysis results from the fire-fighting water samples and the purification plants. In addition, the Labour Inspectorate was still not content with the safety measures proposed for the opening of damaged containers known to contain dangerous contents. Conti was being told by the Havariekommando that it had to produce a proposal for disposing of the water.

Conti invited further findings that: it wanted to discharge the water, but no one was telling it that it had to do so or when; what it was being told was that if it was discharged, that had to be done in an appropriate manner. Again, I consider that those further findings are made good by the evidence relied on.

(xvii) The contract to remove remaining firefighting water was signed on 14 November 2012, with Hydro mobilising to site on 23 November 2012.

Conti asked me to find, further, that all of this occurred without any suggestion that as a matter of German or EU law the firefighting water had to be removed prior to repairs. It was common ground that the firefighting water would have to be removed (and therefore disposed of safely) in order to repair the ship. Obviously, therefore, if it had not been removed previously, it would have needed to be removed during or in preparation for ship repairs. The further finding justified by the (lack of) evidence is that there is no evidence as to whether anything was said to Conti about whether it had to be removed prior to and independently of a repair process, in circumstances where the ship was to be repaired.

(xviii) Discharge was temporarily stopped after "the Environmental Agency" (as Mr Scales called it in his evidence) declared the ship as waste on 5 December 2012. What Mr Scales said on this point appeared to relate either to the letter from the NMU of 30 November 2012 or to the subsequent order of the GAA, the latter requiring all the waste on board to be the subject of a waste notification made to the NGS, or possibly both.

(xix) The notification procedure which was required as a result of the decision of the German authorities at the beginning of December related to the waste and firefighting water on board.

(xx) After completion of the discharge of sound and damaged containers the waste on board was partly derived from the ship and partly the cargo; it was contaminated by toxic residues of the cargo and of the fire. The firefighting water was contaminated with zinc, copper and chrome and it was this metal content that was particularly problematic.

(xxi) The GL ERS continued to give advice up to 4 March 2013.

That advice continued, therefore (I add), even after all firefighting water had been removed; it continued to involve trim and stability calculations driven by conditions and requirements at the repair yard.

Discussion – General

26. A right to limit aggregate liability in relation to claims arising out of the operation of ships was first given in the United Kingdom to owners, but not to charterers, in 1733. The limit was then based on the value of the ship and freight. In 1862 it became tonnage limitation, that is to say the limitation amount was changed so as to be calculated on the registered tonnage of the ship (£8.00 per registered ton for loss of or damage to goods; £15.00 per ton for loss of life or personal injury). The existing legislation was amended and consolidated in ss.502 and 503 of the Merchant Shipping Act 1894. The right to limit in this jurisdiction was extended to bareboat charterers by s.71 of the Merchant Shipping Act 1906, which provided that "*Sections five hundred and two to five hundred and nine of the principal Act [i.e. the 1894 Act] shall be read so that the word "owner" shall be deemed to include any charterer to whom the ship is demised*".

27. The first International Convention on limitation was agreed in 1924. It provided for a tonnage limitation regime for owners, but also provided (at Article 10) that "*Where a person who operates the vessel without owning it or the principal charterer is liable*

under one of the heads enumerated in article 1, the provisions of this convention are applicable to him".

28. The United Kingdom signed but did not enact the 1924 Convention. It never became part of English law. A new Limitation Convention was signed in Brussels in 1957. The provision permitting charterers to limit was Article 6(2):

"*Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the master and members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself: Provided that the total limits of liability of the owner and all such other persons in respect of personal claims and property claims arising on a distinct occasion shall not exceed the amounts determined in accordance with Article 3 of this Convention.*"

29. The United Kingdom did not incorporate the 1957 Convention into domestic law. Instead, the provisions of the 1894 Act were amended by the Merchant Shipping (Liability of Shipowners and Others) Act 1958, s.3 of which provided as follows:

"***Extension to other persons of provisions applying to shipowners***
(1) The persons whose liability in connection with a ship is excluded or limited by Part VIII of the Merchant Shipping Act, 1894, shall include any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship.
(2) In relation to a claim arising from the act or omission of any person in his capacity as master or member of the crew or (otherwise than in that capacity) in the course of his employment as a servant of the owners or of any such person as is mentioned in subsection (1) of this section –
(a) the persons whose liability is excluded or limited as aforesaid shall also include the master, member of the crew or servant, and, in a case where the master or member of the crew is the servant of a person whose liability would not be excluded or limited apart from this paragraph, the person whose servant he is; and
(b) the liability of the master, member of the crew or servant himself shall be excluded or limited as aforesaid notwithstanding his actual fault or privity in that capacity, except in the cases mentioned in [s.502(ii) of the 1894 Act]."

30. The 1976 Convention was adopted to update the 1957 Convention. It introduced an increased limitation amount, a more restricted ability to break limits, and the extension of the right to limit to salvors not working on board a ship (to resolve the issue raised in *The Tojo Maru* [1971] 1 Lloyd's Rep 341, where a salvor had been unable to limit liability on a claim by the salved ship for damage allegedly caused by the negligence of one of the salvors' divers). There is nothing in the language of the 1976 Convention, or in the *travaux préparatoires*, suggesting that the 1976 Convention was intended to alter the circumstances in which a charterer could limit.

31. The 1976 Convention was given the force of law in the United Kingdom by the Merchant Shipping Act 1979, the relevant provisions of which were later replaced by the Merchant Shipping Act 1995. It was amended in 1996 (and again in 2015).

32. The main issues that require determination so as to decide whether MSC's liability to Conti, as established in the arbitration, or any part of it, is subject to limitation under the Amended 1976 Convention, are all issues of construction of Article 2.1. It was common ground that the proper construction of the Amended 1976 Convention is to be ascertained in accordance with the Vienna Convention on the Law of Treaties 1969.

The general rule of interpretation laid down by Article 31.1 of the Vienna Convention is that:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

33. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including any *travaux préparatoires*,

> "*to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
>
> *(b) leads to a result which is manifestly absurd or unreasonable.*"

34. As the Court of Appeal noted in *The CMA Djakarta* [2004] EWCA Civ 114, [2004] 1 Lloyd's Rep 460, "*the interpretation of international conventions must not be controlled by domestic principles but by reference to broad and generally acceptable principles of construction*" (*per* Longmore LJ at [9], citing *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, *per* Lord Macmillan at 350, and other cases in the House of Lords).

35. Article 2.1 of the Amended 1976 Convention provides that "*Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability*"; and that wording introduces sub-paragraphs (a) to (f). Articles 2.1(a) to 2.1(e) thus extend limitation of liability under the Convention to "*Claims in respect of*" the stated matters. The 1976 Convention has four authentic texts, English, French, Spanish and Russian. For "*Claims in respect of*", the French, Spanish and Russian authentic texts are "*créances pour*", "*reclamaciones relacionadas con*", and "требования в отношении". Article 2.1(f) provides that limitation of liability under the Convention applies to "*Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with the Convention, and further loss caused by such measures*". When considering MSC's reliance on Article 2.1(f), it will be "*the person liable*".

36. Article 2.1(d) is not part of the Amended 1976 Convention, as I have defined that term, since I have defined it to mean the 1976 Convention as amended by the Amending Protocol of 1996 and enacted under English law by the Merchant Shipping Act 1995. On its own terms, the 1976 Convention allowed for derogation from Article 2.1(d). Paragraph 3 of Part II of Schedule 7 to the 1995 Act does derogate, in that it provides that Article 2.1(d) shall not apply unless a fund has been established to benefit harbour or conservancy authorities with claims falling within Article 2.1(d), and no such fund has been established.

37. The fact that Article 2.1(d) is not part of English law cannot sensibly affect the meaning of the other sub-paragraphs of Article 2.1 as they apply here. The full text of Article 2.1, including all of sub-paragraphs (a) to (e), is the immediate context in which any

one of those sub-paragraphs falls to be construed. I shall therefore set out Articles 2.1(a) to (e) in full.

38. With that introduction, then, Article 2.1(a) to (e), as supplemented by Article 2.1(f) but subject to Articles 3 and 4, provide that limitation of liability under the Convention applies to:

"*(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;*

(b) Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;

(d) Claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;

(e) Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;"

39. Article 2.2 provides that: "*Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraph 1 (d), (e) or (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.*"

40. The Convention does not define what it means by a claim brought "*by way of recourse or for indemnity*", and that language could mean a number of things, so it is legitimate to look to the *travaux préparatoires* for assistance. They state the view that Article 2.2 might be unnecessary, "*but it was felt that it should be expressly stated that a limitable claim does not change its nature when brought as a "recourse claim".*" The example given to illustrate was where an insider and an outsider are both liable to a claimant and the outsider satisfies the claim in full (having no right to limit). The outsider's claim against the insider for contribution as a joint tortfeasor, it was said, should be subject to limitation, just as the claimant's claim would have been if pursued against the insider. The *travaux* also note that in the English Convention text "*recourse*" was preferred to "*contribution*" to avoid confusion with contribution in general average.

41. I do not think the intention of the example given in the *travaux* was to suggest that the recourse claimant has to be an outsider for Article 2.2 to apply. The most obvious situation for a recourse claim is where both owner and charterer would be liable on a cargo claim, one of them meets the claim, and there is a claim over against the other. The argument on both sides in this case took it as correct that in such a case, the recourse claim is within Article 2.2 and is limitable or not, as the case may be, by reference to the nature of the original claim.

42. There may be a question whether Article 2.2 refers *only* to claims by a claimant (insider or outsider) against a defendant (necessarily an insider, else Article 2 would not be being considered at all), where the claimant and the defendant were both liable to a third party and the claim by the third party against the defendant would have been limitable. It will not be necessary to take a view on that question on this occasion, although it might be relevant to one of several doubts I have about aspects of what Thomas J said, *obiter*, in *The Aegean Sea* [1998] 2 Lloyd's Rep 39. The Court of Appeal in *The CMA Djakarta*, *supra*, decided that a claim by an owner against a charterer in respect of the owner's liability on a cargo claim is limitable under Article 2.1(a), and referred to such a claim as a 'recourse claim', without reference to whether the charterer would (also) have been liable to the cargo claimant or whether the 'recourse claim' was limitable via Article 2.2 or by direct application of Article 2.1(a).

43. It is convenient at this point to mention one argument put to Thomas J in *The Aegean Sea*, *supra*. In that case, a voyage charterer claimed to limit its liability under the 1976 Convention in respect of a damages claim by the owner alleging that La Coruña, the discharge port ordered under the voyage charter, was unsafe for the ship and that the unsafety caused her to suffer a major casualty leading the owner to suffer loss and damage of various kinds. The judge held that the charterer could not limit at all in respect of a claim of that type by the owner. He went on to consider, *obiter*, which of the elements of the owner's claim might have been subject to limitation under Article 2.1 if he was wrong to say that the claim fell outside its scope altogether.

44. In that latter part of his judgment, Thomas J concluded that:

(i) the loss of the ship was not loss of property on board within Article 2.1(a);

(ii) the loss of bunkers from the ship, by contrast, *was* a loss of property on board;

(iii) the loss of freight, if it was not earned, was a loss consequent upon the loss of the ship and therefore not within Article 2.1(a), and a claim for damages for that loss was a claim for the infringement of contractual rights, so as not to be within Article 2.1(c), whatever might be meant in that sub-paragraph by "*loss resulting from infringement of rights*". I doubt that Article 2.1(c) was relevant at all; and I prefer the conclusion that a claim for damages for a loss of freight would have been a claim for consequential loss resulting from the loss of the ship and therefore not limitable;

(iv) pollution claims made by the owner would have been within Article 2.1(a) and/or 2.1(c), and I shall come back to that later;

(v) finally, as regards damages to compensate the owner for what it had paid salvors:

(a) to the extent the owner had paid its own share of salvage entitlements, that went with the loss of the ship and was not within Article 2.1(a), and if it might be a loss from infringement of rights within the meaning of Article 2.1(c), that would be contractual rights so as to be excepted from limitation under that sub-paragraph. Again, as in (iii) above, with respect I do not think reference to Article 2.1(c) was called for;

(b) to the extent the damages would compensate for the owner having met a liability to cargo interests to compensate them for their share of salvage entitlements, that loss "*can properly be characterized as a consequential loss resulting from the loss of the cargo*" so as to fall within Article 2.1(a) (*ibid* at 55 lhc).

45. The argument put to Thomas J, to which I referred in paragraph 43 above, concerned the last of those conclusions. The owner argued that a damages award to compensate it for meeting a liability to compensate cargo interests for their share of salvage would be excluded from limitation under the Convention by Article 3(a), which provided that: "*The rules of the convention shall not apply to: (a) claims for salvage or contribution in general average.*" (As amended by the 1996 Protocol, that now reads "*… claims for salvage, including, if applicable, any claim for special compensation under article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average.*" Nothing turns on that change of wording.)

46. Thomas J considered, and I respectfully agree, that Article 3(a) "*only excludes claims against the shipowner for his contribution in general average and claims against the shipowner for salvage*". The cargo interests' loss that had been compensated by the owner included a salvage liability; but that was a liability on the part of the cargo interests *for cargo's share of salvage*. Their claim against the owner for damages to compensate them for incurring that liability was therefore not a claim "*for salvage*" within Article 3(a). The cargo interests' claim was a claim in respect of the loss of property on board (with consequential losses resulting therefrom, including a liability for cargo's share of salvage); the owner's claim to pass on that liability to the charterer was to be characterised in the same way; that meant it was limitable under Article 2.1(a), since Article 3(a) did not apply to exclude it.

47. In the *CMA Djakarta* at first instance, [2003] EWHC 641 (Comm), [2003] 2 Lloyd's Rep 50, David Steel J took the decision in *The Aegean Sea* to mean that a charterer might only limit under the Amended 1976 Convention to the extent that the claim against it arose from its having acted *qua* owner, which David Steel J defined to mean undertaking an activity "*usually associated with ownership*", that is to say "*to the extent that [the charterer] operates or manages the vessel*" (*per* Longmore LJ, [2004] EWCA Civ 114 at [2]). The Court of Appeal disagreed, considering that "*To say … that a charterer must be acting qua owner or as if he were owner is not only to impose a gloss upon the wording of the Convention and accord it a meaning other than its ordinary meaning. It is also to impose a requirement the ambit of which will often be difficult to ascertain*" (*ibid*, at [15]).

