IN THE COURT OF APPEAL **Cl No. CA-2026-000025**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

B E T W E E N:

OCEANUS CAPITAL SARL

Claimant / Respondent

- and -

LLOYD'S INSURANCE COMPANY S.A.

Defendant / Appellant

"M/V VYSSOS"

APPELLANT'S SKELETON ARGUMENT

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*References to the appeal bundles are in the form [**CB (core bundle), SB (supplementary bundle) or AB (authorities bundle) /Tab/Page**]*

A. Overview

1. This is an appeal by the Defendant insurers, brought with the Judge's permission, against her order, dated 17 December 2025, which she made for the reasons set out in her judgment, dated 17 December 2025, with neutral citation number [2025] EWHC 3293 (Comm) (the "**Judgment**")[1].

2. The claim arose out of the second of two trips undertaken by the M/V "Vyssos" (the "**Vessel**") into Ukrainian waters in November and December 2023. The contractual scheme between Owners and the Respondent required the Vessel to be fully insured against war risks. In particular, by clause 17.2 of the Facility Agreement, the owners of the Vessel ("**Owners**") covenanted to the Respondent mortgagee that it would

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[1] Paragraphs in the Judgment are referred to as **[J/x]**.

procure that the Vessel was fully insured against war risks on such conditions that the Respondent would approve in writing.

3. The Respondent was especially closely engaged with the Vessel's activities and was watching her movements because its loan to the Owners had been a disaster from the very outset – the Owners were in default immediately and not a penny of the loan had been repaid. The fact that the Respondent had entered into a bad bargain and was seeking to manage its financial exposure explains its proactivity. The Respondent could have foreclosed on the loan and taken possession of the Vessel, but it chose not to. In the circumstances, it needed to keep the Vessel trading to have any possibility of being repaid.

4. The Owners and the Respondent were both fully aware of the fact that the Owners' 'Vessel Protect' annual war risks policy (the "**Annual War Risks Policy**") would not cover the Vessel while trading in Ukrainian waters. Accordingly, at the Respondent's request, for each voyage to Ukraine the Owners presented the Respondent with additional cover notes which provided *prima facie* cover against war risks while the Vessel was trading in Ukrainian waters.

5. The first voyage to Ukraine in November took place without incident. On 26 December 2023, at the Respondent's request, the Owners provided the Respondent with a cover note (the "**December Additional Cover**") which purported to cover the Vessel against war risks for the Vessel's second trip to Ukraine. The Respondent had its own insurance specialist check whether the December Additional Cover was in order and, having had confirmation that it was **[SB/27/128-129]**, sent a WhatsApp to the Owners confirming in writing that "*everything ok*" **[SB/21/122]**.

6. The decision to trade in Ukrainian waters was a conscious one, taken in the full knowledge that there would be no cover under the Annual War Risks Policy if a casualty were to befall the Vessel during such a trade. In the light of this knowledge, the Respondent could have held the Vessel back or taken out its own primary war risks and/or hull and machinery cover. Instead, the Respondent approved and chose to rely on the December Additional Cover as providing it with *prima facie* war risks cover while the Vessel was in Ukrainian waters.

7. The next day, on 27 December 2023, the Vessel entered Ukrainian waters where it was struck by a mine (the "**Mine Strike**") and sustained serious damage. The Vessel was subsequently declared a constructive total loss. The Respondent made a claim under the December Additional Cover, but that claim was rejected on the grounds that the policy was a forgery.

8. Neither the Mine Strike nor the fact that the December Additional Cover was a forgery, on their own or together, was sufficient to trigger coverage under the mortgagee's interest insurance policy (the "**MII Policy**") underwritten by the Appellant. That policy is a specialised form of contingent insurance. It is not a conventional insurance on property whereby the Appellant undertook to hold the Respondent harmless from loss of or damage to the Vessel. Moreover, it does not respond to general (mis)conduct on the part of the Owners or Charterers; but rather only insures against loss resulting from non-payment by the primary policy providing *prima facie* cover that is proximately caused by the named perils therein; of which fraud (in the form of a forged policy) is not one.

9. The Judge concluded otherwise. After a two-day trial in November 2025, she found that the Respondent was entitled to an indemnity under the MII Policy.

10. The Appellant respectfully submits that the Judge erred in a number of respects in her construction of the MII Policy and/or as a matter of law and was wrong to find that the Respondent was entitled to an indemnity under the MII Policy.

11. The Appellant's three grounds of appeal map its three defences to the Respondent's claim:

    11.1. **Ground One**: the learned Judge was wrong to find **[J/44]**; **[CB/8/100]** that the proximate cause of the Respondent's loss was the loss of or damage to the Vessel as a result of the Mine Strike. She should have concluded that the proximate cause of the Respondent's loss was the fact that the December Additional Cover was a forgery: that is not a peril insured against under the MII Policy.

11.2. **Ground Two**: alternatively, if the Respondent's loss was caused by an insured peril (namely the breach of Trading Warranties in the Annual War Risks Policy), the Judge was wrong to find **[J/76]**; **[CB/8/115]** that the Respondent thought that the Vessel would not be breaching the Trading Warranties because of the December Additional Cover. She should have concluded that the claim fails because the insured peril occurred with the privity of the assured Respondent, contrary to the express proviso in Clause 1.1.

11.3. **Ground Three**: further, even if the proviso is inapplicable, the Judge should have found that the claim failed for want of fortuity because the relevant loss was an inevitability.

12. The essential flaw in the Judge's analysis was her failure properly to construe the MII Policy and to understand the nature of the loss insured against.

