Claim No. CA-2026-000025

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

SUE PREVEZER KC SITTING AS A DEPUTY HIGH COURT JUDGE

B E T W E E N:

OCEANUS CAPITAL SARL

Claimant / Respondent

- and -

LLOYD'S INSURANCE COMPANY S.A.

Defendant / Appellant

M/V "VYSSOS"

RESPONDENT'S SKELETON ARGUMENT

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A Overview

1. This is the Respondent's ("**Oceanus's**") skeleton argument, in which it argues that that the judgment of Sue Prevezer KC (the "**Judge**") dated 17 December 2025, with neutral citation number [2025] EWHC 3293 (Comm) (the "**Judgment**"), should be upheld and the appeal dismissed. [CB/8/77]

2. Oceanus was the mortgagee of the dry bulk carrier M/V Vyssos (the "**Vessel**"), having provided financing to the Vessel's owners, Lyra Mare Limited ("**Lyra Mare**"). In order to protect its equity in the Vessel, Oceanus obtained mortgagees' indemnity insurance, and by a cover note effective from 3 February 2023 to 2 February 2024 Lloyd's Insurance Company SA ("**Lloyd's**") underwrote cover of Oceanus's interest as mortgagee of the Vessel (the "**MII Policy**"). [CB/13/157]

3. The Vessel's own insurance included a war risks policy issued by Vessel Protect (the "**War Risks Policy**") which (importantly) applied to trading worldwide, but was subject to a warranty by which Lyra Mare warranted that they would not enter various areas of high risk – including Ukrainian waters (the "**Trading Warranties**"). The War Risks Policy provided that if the Vessel breached the Trading Warranties, the underwriters would not be liable [SB/17/60]

4. When, in early November 2023, the Vessel did sail into Ukrainian waters, Lyra Mare obtained an extension.

5. The Vessel sailed into Ukrainian waters again in late December 2023. Oceanus insisted that an extension be obtained and made clear that the Vessel should not sail into Ukrainian waters without one. Lyra Mare produced a document purporting to demonstrate that cover had been extended.

6. On 27 December 2023, the Vessel was damaged by a mine strike in Ukrainian waters (the "**Mine Strike**") and, after some investigation, declared a constructive total loss ("**CTL**").

7. Following the Mine Strike, it transpired that the Vessel in fact had no valid war risks cover for a trip to Ukrainian waters: the waters were outside the Trading Warranties in the War Risks Policy, and the additional cover ("**the December Additional Cover" or "DAC**") purportedly obtained by Lyra Mare's sub-charterer was in fact a forgery. The Judge found that Oceanus did not realise that the December additional cover was a forgery, and that there was no reason for Oceanus to suspect that it was a forgery **[J/74-75]**. [SB/28/130] [CB/8/113]

8. Oceanus therefore claimed on the MII Policy an indemnity against its losses arising out of the loss of the Vessel.

9. Oceanus argued, and the Judge found, that its losses fell squarely within the insuring clause in the MII Policy and that it was entitled to an indemnity: Oceanus suffered loss resulting from the loss of the Vessel which, in the absence of an insured peril, that is to say breach of trading warranties under Lyra Mare's war risks policy, would have been covered by Lyra Mare's war risks policy.

10. Lloyd's denied cover on three bases, which it maintains on appeal (albeit for slightly different reasons than presented at first instance), and which are addressed at section F below. The parties' positions on those three bases, as now advanced, can be summarised as follows:

	Lloyd's contention	**Oceanus's answer**
1	PROXIMATE CAUSE	
	The proximate cause of the Mortgagee's loss was the Mortgagee's inability to recover under the December Additional Cover due to it being a forgery. This loss was not insured under the MII Policy or otherwise caused by a peril insured against under the MII Policy.	The Mortgagee's loss resulting from the damage to the Vessel was the loss of the Mortgagee's interest in the Vessel, alternatively the loss of the indemnity under the War Risks Policy; and the proximate cause of that loss was the damage to the Vessel, alternatively the breach of the Trading Warranties.
2	PRIVITY	
	The Mortgagee's claim is excluded by the express proviso in Insuring Clause 1.1 of the MII Policy i.e., the Mortgagee was privy to the occurrence and/or existence of the breach of the Trading Warranties.	The Mortgagee was not privy to the breach of the Trading Warranties because its consent was vitiated by fraud and/or conditional on appropriate additional cover being put in place, and that condition was never satisfied.
3	NOT A FORTUITY	
	The existence and/or occurrence of the insured peril was not fortuitous. The circumstance (i.e. that the War Risks Policy would not respond, because of the breach of the Trading Warranties) was a known certainty to the Mortgagee and, accordingly, was not fortuitous.	The loss was fortuitous as it resulted from the damage to the Vessel, which was not bound to happen; alternatively the breach of the Trading Warranties was fortuitous as regards the Mortgagee.