48. Accordingly, "*a charterer's ability to limit will depend on the type of claim that is brought against him rather than the capacity in which he was acting when the liability was incurred. … To analyse a claim is primarily a legal task and is a familiar one to charterers, their insurers and advisers*" (*ibid*, at [34]). Longmore LJ added that: "*It is doubtless inaccurate to say that of all the claims that could be brought by an owner against a charterer, it will only be liability to indemnify the shipowner in respect of cargo claims that he will be able to limit. But I cannot at the moment easily think of any other category where limitation is likely to apply.*"

49. The present case appears to be the first occasion since *The CMA Djakarta* on which the English court has had to consider a claim by a charterer that it is entitled to limit under

the Amended 1976 Convention a liability to the owner other than in respect of cargo claims.

50. The *CMA Djakarta* was also a container ship that suffered an explosion on board, due to the dangerous nature of container contents (bleaching powder), causing the abandonment of a voyage, leading to an arbitration award in favour of the owner against the time charterer for breach of a term of the charter prohibiting the shipment of dangerous goods. Longmore LJ noted, at [5], that the damages awarded for the repair of the ship, over US$26 million, included the cost to the owner of salvage services rendered to the ship, c.US$4.7 million, but there were also claims by the owner for "*(1) their liability to contribute to general average and (2) their liability to the cargo owners for loss or damage to cargo.*"

51. The Court of Appeal decided that:

    (i) Article 2.1(a) of the Amended 1976 Convention does not extend tonnage limitation to a claim for damage to the ship by reference to the tonnage of which limitation is to be calculated. As regards loss of or damage to property, Article 2.1(a) covers only claims in respect of loss of or damage to property *other than the ship*, and consequential loss resulting from the loss of or damage to such property. That view of Article 2.1(a) was approved by the Supreme Court, *obiter*, in *The Ocean Victory* [2017] UKSC 35, [2017] 1 WLR 1793 (and, I have the temerity to add, it is obviously correct).

    (ii) Therefore, the owner's claim for compensation for the damage to the ship, and loss consequential upon that damage, including repair costs and the owner's liability for salvage services rendered to the ship and for contribution to general average, was *not* a claim to which Article 2.1(a) applied tonnage limitation. However, the claim for compensation or indemnity for a liability to cargo owners for the loss of or damage to their cargo *was* a claim to which Article 2.1(a) would grant the charterer the right to limit.

52. Mr Kenny KC submitted that *The CMA Djakarta* is not authority against a claim by MSC in this case to limit under Article 2.1(a) its liability for the damage caused to *MSC Flaminia*, on the basis that it was caused by the loss of or damage to the DVB that exploded, so as to be (as Mr Kenny KC suggested) a claim in respect of consequential loss resulting from (non-ship) property damage. *The CMA Djakarta* is not against MSC, it was said, because the charterer in that case did not run the equivalent argument (*viz.* that the explosion that damaged the ship was itself, or was caused by, damage to the bleaching powder).

53. I consider that is too narrow an approach to what was decided by the Court of Appeal. If MSC wishes to claim that Article 2.1(a) entitles it to limit its liability on a claim by Conti in respect of damage to the ship, including consequential losses resulting to Conti from damage to the ship, then it must contend that *The CMA Djakarta* is wrongly decided, and that is not an argument available to it in this court. Were it open to me to consider the argument that if loss of or damage to cargo causes damage to the ship, a claim by the owner for compensation for the damage to the ship (and consequential loss) is limitable, however, I would reject it for a reason that is material to the present case, so it is appropriate to set it out.

54. To recap:

(i) Article 2.1(a) applies tonnage limitation to "*Claims in respect of loss of life or personal injury or loss of or damage to property … occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom*".

(ii) MSC's argument proposes that a claim for damages to compensate an owner for damage to the ship is a claim in respect of consequential loss resulting from damage to cargo if damage to cargo was a cause of the damage to the ship.

55. MSC rightly accepted, however, that if cargo is damaged because of damage to the ship, a claim by a cargo owner for compensation for damage to its cargo is not a claim in respect of damage to the ship. That suggests that MSC's argument is flawed. If the involvement of ship damage in causing cargo damage does not make a claim for compensation for damage to cargo a claim in respect of damage to the ship, then by parity of reasoning the involvement of cargo damage in causing ship damage does not make a claim for compensation for damage to the ship a claim in respect of damage to cargo. The causal contribution of cargo damage in the damage to the ship does not turn a claim for damaging the ship into a cargo claim. In my view, except when it concedes (indeed, avers) that a cargo claim is still a cargo claim even if the cargo damage was caused by damage to the ship, MSC's argument errs in treating the scope of Article 2.1(a)-(e) as a factual matter of causation rather than an issue of claim characterisation.

56. In *The APL Sydney* [2009] FCA 1090, a decision in the Federal Court of Australia, the ship dragged her anchor so as to damage a submarine pipeline used to transport ethane. The plaintiffs received ethane supplies via the pipeline so that the damage to the pipeline damaged their businesses. They argued that Article 2.1(a) of the 1976 Convention did not apply to their claim for damages against the owner. Their argument was that "*the reference to consequential loss in Art 2.1(a) is to consequential loss suffered by a person resulting from a "concrete loss" [i.e. loss of life or personal injury, or loss of or damage to property] suffered by that same person*" (*ibid*, at [21]).

57. That argument was rejected by Finkelstein J (*ibid*, at [22]-[28]). The reasoning is concise, and I consider, with respect, that the treatment (at [27]) of *The Breydon Merchant* [1992] 1 Lloyd's Rep 373 is questionable. However, in my judgment the premise for the decision was accurately encapsulated by the law reporter in the headnote in saying that the plaintiffs' claims were being characterised as "*claims for economic loss, consequential upon property damage*". That is to my mind the natural sense of the 'consequential loss' element of Article 2.1(a), given its context and purpose, namely one part of a set of provisions identifying types of claim that might be brought against an owner so as to define the scope of the tonnage limitation regime. The focus is the nature of the claim brought (whatever the basis on which liability, if any, will be imposed, for example be it contractual, tortious or statutory), and not on mechanisms of causation.

58. In S Derrington and J Turner, *The Law and Practice of Admiralty Matters* (2007), at p.249, it was suggested that the 'consequential loss' element of Article 2.1(a) might "*relate to further loss (or damage) resulting from, eg, the loss of property (such as bunkers), such as pollution of beaches and resulting clean-up costs; alternatively, they may be confined to 'consequential loss' in the narrower sense, that is losses caused to*

the property owner upon the loss of or damage to his property, such as loss of profits". The learned authors' view was that their narrower reading was the better one; and *The APL Sydney* has not changed their view (see now 2nd Ed. (2016), at 10.66 to 10.69).

59. However, I do not find Derrington and Turner's analysis persuasive. First, I find the illustration of the wider meaning that they reject by the example of bunkers polluting beaches unhelpful. A beach polluted by escaping bunker oil is property other than the ship damaged in direct connection with the operation of the ship from which the bunkers escaped, just as was the submarine pipeline in *The APL Sydney*. Second, with respect, the learned authors assume without explanation that if Article 2.1(a) refers only to loss consequent upon the loss of or damage to property, which I have said already I think is its natural meaning, a claim in respect of such loss could only be made by a party entitled to damages for the property damage or loss itself. In that regard, I am with Finkelstein J in *The APL Sydney* at [38] (albeit he was there dealing directly with Article 2.1(c) rather than with Article 2.1(a)). That is to say, I do not regard the resistance of the common law to claims in tort for economic loss consequent upon damage to property in which the claimant has no proprietary or possessory interest as reason to assume, when construing the 1976 Convention, that such claims could not be made.

60. The 1976 Convention was adopted as the Final Act of the 1976 International Conference on Limitation of Liability for Maritime Claims in London ("the 1976 Limitation Conference"). It was thus an Act of participating states from all parts of the world and all manner of legal traditions. It was to be open to participation by all states. Derrington and Turner express the view, upon what basis they do not say, that "*a claim for economic loss not contingent on damage to property is most unlikely to have even been contemplated*" at the time of the 1976 Limitation Conference. By contrast, Finkelstein J understood the position to be that "*in most civil law countries it is permissible to bring a claim for pure economic loss*"; it was not suggested to me that he was wrong about that; and indeed, for example, the position in Italian law was recently shown to this court to be rooted in Italian Supreme Court decisions from the early 1970s (*River Countess & MSC Opera* [2021] EWHC 2652 (Admlty)). (The fact that there might have been room for the view that the position was not definitively settled there is neither here nor there for present purposes.)

61. Finkelstein J also noted that in *The Aegean Sea*, Thomas J concluded, *obiter*, that the pollution claims against the owner, and therefore the owner's claim to the extent that it sought compensation from the charterer in respect of those claims, were consequential loss claims within the meaning of Article 2.1(a). The *Aegean Sea* grounded, broke in two and exploded, causing *inter alia* pollution of the environment and damage to private property ([1998] 2 Lloyd's Rep 39 at 42 rhc). The pollution claims included claims for liability incurred by the owner under Spanish legislation giving effect to the Civil Liability Convention on Oil Pollution Damage, 1969, including liability for loss of use and loss of profits claims brought by fishing boat owners, yacht owners, fish and shellfish farm owners, shell fish harvesters, fishing net and fishing pot owners, and shop owners (*ibid* at 43 rhc). Thomas J considered that their claims, and therefore the owner's claim in relation to them, were all claims in respect of damage to property or consequential loss resulting therefrom within the meaning of Article 2.1(a) (*ibid* at 52 rhc).

62. The pollution claims against the owner in *The Aegean Sea* were not excluded from tonnage limitation in this jurisdiction by Article 3(b) of the Amended 1976 Convention

(*ibid* at 53 lhc-54 rhc). Article 3(b) excludes "*Claims for oil pollution damage within the meaning of the [1969 Convention] or any amendment or Protocol thereto which is in force*". However, at the material time by paragraph 4(1) of Part II of Schedule 4 to the Merchant Shipping Act 1979 restricted that exclusion, under English law, to "*claims in respect of any liability incurred under section 1 of the Merchant Shipping (Oil Pollution) Act 1971*"; and liability under that 1971 Act required there to have been pollution damage in the United Kingdom, or measures taken to mitigate such damage.

63. Thomas J founded the view that Article 3(b) was not in play on the plain meaning of that provision of the 1979 Act. That is the first full paragraph at 54 rhc, before Thomas J turned to consider the owner's claim to pass on its liability to Cristal Ltd. Immediately prior to that, Thomas J expressed what he said was a preliminary view that Article 3(b) only refers to an oil pollution claim made against the party seeking to limit under the Amended 1976 Convention. That seems correct to me, but with respect I am not sure it means that Article 3(b) would have been irrelevant if its scope had not been confined by the 1979 Act.

64. That is the nagging concern to which I referred in paragraph 42 above. If it arose for decision, I would wish to have full argument (counsel did not touch on the point in this case) as to whether if a claim within Article 3(b) were made against an owner, so it was *not* subject to tonnage limitation, a claim over by the owner against a charterer in respect of that claim would be limitable. Thomas J thought it a concern to posit an insider other than the owner, the only party against whom an oil pollution claim under the 1969 Convention could be brought, being unable to limit under the Amended 1976 Convention in respect of such a claim. Provisionally, I consider that is not a concern; rather, it seems to me as things should be – if the owner cannot limit under the Amended 1976 Convention for that type of claim, why should the charterer be entitled to? I therefore wonder if there is not room for the view that in the circumstance posited, the owner's claim to pass on its oil pollution liability would be a recourse claim within Article 2.2 the limitability of which was determined by the limitability of the claim against it that it sought by the recourse claim to pass on to the charterer, meaning that it was not limitable.

65. Be that as it may, Article 3(b) not being in play to exclude them, Thomas J concluded that the pollution claims in *The Aegean Sea* fell within Article 2.1(a). I agree with that conclusion, but not entirely with the reasoning given for it. Thomas J suggested that all the pollution claims, including claims for lost profits brought by local fishing boat or shop owners whose boats and shops were not damaged, were "*consequential loss claims within art. 2.1(a) resulting from the loss of the cargo*". As I understand the facts of that case, those local claimants would not have been claiming that they had suffered loss through the cargo being lost. They would have been claiming that they had suffered loss through the environment being damaged.

66. That damage may have been caused, as a matter of fact, by loss of cargo (and/or bunkers), but I would not say that those local claimants were claiming in respect of that loss (or for consequential loss from loss of cargo and/or bunkers). The foundation of their claims was surely their interest, protected by Spanish law such that they could pursue the owner on the basis of it (if their claims were sound), in the physical environment in which they were located and operated. Mr Kenny KC was correct, in my view, to characterise those claims, as he did in his written note for closing argument, as claims by "*shops and municipalities affected by the damage of property in Spain*".

As with the plaintiffs whose claims were considered by Finkelstein J in *The APL Sydney*, theirs were claims in respect of that property damage, their fortunes having been tied to the property that was damaged in a way that was protected by the applicable system of law by the right of action it gave them to pursue the owner when its ship damaged that property.

67. Corrected as to that aspect of the reasoning, I consider that the lost profits claims in *The Aegean Sea*, as claims for consequential loss resulting from the environmental damage, likewise the lost profits claims in *The APL Sydney*, as claims for consequential loss resulting from the pipeline damage, were rightly considered to be claims within the scope of Article 2.1(a), since the relevant property damage occurred in direct connection with the operation of the ship in question, and was not damage to the ship herself. Under the tonnage limitation regime of the Amended 1976 Convention, those claims as made against the owner were limitable; the claim by the owner to pass those claims on to the charterer was likewise limitable.

68. That is so although the property damage in respect of which those local claimants pursued claims was itself caused by damage to the ship, as a matter of fact. That did *not* mean that they were pursuing claims in respect of damage to the ship so as to be outside Article 2.1(a) after all. So here, the fact that it can be said, in point of fact, that all the damage to the ship can be traced back, by a chain of causation, to loss of or damage to the DVB that exploded, cannot mean that a claim by Conti for compensation for damage to the ship is a claim in respect of loss of or damage to the DVB (or consequential loss resulting therefrom). That is to say, the causal connection on the facts does not turn a claim for damaging the ship into a cargo claim.

69. The plaintiffs in *The APL Sydney* suffered harm by reason of the pipeline being damaged. Their claim was therefore in respect of (consequential loss resulting from) that damage to property other than the ship. In the present case, leaving aside any 'recourse claims' in respect of liability for cargo claims (which are not covered by the arbitration award in favour of Conti, and on which the arbitrators' jurisdiction is reserved), Conti was not harmed, directly or indirectly, by the cargo being lost or damaged. Their claim was therefore not in respect of (consequential loss resulting from) cargo loss or damage.