B. <u>The Policy</u>

13. The MII Policy was written on the Institute Mortgagee's Interest Clauses Hulls (1/3/97 CL337-97) terms. These terms are different (and, in certain respects, very different) from other wordings that were historically (or, in the case of the BankServe wording, still are[2]) available in the market and have been the subject of previous decisions[3].

14. The mortgagee has an insurable interest (section 14(1) of the MIA) and could insure the Vessel against loss and damage in its own right. However, such cover is expensive and may not respond in the event that the vessel is scuttled. Accordingly, as its primary

[2] The lender friendly BankServe form (considered in <u>Piraeus Bank AE v Antares Underwriting Ltd</u> [2022] 2 C.L.C 46) provides wider coverage than this MII Policy, including cover "*for loss of, or damage to, or liability arising in connection with Vessel … which occurs by virtue of any alleged deliberate, negligent or accidental act or omission …*" **[AB/24/546]**

[3] For a basic summary of the background of mortgagees' interest insurance, see: <u>The Good Luck</u> [1988] 1 Lloyd's Rep. 514 at 520-521 per Hobhouse J. **[AB/11/153-154]**, Hudson, <u>Mortgagees' interest insurance: an examination of the Institute Mortgagees' Interest Clauses – Hulls 1/3/97</u> [1999] Int. Journal of Shipping Law 31 **[AB/27/650-656]** and Colinvaux & Merkin's <u>Insurance Contract Law</u> at B-0800 to B-0802 **[AB/30/679-780]**

form of collateral security for the loan, a mortgagee will almost invariably take an assignment of the Owners' policies. To provide further protection (the level of which will vary depending on the terms of the cover) against the risk of the Owners' policies not responding to a loss, a lender will typically take out secondary or contingent cover in its own right in the form of mortgagees' interest insurance.

15. The terms of cover written in the London market have evolved over time from the original Swedish form[4] to bespoke broker wordings[5] and, eventually, to Institute Clauses. The first Institute form of Mortgagees' Interest Clauses was published in 1986 (but these proved unpopular) and the current wording[6], on which the MII Policy was written, was published in March 1997[7]. This is the first time that this Court has considered a claim under the current wording.

16. The MII Policy contains, among others, the following terms:

> *"***A. RECITAL**
>
> *Whereas the Assured has entered into a loan agreement commensurate with which the Assured holds certain collateral security including a first*

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[4] Criticised by Lloyd L.J. in The Alexion Hope [1988] 1 Lloyd's Rep. 311 at 313 as a "*combination of a medieval English form with a translation from modern Swedish… I hope it will never again be used for a contract of mortgagee interest insurance…*" **[AB/10/136]**

[5] See (for example): the Intersure form considered in The Captain Panagos DP [1985] 1 Lloyd's Rep 625 (which included cover for "*Loss or damage to or liability of the Vessel involving a peril not insured against by the Owners Policies or Club Entries*") **[AB/9/128]** and the BankServe form considered in Piraeus Bank AE v Antares Underwiring Ltd [2022] 2 C.L.C. 46 (which includes cover "*for loss of, or damage to, or liability arising in connection with Vessel… which occurs by virtue of any alleged deliberate, negligent or accidental act or omission…*") **[AB/24/546]**

[6] Given the fundamental differences in wording (most notably in the insuring clause and named perils), the older cases on mortgagees' interest insurance provide limited (if any) assistance when construing the MII Policy.

[7] See the reference to "1/3/97 CL337-97" at [**CB/13/169]**. The reference to "1.3.79" in the cover note **[CB/13/159]** is an obvious typographical error, reversing the 7 and 9.

mortgage on the Mortgaged Vessel and endorsements of its interests on the Owners' Policies and Club Entries.

1. INSURING CLAUSE

1.1 This insurance will indemnify the Assured for loss resulting from loss of or damage to or liability of the Mortgaged Vessel which, in the absence of an insured peril set out in Clause 2.1 below, would prima facie be covered by the Owners' Policies and Club Entries, and not excluded therein, but in respect of which there is subsequent non-payment (or reduced payment which is approved in advance by the Underwriters hereon) by any of the Underwriters of Owners' Policies and Club Entries as a result of any insured peril, ***provided always that such insured peril occurs or exists without the privity of the Assured.****"*

[…]

2.1 Insured Perils *[…]*

> *2.1.2.3 breach of trading warranties contained in any of the Owners' Policies and Club Entries*

2.2 Owners' Policies and Club Entries *– means […] war risks on terms equivalent to current Institute War and Strikes Clauses Hulls – Time and full protection and indemnity risks on conditions equivalent to the rules of a P&I Club that is a member of the International Group of P&I Associations.*

2.3 Net Loss *– means the Assured's loss under the loan agreement to the extent secured by mortgage on the Mortgaged Vessel net of any amounts recovered or recoverable under all security arrangements contained in or collateral to the loan including but not limited to all mortgages (whether on vessels insured hereunder or on other vessels), liens, any floating and fixed charges, security interests, guarantees, insurance policies and pledges*

[…]

3. EXCLUSIONS

In no case shall this policy cover:

3.1 any loss or expense arising from or as a result of:

3.1.1 the relevant Owners' Policies and Club Entries having been terminated or cancelled or cover suspended or non-payment of claims by the Underwriters or insurance brokers thereof due to non-payment of premium or call […]

4. WARRANTIES

It is warranted in respect of the Mortgaged Vessel that:

4.1 Owners' Policies and Club Entries have been taken out and, except as a result of the occurrence or existence of an insured peril without the privity of the Assured, shall be maintained throughout the currency of this insurance for an insured value and limit of liability not less than the amount insured hereunder or the amount of the outstanding loan to the extent secured by the Mortgaged Vessel." **[CB/13/163-166]**

17. The key features of the MII Policy, relevant to the present dispute, include the following:

17.1. The interest insured under the MII Policy was the mortgagee's collateral security as loss payee and assignee of the Owners' Policies[8] – see: the Recital and Insuring Clause[9] **[CB/13/163]**.