11. For the reasons set out below, this Court should dismiss the appeal, uphold the Judgment, and award Oceanus its costs of the appeal.

B Factual background

12. The relevant facts were largely agreed between the parties. They are set out, as supplemented by the Judge's findings, at **[J/1]-[J/22]**, which the Court is invited to read and which are not repeated in full here. This skeleton argument adopts defined terms from the Judgment without defining them again. [CB/8/77]

C The MII Policy

13. By the MII Policy, Lloyd's underwrote cover of Oceanus's interest as mortgagee of the Vessel. The MII Policy contains and incorporates, amongst others, the following terms: [CB/13/157]

> ***INTEREST*** *MORTGAGEE INTEREST*
>
> *[…]*
>
> ***INTEREST:*** *MORTGAGEES INTEREST…*
>
> *[…]*
>
> ***A. RECITAL***
>
> *Whereas the Assured has entered into a loan agreement commensurate with which the Assured holds certain collateral security including a first mortgage on the Mortgaged Vessel and endorsements of its interests on the Owners' Policies and Club Entries.*
>
> *Now it is agreed as follows:*
>
> ***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.*
>
> *1.2 The indemnity payable hereunder shall be:*

1.2.1 the amount of the Assured 's net loss and any amounts recoverable under Clause 6 herein, collectively not exceeding the sum insured on the Mortgaged Vessel, or

1.2.2 the amount of the unrecoverable claim or part thereof under any of the Owners' Policies and Club Entries

whichever is the lesser amount.

[...]

***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.*

[...]

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

[...]

6. DUTY OF ASSURED

[…]

6.2 It is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

6.3 The Underwriters will reimburse charges properly and reasonably incurred by the Assured their servants or agents for such measures except for legal costs and expenses incurred by the Assured in relation to any claim under Owners' Policies and Club Entries which shall only be reimbursed in accordance with clause 6.4 herein.

[…]

Any amounts payable under this clause shall be included within and shall not be additional to the sum insured.

14. Although the Pollution section of the policy is not directly in issue, it is or may be relevant to the interpretation of the word "privity". The Mortgagee's Additional Perils (Pollution) LSW 489 section of the cover note provided:

7. CHANGE OF OWNERSHIP OR CONTROL

This policy will terminate automatically at the time of any change of class, ownership, management or control of a Mortgaged Vessel of which the Assured has knowledge or privity, unless the Assured gives prompt notice of such change in writing to the Underwriters hereon and agrees to pay an additional premium, if required.

D Common ground at trial

15. It was **common ground** at trial that:

15.1. The Vessel was damaged by the Mine Strike;

15.2. Damage from the Mine Strike would prima facie be covered under clause 1.1 of the Institute War and Strikes Clauses 1 October 1983 form incorporated into the War Risks Insurance;

15.3. The Vessel was trading in breach of the Trading Warranties in the War Risks Insurance;

15.4. "Theoretically", breach of the Trading Warranties in the War Risks Insurance is an insured peril under clause 2.1.2.3 of the MII Policy;[1] and

15.5. Oceanus's claim under the War Risks Policy was declined and there was no payment under the War Risks Policy.

E Oceanus's claim

E.1 Introduction

16. Oceanus's claim, accepted by the Judge, was that its loss claimed in these proceedings fell squarely within the indemnity in the insuring clause, subject to the pleaded issue about privity. Although it was largely common ground, Oceanus sets out here for convenience the requirements for the insuring clause to give rise to an indemnity and how it said those requirements were met in this case.

E.2 The insuring clause

17. The insuring clause is clause 1.1, set out at paragraph 12 above. It is repeated here for ease of reference: [CB/13/163]

> *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.*

18. Oceanus's case was that the clause provided for Lloyd's to indemnify Oceanus against loss if:

18.1. Oceanus has suffered loss resulting from loss of or damage to the Vessel;

[1] There was an issue between the parties as to whether this insured peril caused the Mortgagee's loss – intended to be captured by the use of the word "theoretically".