70. A modified version of an example explored in argument serves to illustrate the way in which, in my view, Article 2.1(a) uses the language of "*consequential loss*". Suppose a scaffolding pole breaks, causing tools to fall from the scaffolding, injuring a passing pedestrian. The injured party is unable to work for a time due to their injury, causing loss to their employer for which the scaffolder is liable under the applicable system of law. The employer's loss is caused by the absence of the employee from work. That absence is caused by their injury. That injury was caused by the employee being hit by tools falling off the scaffolding, and that in turn was caused by the scaffolding pole breaking. But that does not mean, as a natural use of legal language in a characterisation of types of claim, that the employer claims in respect of consequential loss resulting from scaffolding pole damage. The employer had no interest in the scaffolding pole and did not suffer loss through the scaffolding pole being damaged. The employer claims for consequential loss resulting from personal injury, since it is the employee's health in which the employer has an (economic) interest such that damage to that health may (consequentially) harm the employer. (Moreover, if the scaffolding pole broke because a car hit the scaffolding through failing to stop because its brake pedal snapped, the

scaffolding owner's claim against the car owner (if he had one) would not be a claim in respect of damage to the car, it would be a claim in respect of damage to the scaffolding pole, and a recourse claim in respect of the personal injury to the pedestrian.)

71. The position would be no different if instead of injuring the pedestrian by chain reaction, the scaffolding pole itself hit the pedestrian as it broke. Neither a claim by the pedestrian for compensation for injury, nor the consequential loss claim by the employer for its loss of profit due to that injury, would be a claim in respect of the damage to the scaffolding pole. The scaffolding pole suffering damage was not harmful to the pedestrian or the employer. The injury to the pedestrian was harmful to the pedestrian and the employer.

72. Applying that approach to this case, since it can be said that the explosion and fire resulted from some damage to and loss of cargo (the auto-polymerisation and venting of the DVB), it can be said that the damage to the ship resulted from that damage to and loss of cargo. But that does not mean that when Conti claimed damages to compensate it for the damage to its ship, its claim was a claim for consequential loss resulting from cargo loss or damage. The cargo suffering loss or damage was not harmful to Conti (except if it had a liability to those for whom it was harmful, for the harm they suffered by it). What was harmful to Conti (cargo claims against it aside) was the damage to the ship.

73. There are two parts of the *travaux préparatoires* to the 1976 Convention of possible relevance to the interpretation of the 'consequential loss' language in Article 2.1(a)**:**

(i) The following notes of the 25th Session of the IMCO Legal Committee:

"*22. It was explained that paragraph 1(a) of this draft Article [i.e. draft Article 2] deals with physical damage and personal injury; 1(b) deals with the exceptional, and mandatory, liability for delay under a bill of lading (consequent upon the proposed revision of the Hague Rules); and 1(c) deals with non-contractual damage of consequential nature. These paragraphs were inter-related and considered together.*

23. The question was raised whether the provision was intended to have the same scope as the 1957 Convention and it was explained that the CMI intended no change."

(ii) The following commentary on the Hamburg Draft Convention from which the 1976 Convention's final text was developed:

"*Sub-paragraph (a) [of draft Article 2.1] is the hard core in the definition of limitable claims: claims arising from loss of life or personal injury or loss of or damage to property. The words "loss" and "damage" in this connection are used in the concrete sense; physical loss and, broadly speaking, physical damage. The words are used in the same sense both in Article 1 of the 1957 Convention and in Article 4, 1, iv), of the 1967 Liens and Mortgages Convention. However, consequential damage – physical damage as well as abstract damage – arising out of loss or damage in the concrete sense shall give rise to limitation of liability as well as to a maritime lien. In the Liens and Mortgages Convention*

> *this may be inferred from the words "claims in respect of" [original emphasis]. It was felt, however, that consequential damage should be specifically mentioned, and, in order to indicate that both concrete and abstract damage are included, the term consequential "loss" was adopted in lack of a better word.*
>
> *…*
>
> *Under sub-paragraph (a) the liability is limitable whether it is based on tort only (liability for collision damage) or "capable of being built on contract" such as cargo liability under a charter party or bill of lading, always provided that the loss arises from concrete damage. Abstract damage other than consequential loss is governed by the two following sub-paragraphs.*"

74. To understand some of that, it is necessary to note the language of the 1957 Limitation Convention and the 1967 Liens and Mortgages Convention to which reference was made. In the former, the material language (in Article 1(1)) was that an owner was entitled to limit liability "*in respect of claims arising from any of the following occurrences, …: (a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship; (b) Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the shipowner is responsible or the act, neglect or default of any person not on board the ship for whose act, neglect or default the owner is responsible … when the act, neglect or default is one which occurs in the navigation or the management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers*". In the latter, the material provision was Article 4.1(iii)/(iv), by which maritime liens were to be available to secure "*(iii) claims against the owner in respect of loss of life or personal injury occurring, whether on land or water, in direct connection with the operation of the vessel; (iv) claims against the owner, based on tort and not capable of being based on contract, in respect of loss of or damage to property occurring, whether on land or on water, in direct connection with the operation of the vessel*".

75. The salient points to note from that material are that:

(i) it was considered and intended that Article 2.1(a) of the 1976 Convention should have the same scope as the equivalent provisions of the 1957 Convention;

(ii) it was considered that a "*claim in respect of*" property damage would include a claim for consequential loss arising out of property damage, so that the 'consequential loss' language in Article 2.1(a) was included for the sake of clarity, not to expand what would otherwise have been the scope of the provision;

(iii) it was considered and intended that "*claims in respect of*" property damage meant the same as "*claims arising out of*" property damage.

76. In my judgment, that all confirms the meaning of Article 2.1(a) that I derived under Article 31 of the Vienna Convention from what I consider to be the ordinary meaning of its text, in its context and given its object and purpose. A claim against a "*shipowner*"

(as defined in Article 1.2) is a claim in respect of the loss of or damage to property if and only if the loss of or damage to property in question is the harm in respect of which the claimant has a right to seek redress which right the claim in question seeks to enforce. That is so whether the claim seeks redress for the property loss or damage itself or for consequential loss. Limitation then applies (subject to Articles 3 and 4) if the property loss or damage occurred on board the ship in question or in direct connection with her operation, whatever the legal basis of the liability, e.g. whether it be tortious, statutory, or contractual, and whether it be strict or fault-based (and if the latter whatever degree of fault might be required for liability). The express reference to consequential loss claims was for the avoidance of doubt to spell out that "*claims in respect of*" the 'concrete' injuries to which Article 2.1(a) primarily refers extend to consequential loss claims.

77. On that basis, *The APL Sydney* was in my view correctly decided. I was not shown whether either of the plaintiffs' claims considered by Finkelstein J as to limitability succeeded on their merits. They appear to have been still open claims when Rares J decided, in a judgment delivered some months later, that there had been two distinct occasions in the *APL Sydney* incident, so that the Convention called for two limitation funds and two distinct sets of claims (*Strong Wise Ltd v Esso Australia Resources Pty Ltd, The "APL Sydney"* [2010] FCA 240, [2010] 2 Lloyd's Rep 555). If the claims considered by Finkelstein J were good claims, that meant that the applicable system of law afforded those plaintiffs a right of redress in respect of damage to the pipeline, although they had no proprietary or possessory interest in it but only, through its use in connection with their businesses, an economic interest in its remaining undamaged. Their claim, therefore, was in respect of the damage to the pipeline (and was for consequential loss rather than for the pipeline damage itself).

78. In the present case, there was loss of and damage to cargo and the cargo was of course property on board for the purpose of Article 2.1(a). There was property loss and damage both prior to and causing the explosion and fire, and also resulting from the explosion and fire. But Conti's claim against MSC, established in the arbitration, did not seek to enforce a right of redress in respect of loss of or damage to cargo. It sought to enforce a right of redress in respect of the risk of harm to the ship that had been posed by the cargo, and the damage the ship suffered when that risk eventuated. Conti's claim against MSC was not subject to tonnage limitation under Article 2.1(a) of the Amended 1976 Convention.

79. That brings me to an overarching prior submission advanced by Conti. Mr Smith KC argued that tonnage limitation under Article 2.1 only applies to claims in respect of losses suffered in the first instance by an outsider (in the meaning I have given to 'outsiders' and 'insiders', in paragraph 11 above). The argument was that if an insider suffers its own loss in or as a result of a marine incident, as distinct from incurring liability to an outsider, tonnage limitation never applies to the insider's claim against another insider in respect of that loss. On the facts, it was said that none of Conti's losses for which the arbitrators have awarded it compensation was loss suffered by an outsider for which Conti had a liability it was seeking to pass on to MSC. All of Conti's losses held recoverable from MSC were its own losses.

80. Although Mr Smith KC developed the argument attractively and with great skill, there is an insuperable obstacle in its way. The owner and charterer of a seagoing ship are both insiders. Either may have property on board exposed to the risk of being lost or

damaged through the other's actionable breach. Most obviously, a charterer may own some or all of the cargo being carried; and as Mr Kenny KC noted, pertinently for a case about a container ship casualty, a containership owner may own some or all of the containers being carried. Or again, bunkers on board will normally be owned by one or other of them. On the ordinary meaning of the language of Article 2.1(a), a cargo claim by the charterer against the owner, or a claim by the owner against the charterer for loss of or damage to its containers, or a claim by either against the other for loss of or damage to its bunkers, is a claim in respect of loss of or damage to property occurring on board. There is nothing in the language of Article 2.1(a) indicating or requiring (for it to make sense) an exception not stated for claims by one insider against another. Likewise, the personal belongings of the ship's officers and crew. Furthermore, it seems a startling notion that extending the right to limit to charterers might be said to have damaged owners' right to limit in the core field of cargo claims.

81. If having regard to the nature and consequences of the tonnage limitation regime, the ordinary meaning of Article 2.1(a) would produce a manifestly absurd or unreasonable result, the question whether some different meaning can and should be adopted as the true interpretation would require close scrutiny, in which, applying Article 32 of the Vienna Convention, recourse might be had to supplementary means of interpretation.

82. Articles 6 and 7 of the Amended 1976 Convention provide for separate limits of liability, in each case for claims arising on any given distinct occasion, in respect of:

    (i) loss or life or personal injury suffered by passengers of a ship (Article 7.1);

    (ii) other claims for loss of life or personal injury (Article 6.1(a)); and

    (iii) all other claims plus the excess (if any) of the amount required to pay all claims within (ii) above over the limit under Article 6.1(a) (Article 6.1(b), read with Article 6.2).

83. My focus is on the tonnage limit under Article 6.1(b). Its potential availability, by operation of Article 6.2, to respond in part to claims for loss of life or personal injury is not relevant on the facts and does not affect the analysis, so for simplicity I ignore it. The Club LoU that stands as the limitation fund in this case is for the Article 6.1(b) limit, as now set by the 1996 Protocol.

84. By Article 9.1(a) of the Convention, that Article 6.1(b) limit applies to "*the aggregate of all claims which arise on any distinct occasion*" against insiders ("*the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible*"). That is one aggregate limit for all limitable claims against all insiders. By Article 11.1, any insider facing a limitable claim may constitute a tonnage limitation fund in that amount, and by Article 11.3 a fund constituted by any insider is deemed constituted by all insiders ("*A fund constituted by one of the persons mentioned in paragraph 1 (a) … of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1 (a) …*"). That is one fund for the benefit of all insiders (limiting, and funding the discharge of, the limitable liabilities), to match the one aggregate limit. I do not regard the contrary as sensibly arguable, the best efforts of Mr Kenny KC to identify a contrary argument notwithstanding.

85. Where under the terms applicable to the contractual or other legal relationship between two insiders, one bears towards the other legal liability for a casualty (here, MSC's liability to Conti for this casualty, as determined by the arbitrators), the burden of establishing a limitation fund for the benefit of them both (and all other insiders) must fall on the former. Self-evidently a claim by the latter, if they constitute the fund, for the value of the fund thus constituted, is not itself limitable. Anything else would be absurd. If in this case Conti had established the limitation fund, then on the arbitrators' findings as to liability under the time charter, Conti would have been entitled to be compensated by MSC for the cost of having done so.

86. Bearing that self-evident truth in mind, there is nothing unreasonable or absurd in a charterer's claim against the owner, for loss of or damage to cargo the charterer owned, being limitable. If the cargo claim is sound, and if it is enforced in a jurisdiction where the Amended 1976 Convention will apply, the charterer will recover *pari passu* with, for example, outsiders who also have valid cargo claims. Similarly, to my mind it is not unreasonable or absurd for an owner's claim against the charterer, for loss of or damage to its containers on board, to be limitable. From the perspective of the Convention and its aims, why should the charterer, respectively the owner, not stand *pari passu* in that respect with, for example, outsiders' cargo claims? Likewise, claims for loss of or damage to bunkers.

87. That does not give rise to the absurdity, as Mr Smith KC submitted it did, of the claimant charterer or owner paying its own claim if it establishes the fund in the first instance. Assume a cargo claimant charterer establishes the fund. If it fails to establish the owner's legal responsibility *inter se*, then its cargo claim fails, its claim to be reimbursed the value of the fund fails, all other claimants against the fund share the fund *pari passu*, and that is as it should be. If it establishes the owner's legal responsibility *inter se*, then its cargo claim succeeds, it shares in the fund *pari passu* with all other claimants against the fund, *and* its claim to be reimbursed the value of the fund is also a good claim, recoverable independently of the fund, and that is also as it should be – the charterer then has not, ultimately, had to fund the fund, and it makes a net recovery of its proper rateable share of the tonnage limit (as funded, ultimately, by the owner), *pari passu* with other relevant claimants.

88. I shall not lengthen the discussion by repeating all of that, *mutatis mutandis*, for other types of claim between an owner and charterer in respect of loss of or damage to the claimant party's property other than the ship. I would though add this, if only because I apprehend Mr Kenny KC in his reply argument got this element of the logic wrong, so it may assist the parties to spell it out: in the latter case, when the owner reimburses the charterer for having put up the fund, that does *not* discharge any part of the owner's liability for the charterer's cargo claim; the charterer then proves against the fund for the full value of that claim and shares the fund *pari passu* with any other limitable claims by reference to that value.

89. I do not overlook that the prime purpose behind extending tonnage limitation to charterers was to ensure that cargo claimants could not 'beat the limit' by suing charterers as carriers under charterers' bills of lading. That means that the Amended 1976 Convention had well in mind, and should be interpreted so as to operate reasonably and without absurdity for, the case where both owner and charterer are liable to outsider claimants (most obviously, cargo claimants and public bodies with casualty clear-up responsibilities).