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[8] By a General Assignment, the Respondent as mortgagee took an assignment of all rights and interest of every kind which Owners had in respect of, or in connection with, *inter alia*, sums payable under or in relation to the insurance of the Vessel **[SB/16/51]**.

[9] See also: Colinvaux & Merkin's Insurance Contract Law at B-0804: "*The interest is the right to claim under the owner's marine or war risks policy (as the case may be) in its capacity as assignee or loss payee for loss and damage to the mortgaged vessel*." **[AB/30/681]**.

17.2. The MII Policy is not a conventional first party property insurance whereby the Appellant promises to prevent or hold the assured harmless against loss of or damage to the Vessel – see: the Insuring Clause, the definition of net loss (Clause 2.3) **[CB/13/165]**.

17.3. Loss of and/or damage to the Vessel is a necessary but insufficient occurrence to trigger coverage under the MII Policy – see: the Insuring Clause **[CB/13/163]**.

17.4. The relevant "*loss*" insured against (being the first reference to "*loss*" in the first line of the Insuring Clause) is the mortgagee's net loss which results from (i) loss and/or damage to the Vessel which is *prima facie* covered by the Owners' Policies, coupled with (ii) non-payment under the relevant Owners' Policy caused by an insured peril[10] – see: the Insuring Clause. **[CB/13/163]**.

17.5. The mortgagees' net loss resulting from non-payment under the Owners' Policies must be proximately caused by a named insured peril – see: the Insuring Clause and the definition of insured perils (Clause 2.1) **[CB/13/163-165]**.

17.6. There is only cover under the MII Policy if the relevant insured peril "***occurs or exists without the privity of the Assured***" – see: the Insuring Clause. **[CB/13/163]**.

17.7. The insured perils are specifically defined. There is no right to an indemnity under the MII Policy if the proximate cause of the non-payment is fraud or deceit or another 'act or omission' unless the relevant conduct falls within

[10] This feature of the MII Policy is fundamentally different to other wordings, such as that considered in The Captain Panagos DP [1985] 1 Lloyd's Rep 625, at 629-630 (where the policy was construed as an insurance against physical loss and damage and non-payment under the owner's policy was a condition precedent to the right of recovery rather than an element of the insured risk) **[AB/9/130-131]** and in Piraeus Bank AE v Antares Underwriting Ltd [2022] 2 C.L.C. 46 at [231(i)] (where "*loss*" was construed as meaning the total loss of the vessel albeit such loss was insufficient to trigger coverage unless caused by a peril insured under the mortgagees' insurance at [231(vi)]). **[AB/24/578]**.

the definition of an insured peril – see: the Insuring Clause and the definition of insured perils (Clause 2.1) **[CB/13/163-165]**.

17.8. The risk of non-payment because an Owners' Policy is null and void *ab initio* (whether as a result of it being a forgery or otherwise) is not an insured peril (Clause 2.1[11]) **[CB/13/163-165]** and the risk of non-existent primary cover is borne and retained by the mortgagee (warranty at Clause 4.1) **[CB/13/166]**.

17.9. The risk of non-payment because an Owners' Policy has been cancelled or terminated on account of the non-payment of premium is excluded (Clause 3.1.1) **[CB/13/165]**.

17.10. The Annual War Risks Policy, the additional war risks policy taken out for the first voyage to Ukraine in November 2023[12] (the "**November Additional Cover**") and the December Additional Cover all fall within the definition of "Owners Policies and Club Entries" in the MII Policy (Clause 2.2.) **[CB/13/165]**.

18. In short, the risk of a loss to the mortgagee as a result of loss of or damage to a Vessel and the non-payment by the relevant Owners' Policy is retained and borne by the mortgagee unless the proximate cause of that loss is one of the insured perils defined in Clause 2.1 of the MII Policy.

C. Background Facts

19. The facts leading to the present dispute are set out in full in the Judgment at **[J/5 – 22]**; **[CB/8/79-88]** and are not repeated here. By the time the matter came to trial, there was very little in dispute between the parties on the facts, and the Judge heard evidence from only one witness: Mr Wilhelm Magelssen of the Respondent's investment manager, NRP Marine Asset Management ("**NRP MAM**").

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[11] Separately, *avoidance* of the Owners' Policies on the grounds of misrepresentation or non-disclosure is an insured peril under Clause 2.1.1. **[CB/13/163]**

[12] [**SB/18/91**]. Like the December Additional Cover, it was written on Institute War and Strikes Clauses Hull, included the Mortgagee, Loss Payable Clause and Notice of Assignment, Mortgage Clause and noted the interest of the Respondent as mortgagee.

20. What follows is a brief summary of the circumstances which led to the Respondent's alleged loss (see **[J/15 – 19]**; **[CB/8/85-87])**:

20.1. On 21 December 2023, whilst the Vessel was on charter from Owners to Azov Wave Shipping and Trading Co ("**Charterers**") and sub-chartered to Maxgrain SA, the Vessel's managers Nava Shipping Limited ("**Nava**") sent an email to NRP MAM[13] stating that the Vessel would again be trading in Ukraine: "*Itinerary is Istanbul, Sulina, Odessa, South Italy. Dates will be given as soon as they are known.*" **[SB/24/126]**.