90. As a matter of policy, a view might have been taken that outsiders should never have to share with insiders in the distribution of a tonnage limitation fund. But that is not the only view that might be taken, not least because the flip side of outsiders with claims not having to share the fund would be that a claim similar in kind to their claims (for example, a cargo claim) could 'beat the limit' and be enforced, including through proceedings *in rem*, in competition with those claims. It would not have been difficult to give effect in the text of Article 2.1 to an absolute policy of 'outsider claims only'. Its primary wording could have been, "*... the following claims ... shall be subject to limitation of liability unless made by a shipowner otherwise than by way of recourse or indemnity as referred to in paragraph 2*".

91. Unless that policy view can be discerned in the Convention or in the *travaux préparatoires* – and I do not think it can be – I do not see it as an unreasonable result, and it is certainly not an absurd result, that, for example, an outsider cargo claimant could find itself sharing a tonnage limitation fund with an insider liable on that cargo claim, by reason that ultimate legal responsibility for the casualty lay with another insider and the first insider's property (other than the ship) was also lost or damaged. Given the basic concept of 'one fund for all' upon which the tonnage limitation regime is built, that is a reasonable and workable outcome.

92. Nor do I agree with a submission by Mr Smith KC that Article 12.2 of the 1976 Convention is only needed if tonnage limitation applies exclusively to claims in respect of loss suffered in the first instance by outsiders, so that the existence of Article 12.2 might be said to support Conti's argument. Article 12.2 provides that: "*If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention*".

93. That provision is needed to ensure that when a party liable makes a subrogated claim on the fund, it is valued by reference to the value of the original claim without reference to tonnage limitation (but with ultimate recovery from the fund, of course, capped at the amount in fact paid to the original claimant). The need for that to be made clear does not reflect or imply a notion that there cannot be a limitable claim by one insider against another in respect of loss not originally suffered by an outsider. To illustrate, suppose a limitation fund of US$15 million, three valid cargo claims against the owner each worth, prior to tonnage limitation, US$10 million, and no other limitable claims. Each claim should result in a recovery from the fund of US$5 million. If the owner pays one claim outside the limitation proceedings, paying US$5 million because the claimant accepts the application of tonnage limitation, the claim must still be treated as a US$10 million claim when presented by the owner against the fund. If the claim were treated as now being a US$5 million claim, the fund would unjustly pay out at 60% (15 / 25 x 100%); the other two cargo claimants would receive US$6 million; the owner would recoup only US$3 million; and the owner would find itself having paid US$17 million though all claims were accepted to be subject to tonnage limitation with an aggregate limit of US$15 million. Article 12.2 ensures that the owner has the right to recover US$5 million from the fund that the cargo claimant would have had.

94. In that respect, I disagree with Mr Smith KC's analysis, which was that Article 12.2 is there to prevent a limiting party from recovering under a subrogated claim more than the limited amount that the claimant paid outside the fund could have recovered from the fund. It is there, rather, to ensure that a limiting party is not prevented from

recovering that limited amount in full, assuming it has paid at least that amount in paying the claim outside the fund. In the current context of the attempt by Conti to confine limitation to claims in respect of loss originally suffered by an outsider, it suffices to say that all of the above makes sense, and remains necessary, if (for example) a charterer's cargo claim is limitable. The argument that Article 12.2 presupposes and implies that such a claim is not limitable is therefore not made out.

95. In *The Aegean Sea*, in concluding that the owner's claim against the charterer in that case was not limitable, Thomas J essentially reasoned (although he did not use this language) that it would be absurd or unreasonable for a charterer to be able to limit its liability to the owner except as regards recourse claims in respect of liabilities to outsiders: see [1998] 2 Lloyd's Rep 39, at 49 lhc ("*As … [any] fund is to cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund when a claim is brought against them by owners*"); at 49 rhc ("*… as regards liabilities to those outside the operation of the ship, … rights of indemnity for such claims as have been discharged do not compete with the other claims against the fund or the limitation amount (as the case may be). But this is not the case in respect of the types of claim that the owners seek to bring against … the charterers; a substantial part of those claims by the owners will compete with the other claims*"); at 50 lhc ("*It cannot have been intended that either the limitation amount or the fund be reduced by direct claims by the owners against charterers for the loss of the ship or the freight or the bunkers; it was intended for claims by cargo interests and other third parties external to the operation of the ship against those responsible for the operation of the ship*").

96. I have explained already why, in my view, there is no competition to share in the fund that can be said to be unreasonable or absurd if an insider's claim against another insider in respect of loss of or damage to its property on board is limitable under Article 2.1(a). I should mention two further points:

(i) Thomas J posited (*ibid* at 50 rhc) that it was probably thought by those responsible for drafting the 1976 Convention "*that a claim by shipowners against charterers could be expressly limited by the terms of the charter-party …; it was for those reasons unnecessary to provide for limits in a convention*". I was not shown anything to support Thomas J's conjecture as to the thinking behind the drafting; and, with respect, I do not consider the reasoning to be sound. Tonnage limitation operates *after* and *notwithstanding* any effective limitation of liability in respect of each limitable claim; and the prime example of a limitable claim, namely a bill of lading claim by an outsider, whether it be against the owner or against the charterer depending on the bill, could be expected to be subject to some measure of limitation of liability under the bill of lading terms. The Convention kicks in, if it does, and is needed if a policy of limiting in aggregate maritime liabilities of certain types is to be adopted, when there are claims the aggregate value of which might otherwise overwhelm the ship, even after the application to each such claim of any claim-specific limitation of liability (e.g. under Article IV rule 5 of the Hague or Hague-Visby Rules, if applicable).

(ii) Even as Thomas J reasoned towards the inapplicability of tonnage limitation to claims by an owner against a charterer other than recourse claims in respect of limitable claims by outsiders, he took it as plain that tonnage limitation did apply

> to a cargo claim by a charterer against an owner where the charterer owned the cargo. The first of my quotations in paragraph 95 above (*ibid* at 49 lhc) continues as follows: "*Owners are entitled to the benefit of limitation for a claim by charterers as that claim is brought by charterers not when performing a role in the operations of the ship or when undertaking the responsibility of a shipowner, but in a different capacity, usually through their interest in the cargo carried*" (my emphasis).

97. The Court of Appeal in *The CMA Djakarta* disapproved the reasoning of David Steel J at first instance in that case, and of Thomas J in *The Aegean Sea*, for its conclusion that what mattered was the capacity in which the person seeking to limit had been acting in respect of the events giving rise to the claim said to be limitable. What matters, the Court of Appeal made clear as I noted in paragraph 48 above, is the nature of the claim said to be limitable.

98. If, as Thomas J considered and I also consider, on the ordinary meaning of its language the Amended 1976 Convention applies tonnage limitation to a claim by the charterer against the owner in respect of loss of or damage to the charterer's property on board, for example if it owned some or all of the cargo, and that is not an unreasonable or absurd result requiring that meaning to be doubted, so also it applies tonnage limitation to a claim by the owner against the charterer in respect of loss of or damage to the owner's property on board, for example if it owns containers being carried on board that are lost or damaged.

99. I therefore reject the submission that the only claims by one insider against another to which tonnage limitation is applied by Article 2 are claims to pass on liability in respect of claims by an outsider.

100. In *The CMA Djakarta* at [21], Longmore LJ noted that the rejection of the argument that a charterer could only limit in respect of liabilities incurred *qua* owner did not conclude the inquiry in that case, "*because it is still necessary to ascertain whether a claim for damage to the ship by reference to which a charterer seeks to limit his liability is a claim which falls within art.2 … [and] whether the charterers can limit their liability for any of the other claims brought by the shipowners …*". Likewise here, the rejection of Mr Smith KC's overarching submission that Article 2 only applies to claims in respect of loss suffered originally by an outsider does not conclude the inquiry; and I have already explained why Conti's claim against MSC does not fall within Article 2.1(a).

101. MSC did not rely only on Article 2.1(a), however. It relied also on Articles 2.1(e) and 2.1(f). In that regard, the technique deployed was to treat Conti as having made a series of claims, by reference to losses said by MSC to be of different types, and to subject each to scrutiny against the language of Article 2.1(e) and/or 2.1(f) (as the case may be). I do not regard that as an appropriate technique in the present case.

102. Conti's claim against MSC was that dangerous cargo had been shipped in breach of charter resulting in massive damage to the ship. In calculating their award of damages, the arbitrators included the amounts of many items of expenditure incurred by Conti, duly scrutinised by the arbitrators to the extent that points arose on whether those amounts should be included. (Conti put before the arbitrators around 3,000 individual invoices to evidence the costs it said it had incurred as a result of the casualty.) That

means, as will often be the case with damaged ships, that damages have been assessed by reference to actual costs incurred (scrutinised for causal connection and reasonableness, to the extent points on that arose) rather than by reference to either a more abstract assessment of the reasonable cost required to restore an undamaged ship to Conti or evidence of the ship's pre-casualty and damaged sale values. However, the nature of the exercise, in law, was still that of putting a (negative) value on the damage to the ship (inclusive of losses consequential upon that damage) in respect of which Conti made its claim, and awarding that amount as damages.

103. I consider that to be a complete answer to MSC's reliance on tonnage limitation in this case. That is to say, I think the correct claim characterisation in this case is that, from the perspective of the Amended 1976 Convention, Conti made good in the arbitration a claim (singular) in respect of damage to the ship (including consequential loss resulting from having a damaged ship); and tonnage limitation does not apply to such a claim. Although the primary focus of the reasoning in *The CMA Djakarta* (and in *The Aegean Sea* to the extent not disapproved in *The CMA Djakarta*) was on Article 2.1(a) in particular, in my view it supports my reading of Article 2.1, and my conclusion, that a claim properly characterised as a claim in respect of damage to the ship cannot sensibly be, and on the language of Article 2.1 is not, a claim subject to tonnage limitation by reference to the tonnage of the damaged ship in question.

104. I also note in that regard that it appears to have been accepted by the Supreme Court in *The Ocean Victory* (although it may be without argument) that the claim in that case was properly characterised as a claim "*for the loss of the vessel and consequential losses arising out of the loss of the vessel*" (*per* Lord Clarke at [60]). The Supreme Court concluded, *obiter*, that tonnage limitation does not apply to such a claim. In that case, the claim was by a head time charterer against its sub-charterer (under a trip time charter) to pass on a claim by the owner and/or bareboat charterer for damages to compensate for the loss of the value of the ship, loss of hire and the owner's SCOPIC and wreck removal liabilities.

105. Mr Smith KC in his skeleton argument put the point in this way:

"*99.1 Claims for "damage to the vessel by reference to the tonnage of which limitation is to be calculated" are not within the wording of Art.2(1)(a) and cannot therefore be limited – per Lord Clarke in* ***The "Ocean Victory"*** *approving Thomas J., David Steel J. and Longmore L.J. …;*

99.2 Since the principal claim (for damage to the Vessel) is not the subject of limitation [Conti] submits that the derivative claims (for "consequential loss resulting therefrom") are also not … subject to limitation – see the approach of Thomas J. to the claims for freight and salvage in ***The "Aegean Sea"*** *… and of Longmore L.J. to the claims for salvage expenses and GA in* ***The "CMA Djakarta"*** *…;*

99.3 [MSC's] attempt to shoehorn [Conti's] claims within Art.2(1)(a) by arguing that the fact that [Conti's] losses were a consequence of the damage to cargo means that they are, therefore, consequential losses for the purposes of Art.2(1)(a) is hopeless … .

100. If [Conti] is right on this headline point, then the claim to limit fails at the first hurdle. …"

106. I agree, in substance. I would articulate one part slightly differently (Mr Smith KC's paragraph 99.3), so as to reflect more closely the language of the Amended 1976 Convention upon which MSC's argument founders. Thus, I would say that the false proposition advanced by MSC is that because Conti's losses were, as a matter of causation, a consequence of some loss of and/or damage to cargo, therefore Conti (i) was making a claim in respect of loss of or damage to property, or consequential loss resulting therefrom, within the meaning of Article 2.1(a), and (ii) was not making a claim in respect of damage to the ship, or consequential loss resulting therefrom, to which tonnage limitation does not apply.

107. In closing, Mr Kenny KC refined MSC's argument by suggesting that Article 2.1 has in mind an idea of damage to the ship comprising "*depreciation and costs of saving and repairing [but where] only costs which were incurred in a 'but for' sense by the same, i.e. would not have been incurred otherwise, should be regarded as the costs of saving and repairing the ship*"; and that losses (of any kind) effectively caused by damage to cargo are "*consequential losses resulting [from]*" damage to property on board within the meaning of Article 2.1(a), unless they are within that notion of damage to the ship. I see no reason to entertain such convolutions. They were necessitated by MSC's misinterpretation of the nature of the exercise called for by the language of Article 2.1.

108. A major focus of Mr Kenny KC's argument was the existence of multiple sufficient causes or, as he labelled it, the problem of the "*overdetermined result*", arising (he contended) out of Conti's plea that the costs it incurred and recovered from MSC (in the sense that their amount was included in the arbitrators' *quantum* calculation): (a) needed to be incurred if the ship was to repaired; (b) were in fact incurred to enable Conti to have the ship repaired or as part of the repairs themselves. MSC accepts (a); I am less certain whether MSC accepts (b), but it is my conclusion, and finding on the facts, even if it is not common ground. However, so MSC's argument went, that does not make it right to relate the cost incurred to the repair of the ship, because cost of that kind would have had to be incurred even if the ship was not to be repaired.

109. Take the firefighting water, for example. Conti incurred substantial expense to have contaminated firefighting water disposed of safely that was on board the ship as a by-product of the salvors' firefighting work. The ship could not be repaired without the firefighting water being removed from the ship; if it was removed from the ship, it had to be disposed of safely; and Conti made the arrangements it in fact made to have the firefighting water dealt with, incurring the cost it in fact incurred, in order to get the ship repaired. At the same time, the firefighting water would have needed to be dealt with, meaning disposed of safely, even if the ship was not going to be repaired.

110. Because the steps Conti took were taken to prepare the ship for repairs, Conti understandably considered the firefighting water disposal cost a cost of repair. However, Mr Kenny KC argued, that should not be the court's conclusion, since the firefighting water needed to be disposed of safely whether or not the ship was being repaired. The decision to repair the ship was not a 'but for' cause of the cost claimed by Conti, he suggested.