20.2. The Respondent knew that the Vessel had been ordered to trade in breach of the Trading Warranties and that, if it did so, the Annual War Risks Policy would not provide cover against any loss or damage sustained when doing so. The Judge found that Mr Magelssen had accepted in cross examination that he was chasing Owners and Charterers for the December Additional Cover because he knew this **[J/19]**; **[CB/8/86-87]**.

20.3. On 25 December 2023, NRP MAM sent an email to Nava saying "*please ensure that war risks is in place for loading Ukraine before leaving Romanian waters. Believe it is for Azovs bill [sic] but you as Owners must ensure that the insurance is in place – we can obviously not enter Ukranian [sic] waters befor [sic] we have seen evidence that aoprpriate [sic] insurance is in place*" **[SB/24/126]**.

20.4. On 26 December 2023 at 16:01, with the Vessel approaching Ukrainian waters, Mr Nicolai Heidenreich (NRP MAM's managing partner) sent a follow up email to Nava asking for an update and stating:

> "*Any update on this? See vessel is now just outside river delta to Izmail Needless to say this is vital and urgent that we are comfortable with insurance cover*" **[SB/24/126]**.

[13] At all times, NRP MAM corresponded with Nava and Charterers as the Respondent's representative and agent.

20.5. On 26 December 2023, Mr Magelssen exchanged further WhatsApp messages with Mr Yigiter[14], the owner of the Charterers, in which he further enquired about additional war risks cover being in place **[SB/21/121-122]**.

20.6. At 21:59, Mr Yigiter produced to NRP MAM by WhatsApp **[SB/21/122]** a cover note of the December Additional Cover purporting to confirm additional war risks insurance cover for the further voyage to Ukrainian waters.

20.7. Two minutes later, at 22.01, Mr Magelssen forwarded a copy of the cover note by email to Ms Trine Kjellsby of Wilhelmsen (the Respondent's agent and broker) **[SB/27/129]**.

20.8. At 22:32, Optima (the Charterer's brokers) sent a copy of the cover note to Nava **[SB/32/151]**.

20.9. At 22:43, Mr Magelssen emailed Ms Kjellsby saying "*... so question is: is the vessel insured for Izmail calling? Reason asking [sic] is should we hold vessel back by instruction or are we ok from a need to have on the current cover note*." **[SB/27/128-129]**.

20.10. At 22:46, Ms Kjellsby replied to Mr Magelssen saying "*Everything is in order. No need to hold back vessel ...*" **[SB/27/128]**.

20.11. At 23:49, Mr Magelssen confirmed to Mr Yigiter "*Nothing wrong – everything ok*" without proof of payment of the premium which he indicated he was prepared to wait for until the next day **[SB/21/122]**.

20.12. On 27 December 2023 the Vessel proceeded from Romania towards Izmail and sustained loss and damage from a Mine Strike at 08:20 while in Ukrainian waters **[SB/1/5]**.

20.13. On 29 December 2023, Ms Kjellsby wrote to Mr Yuri Stankov, the broker/manager of the Charterers, asking for confirmation that he had

[14] The first time Mr Magelssen enquired about the insurance over WhatsApp was on 23 December 2023 **[SB/21/118]**.

notified the underwriters under the December Additional Cover of the Mine Strike **[SB/30/145**].

20.14. Also on 29 December 2023, the owners' claim adjusters gave notice of the claim under the December Additional Cover to Mr Zolezzi, the Claims Manager at CR International **[SB/31/147]**.

20.15. At 15:49 on 29 December 2023, Mr Zolezzi confirmed that the cover note purporting to contain the terms of the December Additional Cover was a forgery **[SB/31/147]**.

20.16. On 5 January 2024, Mr Hayward (the Head of Marine at CR International) confirmed that cover note had been forged and that "*no risk has been taken out through us*." **[SB/36/160]**.

20.17. The Respondent claimed under the MII Policy in January 2024.

20.18. On 8 February 2024, the Vessel was declared a CTL.

20.19. The Respondent presented a claim under the Annual War Risks Policy four months later in June of 2024 **[SB/38/163]**. That claim was rejected **[SB/39/165]**.

21. The Appellant advanced three complete defences to the Respondent's claim at trial: (i) the proximate cause of the Respondent's loss was not an insured peril; or (alternatively) (ii) the loss was excluded by the proviso in Insuring Clause 1.1; and (iii) the occurrence of the Respondent's loss was not fortuitous.

22. These defences are reflected in the grounds of appeal.

D. <u>First Ground of Appeal: Causation</u>

23. It goes without saying that an assured's loss must be proximately caused by an insured peril, if it is to be recoverable. A proximate cause is not the first, the last or the sole

cause of the loss; it is the dominant, effective or operative cause.[15] Proximate cause is a question of fact.

24. The proximate cause of the Respondent's loss was the invalidity of the December Additional Cover which the Respondent approved in writing and relied upon as the primary policy that was supposed to provide *prima facie* cover for any loss of or damage to the Vessel while trading in Ukrainian waters. That is not an insured peril under the MII Policy, and the Respondent's claim should have failed on this basis.

The Judge's findings

25. Despite setting out the Appellant's submissions in detail at **[J/36-43]**;**[CB/8/95-100]** and despite reasoning (correctly) that what mattered ultimately was whether the specific terms of cover in the MII Policy were met on the present facts; the Judge then found (for the reasons largely advanced by the Respondent, set out at **[J/28-35]**;**[CB/8/90-95]**) that the proximate cause of the Respondent's loss was the loss of or damage to the Vessel as a result of the Mine Strike **[J/44]**;**[CB/8/100]**.