111. That is a *non sequitur*, as Mr Smith KC argued in response. It does not follow from the proposition that the firefighting water would have had to be dealt with come what may that Conti would have taken the steps it in fact took, at the cost in fact incurred, come what may. How, when, at whose direction and cost, the firefighting water would have

been dealt with if it had not been dealt with as part of Conti's repair preparations, is speculative. The ship was not a total loss; Conti was obliged by clause 1 of the time charter to repair her and return her to full operation under the charter; and she was on hire throughout. Indeed, with that in mind, the cost in fact incurred was first and foremost a cost for Conti of earning hire from MSC under the time charter (albeit a cost that needed to be incurred because of a breach by MSC so that it would be recoverable as part of a damages award against MSC).

112. If it were relevant, on the evidence of Mr Johansson, particularly his evidence during the brief cross-examination by Mr Kenny KC, my finding would be that if there had been a decision not to repair the ship, she would have been scrapped, and then, more probably than not, Conti (with the support of its hull insurers) would have chosen to retain control of the process. That is to say, the ship would not just have been abandoned at Wilhelmshaven, even though a threat to do that was articulated by or on behalf of Conti at one point, in the context of the German authorities' wrongful decision to classify the ship as waste under EU law. (On that, as an aside, not only did the German authorities withdraw the surprising initial notification that the ship herself was waste, in due course Conti was vindicated by a decision of the CJEU that none of the casualty by-products on board the ship should have been so classified: *Conti 11 v Land Niedersachsen*, Case C-689/17.) That means it is unnecessary to deal with an objection Mr Kenny KC raised on the pleadings to any case being pursued for a finding that Conti would in fact have 'walked away'.

113. None of that helps MSC, however. It means only that, if relevant, had Conti not incurred the cost it did to have the firefighting water dealt with as part of having the ship repaired, it would have incurred cost having the firefighting water dealt with as part of scrapping the ship. Either way, that would be cost incurred by Conti by reason that its ship had been damaged (because it would be the nature and extent of the damage to the ship that was causing her to be scrapped, not the nature and extent of the loss of and damage to the cargo).

114. Finally, if the cost in fact incurred, as part of having the ship repaired, were equated (in my view incorrectly) with a cost not incurred to dispose of the firefighting water pursuant to a legal obligation on the part of Conti to dispose of it even if the ship was not being repaired, Conti's claim against MSC for the cost of discharging that obligation would be just that, a claim in respect of that legal obligation (and its consequent financial burden upon Conti), and that would not come within any of the sub-paragraphs of Article 2.1 of the Amended 1976 Convention.

115. For the reasons given above, in my judgment Conti's claim against MSC, as pursued and made good in the arbitration, is not subject to tonnage limitation under any part of Article 2.1 of the Amended 1976 Convention. It was a claim in respect of damage to the ship (including consequential loss resulting therefrom); and that is not a limitable claim.

116. In case it was necessary to do so, Mr Smith KC's argument also engaged with Article 2.1(e)/(f), as variously relied on by MSC, under MSC's approach of taking various groups of expenditure separately, treating Conti as having made a series of separate claims, and exploring whether they could be said to engage Article 2.1(e) and/or Article 2.1(f), as the case may be. In the rest of this judgment, for completeness, I consider the points that would arise if the case were looked at in that way.

Discussion – Cargo Handling

117. Conti paid for various cargo operations undertaken at Wilhelmshaven, i.e. (as MSC summarised them in its skeleton argument) "*the costs of discharging, cleaning, storing, transhipping, releasing and (where necessary) destroying cargo at Wilhelmshaven*". MSC accepts that the ship could not be repaired without discharging the cargo, so that the costs of discharge "*could fairly be described as costs that were ancillary to the repair*". That is fatal to any claim to limit as regards those costs, incurred by Conti as they were in order to repair the ship. It was not possible in practice for Conti to have the ship discharged at Wilhelmshaven without also accepting responsibility (since MSC did not do so) for the post-discharge costs to which this part of MSC's argument referred. MSC in substance accepted that in a footnote in its argument, acknowledging that "*if the cargo was being discharged, plainly it had to be decontaminated and delivered or disposed of, one way or another*".

118. Mr Kenny KC submitted that there is no rule or principle of law that a limitation claimant is not entitled to limit under Article 2.1(e) where costs claimed had to be incurred before the ship could be repaired. That argument says that it is not necessarily fatal to a claim to limit that it concerns costs that had to be incurred by somebody in order to repair a damaged ship. Even if that is correct, it does not mean that a claim by an owner for costs incurred by it in order to repair its damaged ship is not a claim in respect of damage to the ship. To the contrary, in my judgment it plainly is such a claim.

119. Contrary to a submission made in closing argument by Mr Kenny KC but withdrawn upon reflection in a post-hearing note that I requested, and subject to one qualification, none of this was general average expenditure. It was not incurred for the common safety of property involved in a common maritime adventure. The contrary submission advanced by Mr Kenny KC in closing focused on the final sentence of Rule X(c) of the York-Antwerp Rules 1994: "*But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of the completion of discharge of cargo if the condemnation or abandonment takes place before that date.*"

120. That sentence, however, operates only to qualify what precedes it *within Rule X(c)*. By its first sentence, Rule X(c) applies only when "*the cost of handling or discharging cargo, fuel or stores is admissible as general average*", the Rule then being (subject to the qualification in the final sentence) that "*the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average.*" By Rule X(b), the costs of handling or discharging cargo (etc.), including at a port of refuge, are admitted as general average only if the handling or discharge was necessary (i) for the common safety or (ii) to repair damage to the ship caused by sacrifice or accident "*if the repairs were necessary for the safe prosecution of the voyage*".

121. It is common ground that in this case, and as regards all cargo, the voyage was abandoned at Wilhelmshaven, and so no question of ship repairs to complete the safe prosecution of the (original) voyage arises on the facts.

122. I agree with a submission by Mr Smith KC that I have neither agreed facts nor other evidence sufficient to make any finding as to when, how and by whom that decision

was made and/or communicated to interested parties. It seems implausible that it would have been made by Conti as owner rather than by MSC, or at all events without reference to and the consent of MSC, but that is not enough for a positive finding either way. However, that does not affect the conclusion that cargo handling expense at Wilhelmshaven was not general average expense.

123. I said that conclusion was subject to a qualification. Rule III of the York-Antwerp Rules 1994 provides *inter alia* that damage done to ship or cargo, by water or otherwise, in extinguishing a fire on board, shall be made good in general average. *Lowndes & Rudolf: The Law of General Average and The York-Antwerp Rules* (15th Ed.) says, at 3.14, notes that the practice of average adjusters is to allow in general average any *increase in the cost of discharge* caused by the fact that the cargo being discharged was damaged by water or other means used to extinguish a fire on board. This involves treating the cargo damage caused by the firefighting effort as a general average sacrifice and the associated increase in discharging cost as an aspect of that damage, all of which would seem to me to be sound in application of Rule III.

124. Returning, then, to the cargo handling costs at Wilhelmshaven in this case and the question of tonnage limitation, MSC says that to the extent the arbitration award seeks to compensate Conti for having paid those cargo handling costs, Conti should be regarded as having made a claim "*in respect of the removal, destruction or the rendering harmless of the cargo of the ship*" (Article 2.1(e)). I agree with Mr Smith KC that Article 2.1(e) should be read in conjunction with the immediately preceding Article 2.1(d) (even though that is not part of English law: see paragraph 37 above). Article 2.1(d) applies tonnage limitation to claims "*in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship*".

125. Whether simply on its own terms, or when read alongside Article 2.1(d), in my view Article 2.1(e) does not have in mind at all the discharge or post-discharge handling of cargo *by or on behalf of the ship* (whether acting through her own crew and equipment or by shore labour, whether arranged by the owner itself or by a charterer), or (therefore) claims as between an owner and charterer regarding responsibility *inter se* for the cost of such cargo operations. The sub-paragraphs of Article 2.1 function to specify categories of claim that might be made against an owner so as to identify the types of liability that might be incurred by an owner in partial defence to which tonnage limitation is to cap the aggregate liability.

126. The ordinary meaning of Article 2.1(d)/(e), in that context, is that tonnage limitation is to apply in respect of liabilities such as might be incurred by an owner for casualty intervention or aftermath liabilities of the kinds indicated, i.e. wreck removal (etc.) (Article 2.1(d)) and cargo removal, destruction or neutralisation (Article 2.1(e)). Appreciating that to be the natural meaning of Article 2.1(d)/(e), on their own terms as particular categories of limitable claim, is not inconsistent with my rejection of Mr Smith KC's absolutist submission that (recourse claims aside) tonnage limitation only ever applies to claims by outsiders.

127. To my mind, the *travaux préparatoires* confirm that meaning. Firstly, they take sub-paragraphs (d) and (e) together, as I have. Secondly, they record their purpose in this way, namely that "*Sub-paragraphs (d) and (e) … are necessary in addition to the previous sub-paragraphs in order to make claims for wreck removal and removal of*

cargo subject to limitation". Thirdly, it is clear that sub-paragraphs (d) and (e) were only kept as separate provisions (a proposal having been made in one of the preparatory sessions that they might be a single sub-paragraph) to be clear that tonnage limitation in situations of or akin to shipwreck was not confined to claims by those who dealt with cargo still on board a wrecked, stranded or abandoned ship, but also to those who dealt with cargo that had been jettisoned or otherwise detached from a ship.

128. Mr Kenny KC submitted that there would be odd consequences if MSC could not rely on Article 2.1(e) in this case as regards cargo handling costs paid by Conti the amount of which was included in the damages awarded to it by the arbitrators. I did not find the submission persuasive.

129. First, it was said to be the consequence that there would be no right to limit under Article 2.1(e) "*when the need to remove cargo was the result of damage to the ship caused by a collision*", which it was said "*cannot be right*". The difficulty with that argument is its failure to identify the claim (by whom, against whom, for what) that it proposes ought to be limitable, but would not be, if MSC's liability for damages reflecting cargo handling costs in this case is not. If what Mr Kenny KC had in mind is something similar to the present case, i.e. cargo being discharged at either owner's or time charterer's cost, as part of a collision-affected performance of a charter, and a claim between owner and charterer to sort out ultimate responsibility or liability *inter se* for that cost, then he is correct there would be no right to limit under Article 2.1(e) but wrong to suggest there is anything odd about that. If what he had in mind is something dissimilar, i.e. the collision creating a liability for cargo removal, destruction or neutralisation undertaken by some party, whether for cost incurred or loss suffered through that intervention or for remuneration under some locally applicable law, then Mr Kenny KC is right to think that one would expect Article 2.1(e) to apply but wrong to assert that it would not because it does not in the present case.

130. Second, it was said to be odd if the cost of discharging cargo ancillary to, i.e. necessary to permit, the repair of the ship were not covered by Article 2.1(e), because "*(1) [it] would mean that 2(1)(e) would almost never operate because (a) after most casualties, the ship is repaired and (b) it is almost always necessary to discharge the cargo before a repair is carried out [and] (2) [it] would also mean that the question whether the limitation claimant could limit or not would depend on the happenstance of whether or not the shipowner chooses to repair*." The first point begs the question whether Article 2.1(e) has in mind cargo discharge to facilitate ship repairs. It also assumes for no reason that Article 2.1(e) is designed to come into play often, so it is like arguing that Article 2.1(d) should not be limited to cases of shipwreck and the like, despite it saying that it is, because (thankfully) those are now rare. The second point suffers from the same flaw as does the first submission, considered in the previous paragraph:

(i) What claim, by whom against whom, does the argument posit being made in the case where the ship is not to be repaired? The assertion of an untoward contrast means it is being posited that the cargo is discharged, from the ship that is not to be repaired, at cost to someone who then seeks reimbursement or damages to cover that cost.

(ii) If that is all between owner and charterer, i.e. the one incurs the cost and makes a claim on the other for it, Mr Kenny KC is wrong to suggest there is a contrast – as in the present case, that claim will not be limitable under Article 2.1(e).

(iii) If that is between some outside party and the owner or the charterer, i.e. the outside party incurs the cost and makes a claim on the owner or the charterer for it, then depending on the fuller facts, that claim might be limitable (possibly under Article 2.1(e), possibly under a different sub-paragraph), but if it is there will be nothing untoward about the contrast because the case will be different in kind from a squabble between owner and charterer over which of them should have paid for, or has a liability to the other for, the cost of that discharge operation.

131. At my request, and for completeness, the parties submitted brief written notes after the close of the argument at trial considering the *prima facie* allocation of responsibility between Conti and MSC for cargo handling at Wilhelmshaven under the time charter, given that the voyage was abandoned there and that the ship was on hire throughout. (By *prima facie* allocation, I mean leaving aside the effect or implications of the finding by the arbitrators that MSC was liable for the casualty and its consequences by reason of breach of the time charter.)

132. The time charter was on the 1946 New York Produce Exchange Form, as amended and supplemented by the parties. Clause 8, as amended by the parties, provided *inter alia* that MSC was to "*load, stow, ~~and~~ trim **discharge, tally, dunnage, lash and unlash** the cargo at their expense under the supervision of the Captain*". Mr Kenny KC submitted, Mr Smith KC accepted, and I agree, that Clause 8 did not impose on MSC a duty to discharge (or arrange and pay for discharge) otherwise than at a place of discharge it had ordered (see *The Pythia* [1982] 2 Lloyd's Rep 160). However, Mr Smith KC submitted, Mr Kenny KC at least implicitly accepted, and again I agree, that that does not mean MSC's responsibility for discharging would only ever be for discharging at the discharge port originally ordered.

133. In any number of circumstances, including those following a casualty, a time charterer might find itself ordering discharge elsewhere, or agreeing to a discharge elsewhere, in such a way that its employment orders are thereby varied. In that case, Clause 8 will apply to discharge at the new (replacement) discharging place. Robert Goff J (as he was then) rightly recognised that in *The Pythia* at 165 rhc, but on the facts in that case his conclusion was that the charterer had merely acquiesced "*in a different mode of performance by the owners of their obligations under the time charter*" (*ibid* at 167 rhc). As the editors of *Scrutton on Charterparties* put it (24th Ed., at 17-035), in summary "*[Clause 8] does not mean that whenever discharging is necessary the charterers must pay for it. In general, the obligations of time charterers as to discharging will apply only to the designated discharging place, unless they have ordered the discharge or it has been agreed as a variation that the cargo shall be discharged at an alternative place.*"

134. Given my decision on the meaning and effect of Article 2.1(e) of the Amended 1976 Convention, it is not necessary to reach a conclusion on whether under Clause 8 MSC had *prima facie* responsibility under the time charter for cargo handling at Wilhelmshaven, irrespective of its liability for breach of charter causing the casualty. In particular, therefore, the impact of the limited factual basis upon which I would have had to decide that point had it mattered (see paragraphs 121-122 above) does not need to be considered.

135. My conclusion is that a claim as between an owner and a time charterer for reimbursement of or damages in respect of the cost of cargo handling during the course of a time charter incurred by one of them but said by them to have been the responsibility or liability of the other, pursuant to or by reason of a breach of the time charter between them, is not a claim in respect of the removal, destruction or rendering harmless of cargo within the purview of Article 2.1(e) of the Amended 1976 Convention.

Discussion – Firefighting Water

136. A logically prior question arises – or so it seemed to me after there had been a certain focus on general average and the York-Antwerp Rules in view of Mr Kenny KC's submissions about cargo handling costs – whether the firefighting water on board the ship, contaminated as it was with dangerous and toxic residues created by the fire, constituted damage to the ship. If it did, then it was damage done to the ship in extinguishing the fire. On that basis, the cost of removing it from the ship would be a cost of making good such damage, and that would be allowable in general average under Rule III.

137. Mr Kenny KC submitted that even if all that were true, it would have no bearing on tonnage limitation. I am not sure that is right. If it were the cost of making good damage to the ship, then Conti's claim for it would be a claim in respect of damage to its ship, and tonnage limitation would not apply. However, it will not be necessary to express a final conclusion about that, or therefore to determine whether, as Mr Smith KC submitted, the presence of the contaminated firefighting water on board *did* constitute damage to the ship.

138. To seek to bring the cost of removing the firefighting water (which carried with it, on the facts of this case, the cost of treating it so as to extract harmful contaminants and then the cost of disposing of those extracted contaminants), Mr Kenny KC contended that removing it should be seen as part of a process of rendering harmless the cargo that had been on fire, or part of the process of removing and destroying cargo that in the circumstances needed to be removed and destroyed, since at least some of the harmful contaminants will have been cargo remnants. I find that a rather strained way of characterising the facts; but were it correct, the problem for the argument is that here were (in effect) extraordinary cargo handling measures, the need for which was created by the casualty, but the relevant claim in relation to which was between owner and charterer to determine which of them bore responsibility or liability for them under a time charter. That, I concluded when considering cargo handling costs characterised by MSC as such, is not within the purview of Article 2.1(e).

139. Mr Kenny KC submitted in the alternative that Article 2.1(f) applies. That requires there to have been a claim "*of a person other than [MSC] in respect of measures taken in order to avert or minimize loss for which [MSC] may limit his liability in accordance with this Convention, and further loss caused by such measures*". For the sake of brevity, I shall use 'mitigate' as a synonym for 'avert or minimise'. The argument was that engaging salvors to deal with the fire, which involved extinguishing it, if possible, was a measure taken by Conti to mitigate loss of or damage to cargo, just as much as it was a measure taken to mitigate the loss of or damage to the ship. The cost of removing the firefighting water, then, was said to be "*further loss caused by [that measure]*" so as to fall within the second part of Article 2.1(f).

140. The argument is possible, on the language of Article 2.1(f), because it does not say that its subject matter is claims by a party in respect of measures taken *by it (or on its behalf)* to mitigate loss *to it* for which the party seeking to limit *would have been liable to it* but with a right to limit under the Convention. I agree with Mr Kenny KC that the ordinary meaning of the text, given the absence of anything like the italicised words in the preceding sentence, is that it covers the case where a measure taken by A, in order to mitigate relevant loss, causes further loss to C, and C makes a claim in respect of that loss against D, the party claiming entitlement to limit. The *travaux préparatoires* evidence a degree of debate and confusion about the intended scope and effect of Article 2.1(f), but to my mind they are tolerably clear that such a 'rebound' effect was intended. I think it is also clear that the provision was intended to cover the case of preventive measures taken by or at cost to A (e.g. a public authority), to mitigate loss to B, and by locally applicable law liability was imposed on D to A for that cost.

141. The UK representative at the 1976 Limitation Conference was Lord Diplock. The *travaux* record Lord Diplock's reminder to the Conference, which is also an obvious truth, that "*the Convention was not designed to create liabilities, but simply to limit liabilities …*". A consequence, Lord Diplock noted, was that "*Article 2(1)(f) certainly did not imply that someone who, on behalf of the person liable, had taken measures to minimise loss could not claim for the full loss against the person liable.*"

142. Where a measure is taken by A to mitigate loss it would otherwise have suffered, for which it would have had a claim against D, and that measure comes at a cost to A or causes A loss, the meaning and application of Article 2.1(f) is simple. If tonnage limitation would have applied to A's claim against D in respect of the loss that the measure sought to mitigate, then it applies equally to the claim by A against D (if he has such a claim) for the cost of the measure, or the loss caused by it. Whether A *does* have any such claim is a separate matter. Hence Lord Diplock's observation, coming as it did in response to the Norwegian representative's rather loose comment that under Article 2.1(f), "*anyone who had taken measures to minimize a loss could apply to the fund for reimbursement … if the person liable had limited …*".

143. So, for example, the owner of property who by incurring cost avoids their property suffering damage, who would have had a claim in tort against the owner, limitable under Article 2.1(a), if the property had been damaged, may or may not have a claim for the (pure economic) loss suffered instead. But if they do, under the system of law applicable, then that claim is limitable under Article 2.1(f) because the claim in respect of the property damage had it not been avoided would have been limitable under Article 2.1(a).

144. Where a measure is taken by A, at its cost, aiming to mitigate a loss that would be suffered by B, for which B would have had a claim against D, *and* under applicable law D has a liability to A for that cost, equally it seems to me clear that the application of Article 2.1(f) turns on whether B's claim against D in respect of the loss that the measure sought to mitigate would have been subject to tonnage limitation under the Convention. The language of Article 2.1(f), read plainly, has that effect, and again I think it tolerably clear from the *travaux préparatoires* that this was deliberate, having in mind in particular the case of public authorities stepping in at cost in the face of some marine incident. That is to say, the language of Article 2.1(f), applied to this second example, is to the effect that (a) the claim in respect of which D seeks to limit under Article 2.1(f) does not need to have been brought by B, and (b) the limitability of the

claim brought by A depends on whether a claim brought by B in respect of the loss A sought to mitigate would have been limitable under Article 2.1(a)-(e). At the risk of unnecessary repetition, that does *not* mean that the Convention gives A some right to claim its cost from D – Lord Diplock's point again; it means only that the Convention includes any such claim that might be afforded by the applicable law within the class of limitable claims.

145. To take the second example a step further, as I read it the language of Article 2.1(f) does not presuppose that D *would have been liable* on a claim brought by B in respect of the loss that A's measure sought to mitigate. It operates by reference to types of loss, claims in respect of which are made subject to the tonnage limitation regime. Of course, claimants who make claims against a limitation fund must prove that party's liability to them, apart from the fund, in order to share in any distribution; but that is a different point (Lord Diplock's point, yet again).

146. The true proposition, therefore, in the case where A (a public authority, perhaps) has a claim against D under locally applicable law for cost it incurred in order to mitigate loss to B is that where a claim by B against D in respect of that loss would have been subject to tonnage limitation, if valid, then A's claim against D likewise is subject to tonnage limitation. From the perspective of the Convention, A's valid claim is treated as equivalent in kind to a valid claim by B against D in respect of the loss that the measure taken by A was designed to mitigate.

147. I can see no basis, then, for distinguishing that case from the case where A's action, taken in order to mitigate loss that would be suffered by B, causes loss to C, and applicable law affords C a claim in respect of that loss against D.

148. Superficially, therefore, Mr Kenny KC might seem to have a point. The cost to Conti of dealing with the firefighting water was a financial loss suffered by Conti. The firefighting water was put on board by the salvors' firefighting effort. So the financial loss to Conti in the cost of dealing with the firefighting water was caused, as a matter of fact, by the firefighting effort. Conti engaged the salvors to undertake that effort, and did so (the argument asserts) in order to mitigate loss of and damage to cargo. That might be said to look like the last case just stated, with either Conti or the salvors as 'A', cargo interests as 'B', Conti as 'C', and MSC as 'D'. A claim by cargo interests against MSC in respect of loss of or damage to cargo would have been limitable under Article 2.1(a).

149. However, at least equally Conti engaged the salvors, and they extinguished the fire, in order to avoid the loss of, and minimise damage to, the ship. Looked at from that perspective, Conti or the salvors would be 'A', *Conti* would be 'B' and 'C', MSC would be 'D'; and then the claim whose limitability would determine the applicability of Article 2.1(f) would be the claim by Conti in respect of the loss of or damage to the ship, and that claim would *not* have been limitable, under Article 2.1(a) or otherwise.

150. I think the better view must be that MSC cannot in those circumstances bring themselves within Article 2.1(f) as regards the inclusion within the damages awarded to Conti of a sum reflecting the cost it incurred in disposing of the firefighting water. Even if, contrary to my primary conclusion, the correct way of looking at things is to treat Conti as having made a separate claim for that cost, MSC cannot establish that that claim is distinct from the non-limitable category of claims in respect of the loss of or

damage to the ship. That involves interpreting "*measures taken in order to [mitigate] loss for which the person liable may limit his liability in accordance with this Convention*" as meaning measures taken *the sole purpose of which* was to mitigate such loss.

151. I consider that to be the correct reading of Article 2.1(f), in its context and given its evident purpose of assimilating, for tonnage limitation purposes, claims for compensation or recompense in respect of the burden of mitigation efforts with claims for compensation or recompense in respect of loss sought to be mitigated.

Discussion – Burnt Waste

152. The next claim to consider, if the case is analysed as a series of discrete claims by Conti, is the claim for cost incurred by Conti in order to have burnt waste removed from the ship that was left there after most of the firefighting water had been taken away. By definition – to be capable of being considered for separate analysis at all – this must refer to waste product, i.e. the scrap waste produced by the casualty, no longer identifiable as or sensibly considered to be cargo, ship, or containers, even though in various proportions its origins lay in the cargo, the ship, or containers. In the agreed description that follows, that must be borne in mind, so that (for example) reference to 'fire-damaged cargo' cannot mean material that was still cargo, albeit damaged. If it was still cargo, albeit damaged, then any cost involved in dealing with it was a cost of cargo handling, and I have already rejected tonnage limitation in relation to that in this case.

153. Subject to that explanatory comment, the waste amounted to c.30,500 m.t. (in total) as follows, mixed together on board the ship:

(i) fire-damaged solid cargo (c.14,800 m.t.);

(ii) c.5,400 m.t. of steel scrap (container steel and ship's steel, but more of the former than of the latter);

(iii) c.2,500 m.t. of sludge (mostly burned cargo particles suspended in water); and

(iv) c.7,800 m.t. of contaminated water (contaminated firefighting water mixed with contaminated ballast water and rainwater).

154. In case it matters, I take it that these were not identifiably segregated, separate sets of waste products on board the ship. The categorisations and quantities now agreed were generated, I envisage, as a by-product of the clean-up and disposal work undertaken to ready the ship for repair.

155. MSC contends that cost incurred by Conti to dispose of that burnt waste was a cost of removing or destroying cargo, or rendering cargo harmless, and therefore Conti's claim falls within Article 2.1(e) of the Amended 1976 Convention. I disagree, as I did for cargo handling costs at Wilhelmshaven. If this was a cargo handling cost (which seems a doubtful characterisation anyway), then a claim between Conti as owner and MSC as time charterer concerning the allocation of responsibility or liability for that cost between them under the time charter is not within the purview of Article 2.1(e).

156. For completeness, I should mention one other point concerning the cost incurred to dispose of this waste material. Mr Kenny KC in opening conceded that MSC should not have included under this heading waste removal costs incurred after the end of 2013. The basis for that concession was, he said, that "*during 2013 the vessel was in Romania doing waste removal clear-up exercises, the owners eventually despaired of the Romanians' ability to complete that exercise, the ship left Romania towards the end of 2013 and came back having been cleaned up in Denmark ready for repair and solely for the purposes of repair*"; that is to say, "*once ... [the owners] take [the ship] to Denmark to finish the job to get her ready for repair [the court] should treat that as all repair costs and characterise it for limitation purposes accordingly*". To my mind, that makes sense only if Conti's case is correct, as I have concluded that it is, namely that cost incurred in order to have the ship repaired is properly to be considered for present purposes a cost of repair and therefore a claim for it is properly to be considered a claim in respect of the damage being repaired, i.e. damage to the ship. If that could be trumped by and to the extent of cost that would have had to be incurred if the ship was not being repaired, which was in substance MSC's causation-based argument, then I do not see why that trump card could not be played against the Danish costs as much as against the Romanian costs.

Discussion – National Authorities

157. The final category of expenditure by Conti that MSC claims to be covered by Article 2.1(e)/(f) is payments to national authorities to buy permission for the ship to sail through their territorial waters so as to reach Wilhelmshaven. MSC relies here only on Article 2.1(f).

158. The basic facts are that:

(i) After the casualty, the ship could not complete her voyage, and (as I have held) that was because she was damaged, not because the cargo was (partly lost and) damaged.

(ii) The ship therefore needed a port of refuge.

(iii) Wilhelmshaven was selected and, practically speaking, it was the only option.

(iv) If somehow the cargo had been as damaged as it was and yet the ship had not been damaged sufficiently to be unable to complete the voyage, she would have diverted to Wilhelmshaven to deal with destroyed and badly damaged cargo and containers before being in a position to make for Antwerp.

(v) Conti settled claims made by various governmental bodies in Belgium, France, the UK, and Germany, for a total of c.€1.9m, in order to be given permission to sail through the waters of the English Channel and southern North Sea to reach Wilhelmshaven.

(vi) The vast majority of that total related to claims by the German and UK authorities under the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 for preventative and precautionary measures said to have been taken in those jurisdictions to prevent bunker oil leaking from the ship and polluting their territorial waters.

159. The inventive argument for MSC is that:

(i) the decision to send the ship to Wilhelmshaven was a measure taken to mitigate loss of or damage to cargo, even if it was also and equally a step taken to save the ship;

(ii) the payments to the national authorities were a cost of getting the ship to Wilhelmshaven;

(iii) therefore, those payments were a cost of a measure taken to mitigate cargo loss or damage, claims in respect of which MSC would have been entitled to limit under Article 2.1(a), or the financial loss to Conti through making them was a further loss caused by such a measure;

(iv) therefore, Conti's claim in respect of those costs is a claim falling with Article 2.1(f).