26. At **[J/47]**;**[CB/8/101]**, she agreed with the Respondent that the December Additional Cover "*never existed and cannot be treated as part of Owner's covered policies for the purposes of Clause 1.1 of the MII Policy*". She found that a forged policy does not exist as a policy as a matter of fact, and that the relevant covered policy that existed at the time of the Mine Strike was the War Risks Policy. The loss that the Respondent suffered was found to have resulted from the loss of the mortgaged Vessel by reason of the Mine Strike, which loss would in the ordinary course have been covered by the War Risks Policy, but for Owners' breach of the Trading Warranties thereunder. It was common ground that the underwriters to the War Risks Policy had not paid under that policy as a result of the breach of the Trading Warranties and that that specific breach was an insured peril under Clause 2.1.2 of the MII Policy, in respect of which the Respondent could claim.

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[15] See Section 55 of the Marine Insurance Act 1905, which states that the insurer is not liable for a loss which is not proximately caused by a peril insured against **[AB/1/5]**: Leyland Shipping Co v Norwich Union Fire Insurance Society [1918] A.C. 350 **[AB/4/35-36, 38, 40]** as explained in FCA v Arch [2021] UKSC 1 at [162] to [170] **[AB/23/493-496]**

27. The Judge at **[J/52]**; **[CB/8/103-104]** considered the nature of an MII policy and found that "*the overriding purpose*" is to protect a mortgagee against a loss which it reasonably expects to be covered by the owner's insurances, and which is not ultimately covered due to some (mis)conduct on the part of the owner for which the mortgagee is not responsible. The Judge found that it was clear on the wording of the MII Policy that the loss insured was the loss of/damage to the Vessel, and the proximate cause of that loss was whatever damaged the Vessel – here, the Mine Strike. The proximate cause of the inability to recover under the War Risks Cover for that loss was the breach of the Trading Warranties, which is an insured peril under the MII Policy.

Where the Judge erred

28. The Judge's conclusion on proximate cause was the result of her flawed construction of the MII Policy.

29. Fundamentally, the MII Policy is not, contrary to the Judge's analysis, a primary insurance on property insuring the mortgagee's proprietary interest in the Vessel. It makes no sense, in the context of the MII Policy, to describe the damage to the Vessel as the proximate cause of the Respondent's loss. The Appellant MII insurers did not promise to hold the Respondent harmless from loss of or damage to the Vessel, nor does the MII Policy respond where coverage under the primary policies fails generally or as a result of *any* act or omission (or dishonesty) on the part of the borrowers, being the Owners of the Vessel.

30. Rather, the MII Policy is a contingent or secondary form of insurance that insures the Respondent against financial loss as a result of the *prima facie* Owners' cover not responding to a claim for loss of or damage to the Vessel caused by certain defined conduct on the part of the borrowers, specified as insured perils. The risk that is being insured against is the risk of <u>financial</u> loss due to non-payment by the Owners' insurance which results from a double contingency (i) loss of or damage to the Vessel that is *prima facie* covered by Owners' Policies (as defined in Clause 2.2); together with (ii) the failure of the Owners' Policies to respond to that loss or damage as a

result of one of the insured perils. The relevant causal enquiry concerns the reason why the primary policy providing *prima facie* cover for the casualty did not respond.

31. This construction of the MII Policy is consistent with the way Hobhouse J explained and characterised mortgagee's interest insurance in The Good Luck [1988] 1 Lloyd's Rep 514 at page 521:

> *"Typically, this type of policy covers losses which are not recoverable from the borrowers' insurers, due to some nondisclosure or misrepresentation by the borrower, or due to some act or omission of the borrower which is not in itself an insured peril as, for example, the wilful casting away of the vessel with the privity of the borrower."* **[AB/11/154]**

32. As a matter of the true construction of the MII Policy, the Judge should have recognised that the risk of non-payment because an Owners' Policy is a forgery is not an insured peril (within the meaning of Clause 2.1) and that the risk of loss as a result of non-existent cover is borne and retained by the Respondent (in accordance with Clause 4.1); not by the Appellant.

33. The MII Policy is not an "all risks" policy; it is a named peril policy, which only provides cover if the mortgagee's loss is proximately caused by an insured peril. This is critical, because it is a cornerstone principle of insurance law that to recover an indemnity, the insured must prove that the proximate cause of its loss was one or more of the named perils. The test requires the application of common-sense standards.[16]

34. Because the Judge failed properly to construe the scope of the cover provided by the MII Policy and the nature of the loss that it insured against, she asked herself the wrong question(s) for the purpose of identifying the proximate cause of the Respondent's loss. She should have asked herself: would the Respondent have suffered a net loss within the meaning of the MII Policy following the Mine Strike had the December Additional Cover been a valid (as opposed to a forged) policy, to which the answer was clearly: no.

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[16] See: Yorkshire Dale Steamship Co v Minister of War Transport [1942] A.C. 691 at 702, 706 per Lord Macmillan **[AB/6/66, 70]** and FCA v Arch, *ibid*. **[AB/23/493-496]**

35. In other words, the key counterfactual the Judge should have considered was to suppose that the Mine Strike had occurred during the first trade to Ukraine in November 2023. If it had happened then, as the Respondent accepted at trial **[J/12]**; **[CB/8/83]**, the November Additional Cover would have responded and there would have been no loss within the meaning of the MII Policy. Contrast that with what happened during the December trade, and it is clear that the critical difference was the fact that the December Additional Cover was a forgery.

36. It is the fact that the December Additional Cover was a forgery which so starkly distinguishes the two scenarios. That counterfactual serves to demonstrate that the dominant and effective cause of the Respondent's loss was the fact that the December Additional Cover was a forgery.

37. As noted above, fraud (in this case, in the form of a forged policy) is not a risk that the Appellant assumed (given the terms of the warranty at Clause 4.1), nor is it an insured peril within the scope of Clause 2.1. On this basis, the Judge should have concluded that the proximate cause of the Respondent's loss was not an insured peril, and the claim should have failed.

38. Importantly, and contrary to the Judge's finding on the point, the December Additional Cover was properly to be regarded as the primary policy providing *prima facie* cover against war risks while the Vessel traded in Ukraine, despite being forged. This is how the parties treated the December Additional Cover as a matter of fact (notwithstanding that it was a nullity as a matter of law).

39. The Appellant's case is that "*… <u>prima facie</u> be covered by the Owners' Policies and Club Entries, and not excluded therein …"* means an Owners' policy which the parties were looking to to provide the underlying primary coverage. In this case, everyone knew and accepted that the Annual War Risks Policy did not provide *prima facie* cover while the Vessel was in Ukrainian waters. That was precisely the reason why the Respondent was insistent upon the December Additional Cover which it considered and approved before the voyage took place. It was the December Additional Cover that was being relied upon, as a matter of fact, as providing *prima facie* war risks cover for that voyage.

40. As a matter of construction, the words "*prima facie*" in Clause 1.1 are given their meaning by the remainder of the clause, read with the definition of Owners' Policies in Clause 2.2. They refer to a loss ("*loss of or damage to … the Mortgaged Vessel*") which would otherwise be covered – and not excluded – by the scope and nature of the Owners' Policies as set out in Clause 2.2. For example, a war risks policy which was *narrower* in scope than the current Institute War and Strikes Clauses Hulls – Time would not be an Owners' Policy for purposes of the MII Policy.

41. This conclusion is supported by authority. Calver J in Piraeus Bank AE v Antares Underwriting Ltd [2002] EWHC 1169 (Comm), explained at [264] that the words *prima facie* "*… identify loss, damage or liability which would have been covered by the Owners' Policies - taking into account both the insured perils and the policy exclusions - but in respect of which there is no cover, or cover has been lost, because of the conduct of a Relevant Party (by reason of non-disclosure, misrepresentation, breach of warranty etc)*" **[AB/24/582]**. In the present case:

    41.1. Loss and damage sustained while outside territorial limits is excluded from cover by the Annual War Risks Policy; whereas,

    41.2. The December Additional Cover provided *prima facie* cover for the voyage to Ukraine notwithstanding there was no legal entitlement to an indemnity as a result of the cover being a forgery.

42. A refrain which the Respondent relied on at trial was that a non-existent policy of insurance cannot possibly have caused loss to the Respondent or to anyone.

43. That argument, which the Judge accepted at **[J/47]**; **[CB/8/101]**, is not only inconsistent with commercial common sense, it is also wrong as a matter of law and contrary to the facts:

    43.1. The December Additional Cover existed in documentary form as a matter of fact and had causal and commercial consequences. It is contrary to

commercial common sense to undertake a causal analysis on the basis that the December Additional Cover did not exist.

43.2. A forged contract is null and void, but it can nevertheless have legal effect in the event that it is ratified (see English v English [2010] EWHC 2058 (Ch)) **[AB/19/353-355]** or the putative obligor is estopped from relying upon the fact that the contract is counterfeit (see Greenwood v Martins Bank [1933] A.C. 51., per Lord Tomlin **[AB/5/51]**).

43.3. The December Additional Cover did exist as a document as a matter of fact and it did cause loss as a matter of fact. A forged bank note or a forged bill of lading or a forged bill of exchange may be a nullity as a matter of law, but they do exist and do and can cause loss.

44. Furthermore, the December Additional Cover was the first cover that Owners and the Respondent looked to after the Mine Strike. Two days after the Mine Strike, Ms Kjellsby wrote to the Charterers' broker, asking for confirmation that he had notified the underwriters under the December Additional Cover of the Mine Strike **[SB/30/145]**. On that same day, Owners' claim adjustors gave notice of the claim under the December Additional Cover to the Claims Manager at CR International **[SB/31/147]**. It was only as an afterthought, some five months later, that the Respondent presented a claim under the Annual War Risks Policy in June 2024.

45. While in Ukrainian waters, outside of the territorial scope of the Annual War Risks Policy, the December Additional Cover was providing the *prima facie* cover to the Vessel, because everyone knew that the Annual War Risks Policy would not respond. The December Additional Cover was provided to and relied upon by the Appellant. That the December Additional Cover turned out to be a forgery does not change these facts.

46. The December Additional Cover cannot therefore simply be removed or 'air-brushed' from what actually happened: it was a real document which had real causal impact. The Judge was wrong to find and proceed on the basis that the December Additional Cover did not "*exist*" – it did exist (albeit it turned out to be a forgery). It was the provision of the December Additional Cover that unlocked the voyage to Ukraine

where the Mine Strike occurred. So important was this cover to the scheme of things, that when asked in cross examination whether he would have held the Vessel back from entering Ukraine if a cover note had not been provided with which he was comfortable, Mr Magelssen said he would have "*do[ne] everything in [his] power to hold it back.*" **[SB/12/42]**.

47. In all the circumstances, the proximate cause of the Respondent's loss was the fact that the December Additional Cover (which would *prima facie* have provided cover) did not respond to the Mine Strike on account of the fact that it was a forgery. Forgery (or fraud generally) is not an insured peril under the MII Policy and therefore the claim fails.