160. I do not accept that argument. It fails at step (i), because I have concluded that Article 2.1(f) requires a measure the *sole* purpose of which was the mitigation of loss a claim in respect of which would have been limitable. The concession that sending the ship to Wilhelmshaven was (at least equally) to save the ship is therefore fatal to MSC's reliance on Article 2.1(f), because if the ship had been lost, a claim in respect of that loss would not have been limitable.

161. It seems in any event a peculiar notion that payments required of Conti because of the risk that MSC's bunkers might pollute UK or Germany waters somehow generate in MSC a right to limit against Conti. However, the impact of that concern was not considered fully in counsel's submissions and does not need to detain me further on this occasion, given my other conclusions as to whether this claim is limitable.

Conclusions

162. I do not accept Conti's most far-reaching argument in response to MSC's claim to limit, by which it contended that a claim between insiders cannot be subject to tonnage limitation under the Amended 1976 Convention unless it is a claim to pass on liability for a loss originally suffered by an outsider (as I defined 'insiders' and 'outsiders' in paragraph 11 above). In my judgment, where a ship is under charter, a cargo claim by the charterer against the owner in respect of loss of or damage to cargo owned by the charterer would fall within Article 2.1(a) of the Convention, likewise a claim by an owner against the charterer for loss of or damage to containers owned by the owner. That disproves Conti's absolute proposition.

163. However, I accept Conti's argument that a claim by the owner against the charterer in respect of loss of or damage to the ship, including consequential loss resulting therefrom, i.e. resulting from the ship being lost or damaged, is not limitable, whether under Article 2.1(a) or otherwise. On a proper understanding of the notion of a claim in respect of property loss or damage or consequential loss resulting therefrom to which the Convention refers:

(i) Conti's claim against MSC in the present case was a claim in respect of damage to the ship, including consequential loss resulting therefrom, and therefore MSC has no tonnage limitation defence to it; and

(ii) Conti's claim against MSC was not a claim in respect of loss of or damage to cargo, including consequential loss therefrom, within the meaning of Article 2.1(a).

In particular, it is wrong to say, as MSC contended, that if cargo damage causes damage to the ship, an owner's claim against the charterer for damages for damaging the ship is a claim in respect of cargo damage so as to be limitable, just as it would be wrong to propose that if damage to the ship causes cargo damage, a cargo owner's claim for damages for damaging its cargo is a claim in respect of damage to the ship so as not to be limitable.

164. If paragraph 163(i) above is wrong, so that it is necessary to consider MSC's reliance upon Article 2.1(e)/(f) in relation to the groups of expenses incurred by Conti that were allowed for in the arbitrator's assessment of *quantum*, then:

(i) Conti's claim in respect of cargo handling costs at Wilhelmshaven would not be within Article 2.1(e), because Article 2.1(e) concerns only claims by a party not involved in the operation of the ship for having had to deal with cargo that needed to be removed, destroyed or rendered harmless, and does not cover a claim between an owner and a time charterer in respect of the cost of cargo handling undertaken pursuant to the charter (whether by reference to the clauses concerning responsibility for cargo operations or as part of a claim for damages for breach of the charter);

(ii) Conti's claim in respect of firefighting water removal and disposal costs would not be within Article 2.1(e), because that would require the costs to be characterised, in substance, as cargo handling costs, which is questionable but in any event (i) above would then apply, and would not be within Article 2.1(f), because, upon the proper construction of Article 2.1(f), that would require the sole purpose of the firefighting effort to have been mitigation of cargo loss or damage and that is not the position on the facts;

(iii) Conti's claim in respect of burnt waste removal and disposal costs would not be within Article 2.1(e), because (as with the cost of dealing with the firefighting water) that would require, in substance, that the costs be characterised as cargo handling costs, which is questionable but in any event (i) above would then apply; and

(iv) Conti's claim in respect of the payments it made to national authorities, to ensure lawful passage for the ship to Wilhelmshaven as a port of refuge, would not be within Article 2.1(f), because that would require the sole purpose of making for Wilhelshaven to have been to mitigate cargo loss or damage, and that is not the position on the facts.

165. Overall, therefore, my conclusion is that Conti's claim, whether considered as a single claim or as a series of distinct claims for various groups of items of expenditure, is *not* subject to tonnage limitation under the Amended 1976 Convention, upon a proper

interpretation and application of the provisions of Article 2.1 relied on by MSC as limitation claimant.

166. Finally, in case it will assist the parties to do so, I set out how in the light of this judgment I would answer the Issues set out in the List of Common Ground and Issues:-

(i) *What (if any) was the alleged impairment of the quality and value of the DVB between 1st and 14th July 2012?*

There was initial impairment in quality suffered by the DVB that was subject to auto-polymerisation, resulting in the affected tank load(s) of DVB becoming very hot and some loss of DVB by venting into the hold. The affected DVB was destroyed by the resulting explosion and fire. No attempt was made to establish what, if any, impairment in value the affected DVB might be said to have suffered at any given moment prior to the explosion, after which it was destroyed so as to have no value.

(ii) *Did the explosion and the subsequent fire in the cargo both constitute "damage to property" for the purposes of Article 2(1)(a)?*

On any view, the explosion and fire caused (much) more cargo loss and damage, all of which was "*damage to property*" within Article 2.1(a). Whether it is right to say the explosion and fire each *constituted* cargo damage may depend on exactly how one understands those terms. For example, if an explosion is a sudden increase in volume and release of energy, the exploded DVB, in the instant in which the explosion was occurring, was damaged DVB; but I am not clear that one would say the explosion was damage rather than a mechanism by which damage was caused. I am clear, however, that it does not matter.

(iii) *In Article 2(1)(a), does the phrase "consequential loss" refer only to loss suffered by a party claiming in respect of loss of or damage to property which is consequential on that loss of or damage to property?*

Yes, but to be clear that does not mean the claim must be made by a party claiming damages representing the value of the property lost or the reduction in value of the property damaged. Article 2.1(a) requires there to be a claim in respect of the loss of or damage to property (other than the ship), including claims for consequential loss; such loss can be suffered by a party other than the owner or party entitled to possession of the property lost or damaged; and the applicable system of law might afford that party a right of action in respect of the property loss or damage, to recover their consequential loss, whether or not English law (if applicable) would do so.

(iv) *What kind of causal connection is required by that phrase?*

It is not a question of causal connection, it is a question of interests in or relating to property (other than the ship) that the applicable system of law protects by granting rights of action in respect of loss of or damage to that property. A cargo claim does not cease to be a cargo claim (i.e. a claim in respect of loss of or damage to cargo) if damage to the ship causes the loss of or damage to cargo. A claim in respect of damage to the ship does not cease to be such a claim and

become, instead, a claim in respect of damage to cargo if the damage to the ship is caused by damage to cargo.

(v) *Where losses caused by damage to the cargo are (or are also) losses which Conti was required to incur in order to repair the ship, does it follow that (i) Conti's claims in respect of those losses are to be characterised as claims in respect of damage to the ship or consequential losses resulting from such damage and if so, (ii) does it follow that those claims cannot be limited under Article 2(1)(a)?*

Again, the question is not one of causation, it is one of claim characterisation. The proper characterisation here is that Conti's claim was in respect of damage to the ship, including consequential loss resulting therefrom. That claim is not subject to tonnage limitation under Article 2.1(a), or at all.

(vi) *Does the fact that the damage to the ship and the losses that are set out at (a)-(g) below were consequences of the loss of and damage to cargo identified in paragraph 1 of the Common Ground and of the fire and explosion referred to in paragraphs 3 and 4 mean that those losses are "consequential" on the loss of and damage to any part of the cargo for the purposes of Article 2(1)(a)?*

(a) The costs of engaging Smit to provide salvage services set out at paragraph 7 of the Common Ground;

(b) The sums paid to the relevant authorities identified in paragraph 10 of the Common Ground;

(c) the discharging, decontamination, handling and other costs set out in paragraph 14 of the Common Ground;

(d) the costs of removing the firefighting water at Wilhelmshaven set out in paragraph 19 of the Common Ground;

(e) the costs related to removing waste from the ship set out in paragraph 30 of the Common Ground;

(f) the costs relating to the ship repairs set out in paragraph 33 of the Common Ground;

(g) the miscellaneous costs set out in paragraph 35 of the Common Ground (i.e. survey costs, legal expenses, etc).

Since they were all a result of the explosion and fire, which in turn was caused by the auto-polymerisation (damage) and venting (loss) of DVB (together with an inadvertent ignition spark), as a matter of causation Conti's losses were all consequences of loss of and damage to (part of) the cargo. That does not mean that Conti's claim against MSC was a claim in respect of loss of or damage to cargo, or consequential loss resulting therefrom, so as to be subject to tonnage limitation under Article 2.1(a).

(vii) *For the purposes of Article 2(1)(e), are the claims identified in paragraphs 14, 19 and 30 of the Common Ground limitable as claims "in respect of the removal, destruction or the rendering harmless of the cargo of the ship"?*

No.

Alternatively, are they limitable to the extent that the relevant costs related to the removal or destruction of cargo waste, burned or unburned?

No.

Or insofar as Conti are correct that these are (or are also) costs which they were required to incur in order to repair the ship, are Conti's claims for these losses to be characterized as claims in respect of damage to the ship or for consequential losses resulting from such damage, and if so, does it follow that those claims cannot be limited under Article 2(1)(e)?

Conti's claim was in respect of loss of or damage to the ship, including consequential loss resulting therefrom, and therefore it does follow that there can be no question of tonnage limitation under Article 2.1(e), or at all.

(viii) *Are the claims identified in paragraphs 7 and 10 of the Common Ground related to the work of Smit and payments to public authorities limitable under Article 2(1)(f) because the "person liable" is MSC and MSC is entitled to limit its liability under Article 2(1)(a)?*

No.

(ix) *Are the claims identified in paragraph 19 of the Common Ground related to the removal of the firefighting water limitable under Article 2(1)(f) because they constitute "further loss" caused by measures that Conti took to avert or minimise loss to the cargo in respect of which MSC would be entitled to limit its liability?*

No.

Appendix – Detailed Agreed Facts

The ship, the casualty and the damage sustained

A1. The ship was a German-flagged post-Panamax container ship with a nominal capacity of 6,732 20-foot TEU, of which 3,558 could be carried on deck. She had eight cargo holds in total: hold Nos. 1-7 were forward of the superstructure and hold No. 8 aft. The dangerous cargo which auto-polymerised and ultimately exploded on 14th July 2012, was being carried in hold No.4.

A2. Between 1 and 14 July 2012 one or more tanks of 80% grade DVB suffered loss and damage whilst on board the ship in that:-

A2.1. During this period substantial auto-polymerisation of the DVB occurred, impairing both the quality and value of the DVB;

A2.2. The auto-polymerisation caused a build-up of heat and pressure inside the relevant tank(s);

A2.3. That resulted, on the morning of 14 July, in a venting or escape of DVB from the tank, a process that caused part of the DVB to be lost.

A3. The above constituted damage to property (the DVB) and loss of property (the DVB) for the purposes or Art.2(1)(a).

A4. The vented DVB formed an aerosol in hold No.4 which was ignitable and was, at around 08.00 on 14 July, accidentally ignited causing an explosion which ignited a fire which spread to other cargo stowed in and over hold Nos. 3-7.

A5. The damage caused by the initial explosion and the fire which ensued was very significant indeed, both to the structure of the ship and to cargo on board. Tragically, three members of the crew also lost their lives.

The immediate aftermath of the casualty

A6. Following the explosion and fire, the personnel that were able to evacuate the ship were picked up by the "DS CROWN". After about two and a half hours aboard the "DS CROWN", the "MSC STELLA" arrived on the scene and took the injured crew towards the Azores where they would rendezvous with a helicopter to get the injured crew to hospital promptly. The remaining crew sailed with the "DS CROWN" to Falmouth where they were interviewed and eventually repatriated.

A7. Smit reached the ship at about 0830 hours on 17 July 2012. After some initial firefighting and boundary cooling *in situ*, on 20 July 2012 they began towing the ship towards mainland Europe.

A8. The fire on the ship burned unchecked for four days and caused such extensive damage that there were serious concerns regarding the integrity of what remained of the ship; the heat and smoke generated created a risk of explosion and a toxic smoke hazard on the ship which greatly impaired the work of Smit. Indeed, flare-ups were still detected even after the ship arrived at its port of refuge (over a month later).

A9. On 18 July 2012, Mr Stephen Tierney of TMC was appointed as Special Casualty Representative by Conti. Over the ensuing month, intensive discussions and meetings took

place between the interested parties and the authorities of various countries (including Ireland, the UK, Spain, Portugal, Belgium, France and Germany) with a view to identifying a port of refuge. The ship had been towed to a position of safety but had to wait off Lizard Point whilst awaiting approval to proceed.

A10. The time charter to MSC was extremely profitable for Conti and Conti's intention from the outset was, therefore, to repair her, if at all possible. Even at this very early stage, there were preliminary discussions about repairs. For example, on 26 July 2012, there were discussions about repairs including potentially using DMHI in Romania. On 2 August 2012, NSB Niederelbe Schiffahrtsgesellschaft mbH & Co KG (the **"**Manager**"**) issued an invitation to tender to Lisnave, a Portuguese yard, and Remontowa, a Polish yard. And on 8 August 2012, DMHI tendered for the ship's repair. Even before the she arrived at Wilhelmshaven, Owners had asked GL to prepare a possible condition in which the ship might proceed to a repair yard. In the Arbitration it was MSC's positive case that Conti was under a legal obligation to repair the ship under clause 1 of the time charter and the Tribunal would have agreed with this, had it mattered.

A11. Conti faced enormous difficulties identifying a port of refuge as it appeared that countries were extremely reluctant to be left with a stricken ship. Eventually, on 28 August 2012, an agreement was reached with the German authorities and the ship was allowed to proceed to Germany.

A12. As regards a particular port of refuge within Germany, Conti's options were limited since the ship's draft and the cargo storage requirements were such that there were relatively few German ports capable of accommodating the ship. In fact, there was only one truly viable option (which was chosen for Conti by the German Authorities), given her draft condition and the storage requirements at that time. That was Wilhelmshaven and specifically the JWP facility which at the time had not yet officially opened and therefore had sufficient space to take on a casualty of this size without disrupting ongoing commercial activities. The concession holder at JWP was Eurogate.

A13. On 1 September 2012, Smit submitted a passage plan to the relevant authorities and on 2 September, at 1345 hours, the "FAIRMOUNT EXPEDITION" began towing the casualty from the initial inspection / waiting area off the southwest coast of the UK, towards German territorial waters.

A14. Significant costs and expenses were incurred by Conti in relation to the passage to Wilhelmshaven, which were claimed in the Arbitration and awarded to Conti by the Tribunal:

A14.1. Liabilities to various governmental bodies in Belgium, France, the UK, and Germany of approximately €1.9m.

A14.2. The overwhelming majority of this sum related to claims by the German and UK authorities under the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. These claims related to preventative and precautionary measures said to have been taken in those jurisdictions to prevent bunker oil leaking from the ship and causing pollution in their territorial waters.

Arrival at Wilhelmshaven

A15. The ship arrived at Wilhelmshaven on 9 September 2012. The ship was redelivered by Smit to Conti on 10 September 2012 and the LOF was terminated. By a settlement

agreement dated 7 March 2013, Conti settled its liability to Smit. Conti paid €935,000 in full and final settlement of Conti's salvage remuneration obligations pursuant to the LOF signed in respect of the ship. These costs, which were claimed in the Arbitration and awarded to Conti by the Tribunal, therefore represented the proportion of the salvage settlement for the account of Conti only or, put another way, Conti's pro rata share of the overall liability to Smit.

A16. For the first three days at Wilhelmshaven, the ship was inspected by the police and the Federal Bureau of Maritime Casualty Investigation ("BSU").

A17. Even before the ship had arrived at Wilhelmshaven, Conti, through the Manager, had been in contact with a number of shipyards (including DMHI and HRDD) and at least one waste management company (Nehlsen). These discussions were progressed along with discussions with further shipyards once the ship arrived in Wilhelmshaven.

A18. On 17 September 2012, and after lengthy negotiations to seek to achieve the best rates, Nehlsen was engaged informally to deal with the discharge, temporary storage, cleaning and disposal of recovered containers that needed to be discharged before the ship could be repaired. A contract with Nehlsen was then signed on 24 September 2012.

A19. A contract was signed with Eurogate on 26 September 2012. The prices imposed by Eurogate were undoubtedly on the high side but there was, at the time, no other viable option due to the (forced) choice of refuge facility and the fact that Eurogate was the concession holder and had available space (because the port had not yet formally opened).

A20. Discharge of sound and damaged containers that needed to be removed before the ship could be moved to a repair facility commenced on 28 September 2012. It began with those containers which had suffered the least damage, i.e. which were not in the holds primarily affected by the fire: holds nos. 4, 5 and 6. Discharge proceeded slowly, however, both because of operational requirements imposed by Eurogate and the slow process of cleaning the discharged containers (each of which had to be tested for dangerous chemicals), and because of the need for GL to repeatedly reassess the condition of the ship and her ability to undertake the planned voyage to a repair yard. The one point of dispute on this detailed statement of facts is whether GL's ongoing involvement as described (which in itself is accepted) had any impact on the speed of discharge. On that, Mr Kenny KC's submission in opening was that there was no evidence before the court to support a finding that it had an impact. Mr Smith KC did not advance any contrary submission, and I have proceeded on the basis that the asserted link between GL's ongoing involvement and the speed of discharge was not established, albeit I do not consider that has any bearing on the issues calling for decision.

A21. Discharge of the sound and damaged containers was ultimately completed on 18 December 2012. The process of decontaminating cargo, releasing sound cargo, and destroying unsound and sound but unclaimed cargo continued thereafter, into 2013 and beyond.

A22. During this time, Conti incurred the following costs and expenses, which it claimed in the Arbitration and was awarded by the Tribunal, all of which had to be incurred in order, ultimately, to repair the ship:

A22.1. berth dues, quayside space rental and service charges paid to JWP and Eurogate in the sum of approximately €18.3m (although this figure in fact covers the entire period

up to 15 March 2013 when the ship left Wilhelmshaven and not just the period during which containers were being discharged);

A22.2. cargo handling and disposal costs, totalling approximately €9.2m;

A22.3. customs agents' fees, totalling €210,000;

A22.4. disbursements and bunker supplies, totalling about €4.2m;

A22.5. fire experts' fees, totalling approximately €880,000; and

A22.6. additional services and miscellaneous expenses. MSC originally pleaded a figure of approximately €6.1m under this head; Conti has disputed this and has identified various costs allocated to this category by MSC, which should in fact be allocated to costs of repairing the ship and/or general miscellaneous costs; and MSC accepted this reallocation in its skeleton argument.

A23. A further issue that needed to be considered by Conti at this time was the disposal of the firefighting water on board the ship, which had to be removed before repairs could commence:

A23.1. By early October 2012, a number of possible options were being considered for removal and disposal of at least some of the firefighting water. These proposals included a Nehlsen / Eckelmann proposal (which involved using barges to remove the water and then pumping it ashore to take it via road to a storage / disposal facility) and a proposal from Züblin (which involved building a water treatment facility alongside the ship, treating the water and then disposing of it *in situ*).

A23.2. The Nehlsen / Eckelmann proposal was viewed as uneconomical. The Züblin proposal was viewed as more promising, albeit there were certain planning permission issues as well as concerns over the quality of the treated water.

A23.3. Ultimately, on 7 November 2012 Hydro was engaged to remove and dispose of the fire-fighting water having attended the ship in Wilhelmshaven, presented its method to the Manager and the German Authorities, and carried out a test purification of a small sample of the water to show proof of concept.

A24. After a commissioning phase which involved assistance from a local shipyard (Lloyd Werft) dealing with the construction of necessary pipework, Hydro started to implement its water treatment system on about 1 December 2012.

A25. In parallel, Conti entered continued discussions with various ship repair yards over the repair of the ship. A number of different proposals were considered but the lead contenders by the end of October 2012 were a Romanian shipyard (DMHI), and two Chinese yards: COSCO and HRDD.

A26. By November, Conti had decided that DMHI would be preferable to HRDD and COSCO both in terms of the overall cost (although COSCO and HRDD were slightly cheaper, the benefit was balanced by the costs of transport to and from China) and the perceived risks associated with transport through the Suez Canal. As a result of the decision by the German Authorities referred to below, combined with GL's recommendation that the ship should travel in a loaded state (i.e. with waste, or other substitute ballast material, onboard), by December 2012 the COSCO / HRDD options were no longer feasible in any event.

A27. The negotiations over the ship repair also included negotiations surrounding the waste disposal and removal of firefighting water, because the Manager was considering the possibility of transporting the ship with the waste and at least some of fire-fighting water onboard.

A28. This was initially because GL had recommended that the ship travel in a loaded state in order to maintain structural integrity, but an additional factor was the very high expenses being incurred at the Eurogate terminal (initially around $100,000 per day although this reduced by about half after a few months). DMHI had indicated that it would be sub-contracting the waste disposal aspects to various companies who specialised in waste handling.

A29. On 16 November 2012, DMHI confirmed to the Manager that they were able to collect, dispose and neutralise the waste to European standards and provided their tender for repair of the ship and disposal of waste. By the end of November 2012, Conti intended that, subject to a solution being reached for the treatment of the firefighting water, the ship would be able to depart to the DMHI repair yard in Romania by mid-December 2012.

A30. Unfortunately, on 30 November 2012, the German Authorities classified the ship and all remaining cargo, residues, and container scrap on board as "*waste*." The significant consequence of this was that before the ship would be permitted to leave Germany, a full waste notification process (including for the ship) would have to occur. This was followed by a notification on 4 December 2012 by which the German Authorities modified their earlier decision, confirming that the ship herself was no longer classified as waste but that waste notification procedure would still have to be undertaken in respect of the waste onboard before the ship could depart for repairs.

A31. Conti and its lawyers adopted a three-pronged response to this. First, they disputed the categorisation of the ship as waste. Secondly, under protest, they commenced the waste notification procedure (albeit on the assumption that the ship herself was not waste). Thirdly, they lodged an objection to the requirement that Conti undergo a full notification process.

A32. On 17 December 2012, following a meeting with the Manager a few days earlier to discuss the notification process, DMHI informed the Romanian waste regulator, NEPA, that the ship would be coming to Romania for repairs including waste removal. DMHI further stated that the water was being decontaminated on board the vessel by Hydro and that two-thirds would be neutralised and discharged into the sea prior to arrival.

A33. Meanwhile in Wilhelmshaven, Hydro's progress was slow. Due to this, the operational problems being encountered because of cold weather, and the poor quality of the treated water, in late January 2013 the Manager began to consider various alternative options including Züblin (whose proposal still seemed unlikely to be feasible), Nehlsen / Eckelmann (whose proposal remained very expensive, despite some reduction), and Nord.

A34. Discussions with Nord commenced in late January / early February 2013 and the Manager requested a quote on 6 February 2013. A draft disposal contract was received on 7 February 2013 and matters progressed swiftly thereafter.

A35. On 14 February 2013, the Danish authorities issued their letter of approval for the notified shipment of contaminated water for disposal in Denmark and on 15 February 2013, the

Manager informed Hydro that Conti would be using Nord; the contract was signed on the same day and the contract with Hydro was terminated thereafter.

A36. At this time (i.e. in mid-February 2013), one of the most pressing matters was the ongoing cost still being incurred at Wilhelmshaven even though all of the sound and damaged containers that needed to be discharged before the ship was moved for repairs had been discharged. Although Conti had successfully negotiated a reduction in the berthing fees, their requests in December 2012 to move the ship to a cheaper berth (or even to an anchorage) had been rejected by the German Authorities. Since Conti was in the advanced stage of negotiation of the ship repair and waste disposal contract with DMHI, the decision was taken to proceed to Romania.

A37. On 19 February 2013, the DMHI ship repair and waste disposal contract was signed.

A38. The discharge of the firefighting water was completed by Nord on 1 March 2013. Conti ultimately incurred costs and expenses in the sum of about €7.1m removing the firefighting water, which it claimed in the Arbitration and was awarded by the Tribunal.

Arrival in Romania

A39. On 15 March 2013, the notification procedure and documentation for the voyage to Romania was approved by a letter of confirmation issued by NEPA in Romania (Romania's authority for environmental protection) and an NGS letter of consent. The ship was allowed to depart Germany on that day and arrived in Romania on 30 March 2013.

A40. The ship was not allowed to berth until 17 May 2013, while NEPA carried out various inspections and sampling exercises. These began on 1 April 2013 and delayed the discharging operations but progress thereafter was very slow due to issues with waste notification, the discovery of undamaged containers and containers containing rotten chicken product, the details of which are not relevant for present purposes. On 20 July DHMI's sub-contractor started discharging waste but on 16 October 2013 the decision was taken to stop discharging waste from the ship.

A41. The delays and increased costs of discharging waste in Romania meant that discussions took place with other waste disposal specialists, including Nord and Environmental Protection Engineering of Athens ("EPE"):

A41.1. Having had a positive experience in dealing with the firefighting water, the Manager had (on 28 May 2013) asked Nord to provide a waste disposal concept for dealing with the balance of the firefighting water (to the extent it had not been discharged as part of the initial operation at WHV), muddy residues and solid matter. Nord sent their offer on 14 June 2013 (at the time, the intention was for Nord to discharge the waste while the ship remained in Romania). Representatives from Nord attended the ship in Romania in July 2013.

A41.2. On 10 September 2013 there were confidential discussions between the Manager and NGS in which alternative methods of disposal, including a new country/destination, were considered. On 16 September 2013, the Manager asked GL to provide confirmation that the ship could sail to Denmark or Greece. On 19 September 2013, Nord sent an indicative offer to the Manager and a time schedule.

A41.3. Similarly, on 12 September 2013, the Manager wrote to EPE to request a disposal concept and lump sum quote. EPE submitted their quote for waste disposal on 17

September 2013. However, the Manager considered EPE's timeframe to be too long and were also swayed by the previous positive experience with Nord (i.e. their efficient disposal of the fire-fighting water).

A41.4. The Manager conducted a cost comparison of the waste disposal proposals from EPE and Nord. Nord's proposal was less expensive, although in the same ballpark, particularly once the journey to / from Denmark was factored in. And on or around 17 October 2013, Conti decided to go ahead with Nord. The contract was concluded on 8 November 2013.

Arrival in Denmark

A42. On 8 November 2013, the ship left Romania for Denmark and arrived on 22 November 2013. The contract with Nord was signed on the same day.

A43. Upon arrival in Denmark, discharge operations commenced, and despite some contractual difficulties, made good progress. The progress of the works in Denmark was assisted by the sorting work which had already been done in Romania. The works were completed by 2 February 2014 and the following day the ship departed for Romania.

A44. Conti incurred costs and expenses in the sum of about €24.8m removing the waste from the ship, which it claimed in the Arbitration and was awarded by the Tribunal, comprising:

A44.1. approximately US$7m paid to DMHI for waste removal services carried out whilst the ship was in Romania;

A44.2. other cargo handling and disposal services in Romania in 2013 totalling €180,000;

A44.3. disbursements in Romania, where a total of approximately €1m was incurred but that total related to the period in 2013 when waste removal was carried out and also to the period in 2014 when ship repairs were carried out;

A44.4. fees of about US$535,000 for transiting the Bosporus;

A44.5. costs of disposing waste in Denmark of about €17m; and

A44.6. additional expenses in Denmark of about DKK1.35m.

The repairs and return to service under the Charterparty

A45. The ship arrived in Romania on 17 February 2014 whereupon the repair work commenced. It was completed on 12 July 2014. Sea trials were completed on 14 July 2014 and the ship was ready to return to service on 15 July 2014.

A46. Conti incurred costs and expenses in the sum of about US$21m repairing the ship plus the disbursements in Romania referred to above, which it claimed in the Arbitration and was awarded by the Tribunal. Conti says that part of the miscellaneous expenses referred to in paragraph A22.6 above also falls under this head.

A47. The ship was re-delivered to MSC under the Charterparty on 23 July 2014. During the period between the Casualty and 23 July 2014 Conti incurred various other expenses related to the casualty, which it claimed in the Arbitration and was awarded by the Tribunal, namely:

A47.1. crew expenses totalling about €810,000;

A47.2. survey and expert costs of about €6.7m;

A47.3. legal expenses of about €13.9m;

A47.4. professional fees in relation to GA of about €1.2m; and

A47.5. insurance-related expenses/premia of about €1.2m.

A48. Conti says that part of the miscellaneous expenses referred to in paragraph A22.6 above also falls under this head.

The London cargo proceedings

A49. Claims against MSC under the contracts of carriage were brought in the Commercial Court in London by Stolt as assignees of various cargo interests. The Claim Form was issued on 29 August 2017 and Particulars of Claim were served on 27 November 2017. An Amended Defence was served on 9 April 2018 followed by a Reply on 4 May 2018. These proceedings are presently stayed pursuant to a consent order dated 7 June 2018.