E. Second Ground of Appeal: Privity

48. In the event that the proximate cause of the Respondent's loss was the breach of the Trading Warranties in the Annual War Risks Policy, then the Appellant's case is that there is no cover under the MII Policy because the insured peril occurred or existed with the privity of the Respondent, contrary to the proviso in Clause 1.1. The proper interpretation of the word "*privity*" in the context of the proviso is a point on which there is no prior authority.

The Judge's findings

49. The Judge fully set out the Appellant's submissions on this point at **[J/63-69]**; **[CB/8/109-112]** but found (for largely those same reasons advanced by the Respondent, set out at **[J/56-62]**; **[CB/8/106-109]**) that the proviso was not engaged to exclude the loss. Her reasoning was as follows:

    49.1. The Judge agreed with the Respondent at **[J/72]**; **[CB/8/113]** that the meaning given to "*privity*" in the context of the Marine Insurance Act 1906 (the "**MIA**") (i.e., knowledge and consent) is highly persuasive in the present context and that privity cannot mean something more favourable to insurers under the MII Policy than it means in the general common law. She agreed with the Respondent that there is no real distinction between consent and

concurrence in the present context, and that they can be used interchangeably **[J/73]**; **[CB/8/113]**.

49.2. The Judge found that, while the Respondent knew about the breach of the Trading Warranties, it was only on the basis that additional insurance had been procured that the Respondent agreed to allow the trading to take place. Whether in fact the Respondent could have prevented the Vessel trading in Ukrainian waters, had no forged cover note been procured, was found to be "*highly doubtful*". The fact that Owners / Charterers produced a forged cover note and the parties were committed under the settlement agreement to trading in Ukraine made it, the Judge found, "*highly probable that the Vessel would have sailed into Ukrainian waters regardless of any instruction to the contrary*" **[J/74]**; **[CB/8/113-114].**

49.3. The Respondent did not validly consent to the trade, because any consensus or concurrence was clearly obtained by fraud, as the Respondent "*did not know the true position as regards the war risks insurance*" **[J/75]**; **[CB/8/114]**.

49.4. The Judge went on to conclude at **[J/76]**; **[CB/8/115]** that: "*[The Claimant] thought that the Vessel would not be breaching the Trading Warranties because it thought that the additional cover had been obtained to permit trading and to retain cover.*"

49.5. The Judge found at **[J/76]**; **[CB/8/115]** that it would upend the purpose of the MII Policy to leave the Respondent without cover because the Owners' or Charterers' misconduct extended to fraudulently obtaining the Respondent's consent to act in a way that was in fact in breach of its insurance.

Where the Judge erred

50. The Judge erred in her analysis of whether the Respondent in fact consented to the breach of Trading Warranties and what the effect of fraud is on consent.

51. **First**, the Judge's conclusion at **[J/76]**; **[CB/8/115]** that the Respondent thought that the Vessel would <u>not</u> be breaching the Trading Warranties because it thought that the

additional cover had been obtained to permit trading and to retain cover is wrong. It is flatly contradicted by her own findings to the contrary at **[J/14, 19]**; **[CB/8/84, 86-87]**) and the clear evidence that the Respondent fully understood and always knew that by entering Ukrainian waters the Vessel would be breaching the Trading Warranties. Mr Magelssen agreed in cross examination that he understood that the December Additional Cover was necessary because the Annual War Risks Policy would not cover any damage to the Vessel whilst she was in Ukrainian waters **[SB/12/40-41]**.

52. The Respondent relied on the December Additional Cover precisely because it was consenting to the breach of the Trading Warranties, not because the additional cover somehow prevented or cured a breach of the warranties taking place.

53. **Furthermore**, the Judge was wrong to conclude that the Respondent's consent or concurrence to the breach of Trading Warranties was vitiated by fraud in this case. The Judge failed to consider whether the relevant deception concerned the occurrence or existence of the breach of trading warranties or only the risks or consequences thereof. For example, where an Owner lies about steaming at 5 knots, or where an Owner lies that it can spoof its Automatic Identification System and gets consent to the trade that way, it cannot properly be said that the assured's consent to the breach of trading limits was vitiated by the lie.

54. The Judge reached her conclusion on privity without engaging with the Appellant's argument that the non-fulfilment (fraudulent or otherwise) of a condition will not negate or vitiate consent if it is collateral and relates to the risks or consequences of the insured peril, rather than to the occurrence of the peril itself.

55. The reason why a fraudulent representation that 'I will only steam at 5 knots' or 'I will spoof the Vessel's AIS so no one will know we are in Ukrainian waters' or that 'I have taken out alternative cover' does not vitiate consent to the breach of the trading limits is because the representee is not deceived as to the breach itself. The falsity is collateral to the breach.

56. That proposition is conceptually sound in its own right but support for it can be found in other areas of the law. For example, the Appellant relies on <u>R v Lawrence</u> [2020] 1 W.L.R 5025 (see paragraphs 12 and 34-37 **[AB/22/417, 422]**) and two tort cases from

California (Rains v Supreme Court (1984) 150 Cal.App.3d 933 at 939 **[AB/8/122]** and Freedman v Superior Court (1989) 214 Cal.App.3d 734 at 738 **[AB/12/191]**) as examples of the proposition being applied.

57. The Judge should have asked herself whether the fraud related to the risks or consequences of the breach of trading warranties or to the breach itself. Had she done so, she should have concluded that the fraud was collateral to the breach and did not prevent the Respondent from being privy to the breach of Trading Warranties within the meaning of the proviso to Clause 1.1.

58. The Respondent was deceived into believing that it would have alternative cover available to it. However, that deception was collateral and related to the risks and consequences of trading to Ukraine. It did not vitiate consent to the breach of the Trading Warranties themselves, because the Appellant knew full well that the consequence of trading to Ukraine was that the Annual War Risks Policy would not respond. It was not deceived about that essential fact.

59. Notwithstanding the deception, the Judge should have concluded that the insured peril existed with the privity of the Respondent, which would and should have excluded the Respondent's claim.

F. Third Ground of Appeal: Fortuity

60. It is a fundamental principle of insurance that an insured's loss must be fortuitous. This is articulated by Hobhouse J in The Wondrous [1991] 1 Lloyd's Rep. 400 at 415-416:

> *"… where a situation comes about as a result of the voluntary conduct of the assured, it would not normally be described as fortuitous. It did not happen by chance but by the choice of the assured… For the purposes of the law of insurance, in the absence of an express agreement to the contrary, a policy should not be construed as covering the ordinary consequences of voluntary conduct of the assured arising out of the ordinary incidents of trading; it is not a risk."* **[AB/14/225]**

61. Dias J in Delos Shipholding SA v Allianz Global [2024] 1 Lloyd's Rep 489 explained that for the principle to apply: *"… (a) there must be some choice by the assured; (b)*

the consequences must be such as to flow in the ordinary course of events.” **[AB/26/602]**

62. In the present case, the Respondent made a choice to approve and rely upon the December Additional Cover rather than attempt to hold the Vessel back and the loss it suffered (namely the failure of the Annual War Risks Policy to respond to a casualty whilst the Vessel was on a voyage in breach of the Trading Warranties) was an inevitable consequence of that choice.

The Judge’s findings

63. The Judge considered the Appellant’s submissions on the point at **[J/79-81]**; **[CB/8/116-117].** She found, however, at **[J/82]**; **[CB/8/117]** that the loss suffered by the Respondent was fortuitous in that the Mine Strike was not bound to result from conduct voluntarily entered into by its choice.

64. It was not right to say, she concluded, that the Respondent had a choice whether to rely on the December Additional Cover or to hold the Vessel back from going to Ukraine **[J/82]**; **[CB/8/117]**.

Where the Judge erred

65. The Judge’s conclusion on fortuity was flawed by reason of her failure to understand the nature of the loss insured against. The Judge’s analysis proceeded on the mistaken basis that the MII Policy was a first party property insurance whereby the Appellant undertook to hold the Respondent harmless from Mine Strikes and the like.

66. The relevant loss, for purposes of the MII Policy, was (or at least included) the non-recovery under the Owner’s Policies. That loss (which is a constituent element of the cover under the MII Policy) was inevitable and not fortuitous, because the Respondent: (a) always knew it would not recover under the Annual War Risks Policy if the Vessel entered Ukrainian waters in breach of the Trading Warranties and (b); chose to approve and rely on December Additional Cover and not attempt to hold the Vessel back from proceeding to Ukraine.

67. The Respondent did have a choice: it chose to allow the breach of trading warranties to occur by approving the December Additional Cover and not giving an order holding the Vessel back. It was that choice that made the breach and the fact that the Annual War Risks Policy would not respond an inevitably rather than a probability. As to that:

67.1. Owners had defaulted on the loan right from the very first repayment. Accordingly, the Respondent had ample powers under the Facility Agreement and the General Assignment[17] to take *any* action to protect its interests (including to foreclose on the loan, or to take out its own primary war risks or hull and machinery policy, for example) and to avoid the Vessel trading in a war zone. Indeed, Mr Magelssen accepted this in cross examination **[J/13]**; **[CB/8/83-84].**

67.2. As the contemporaneous exchanges make clear "*No need to hold back vessel…*" [**SB/27/128**] the Respondent had a clear choice either to exercise those powers by holding the Vessel back by instruction, or to allow the vessel to breach the Trading Limits.[18] During cross examination, Mr Magelssen also conceded this **[SB/13/43].** For purposes of this analysis, it is neither here nor there whether the order would have been followed or not.

67.3. The Respondent knew that if the Vessel breached the Trading Warranties, the Annual War Risks Policy would not respond in the event the Vessel suffered loss or damage while in Ukrainian waters.

67.4. The Respondent chose to approve and rely upon the December Additional Cover (rather than the Annual War Risks Policy) as its collateral security while the Vessel was in breach of Trading Limits.

67.5. The Respondent knew that it was an inevitable consequence of its voluntary conduct in approving the December Additional Cover and allowing the

[17] See Clauses 17.2 and 19 of the Facility Agreement and Clause 9 of the General Assignment **[SB/16/56, SB/16/58-59]**.

[18] The Judge found that there were no practical steps available to the Respondent in the circumstances, *other than* issuing an instruction to Owners not to trade to Ukrainian waters **[J/55]**; **[CB/8/105]**.

Vessel to trade in breach of Trading Warranties that, in the event of a casualty, there would be no payment forthcoming under the Annual War Risks Policy. The fact it thought it had a backup is irrelevant.

67.6. The non-payment under the Annual War Risks Policy was not a risk – it was a certainty, in that was the inevitable consequence of the Respondent's voluntary conduct.

68. Even if (as the Judge found) it was probable that an order to hold the Vessel back would not have been complied with, the Respondent's choice to approve and rely on the December Additional Cover and not give such an order rendered the breach of Trading Warranties a certainty (rather than a possibility).

69. For all these reasons, the claim fails for want of fortuity.

G. Conclusion

70. For the reasons set out above, it is respectfully submitted that the appeal should be allowed.

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9 February 2026