18.2. The loss of or damage to the Vessel would, in the absence of an insured peril, *prima facie* be covered by Owners' Policies and Club Entries (and not excluded therein);

18.3. There is a non-payment or reduced payment in respect of the loss of or damage to the Vessel; and

18.4. The non-payment or reduced payment is a result of an insured peril under the MII Policy; and

18.5. The insured peril occurred or existed without the privity of Oceanus.

19. It is convenient to take each of those 5 elements in turn.

E.3 First: Oceanus has suffered loss resulting from loss or damage to the Vessel

20. There was damage to the Vessel caused by the Mine Strike (the Vessel was a CTL) **[J/3]**. [CB/8/78]

21. There was at trial, and remains, an issue between the parties[2] as to the nature of Oceanus's interest that is insured by the MII Policy. Oceanus addresses that dispute further at section F.1(b) below, but says that in either event, it has suffered loss:

21.1. Oceanus's primary case, accepted by the Judge **[J/50]**, was that Oceanus's interest insured by the MII Policy was the value of its interest in the Vessel as mortgagee: Oceanus lost that interest upon the Mine Strike and thereby lost its primary security for the Loan; alternatively [CB/8/102]

21.2. Oceanus lost the payment it would have received as endorsee of the War Risks Policy.

22. In either event, it is clear that Oceanus has suffered loss, and that Oceanus's loss results from the loss of the Vessel. Oceanus lent money on the security of the Vessel, but the Vessel is a CTL and the Vessel's insurance does not respond.

[2] See Appellant's Skeleton Argument, [17.1], [29]. [CB/3/24,31]

E.4 Second: The loss of or damage to the Vessel would, in the absence of an insured peril, prima facie be covered by Owners' Policies and Club Entries (and not excluded therein)

23. It was common ground at trial that damage to the Vessel from the Mine Strike would *prima facie* be covered under clause 1.1 of the Institute War and Strikes Clauses 1 October 1983 form incorporated into the War Risks Insurance **[J/24]**. [CB/8/88]

E.5 Third: There is a non-payment or reduced payment in respect of the loss of or damage to the Vessel

24. It was common ground at trial that Oceanus's claim under the War Risks Policy was declined and there was no payment under the War Risks Policy **[J/22]**. [CB/8/87]

E.6 Fourth: The non-payment or reduced payment is a result of an insured peril under the MII Policy

25. It was common ground at trial that the Vessel was trading in breach of the Trading Warranties in the War Risks Insurance, so that the Vessel's insurers were entitled to decline the mortgagee's claim **[J/22]**. [CB/8/87]

26. It was also common ground that breach of the Trading Warranties in the War Risks Insurance was an insured peril under clause 2.1.2.3 of the MII Policy **[J/24]**. [CB/8/88]

27. In the circumstances, the non-payment under the War Risks Policy was a result of the breach of Trading Warranties. Oceanus addresses the question of proximate cause at section F.1 below.

E.7 Fifth: The insured peril occurred or existed without the privity of Oceanus

28. Oceanus addresses the issue of privity at section F.2 below.

F Grounds of Appeal

29. Oceanus addresses the Grounds of Appeal in turn.

F.1 Issue 1: the proximate cause of Oceanus's loss

(a) Introduction

30. Lloyd's defended the claim, and now appeals, on the basis that the proximate cause of Oceanus's loss was its inability to recover under the forged DAC because of its "invalidity".

31. But that simply is not the loss Oceanus is claiming for. Oceanus claims the loss of its interest in the Vessel as mortgagee, alternatively the loss of an indemnity under the War Risks Policy (not under the DAC). And clearly:

    31.1. The damage to the Vessel was caused by the Mine Strike - not by the invalidity of the DAC

    31.2. It is that physical damage to the Vessel which caused Oceanus' loss.

32. So: the proximate cause of Oceanus's loss was the damage to the Vessel as a result of the Mine Strike. Alternatively, if Oceanus's loss is properly analysed as the loss of an indemnity under the War Risks Policy, the proximate cause of that loss was Owners' breach of the Trading Warranties.

33. The fact that Oceanus was misled about the DAC obviously plays a part in the narrative which led to the Mine Strike. But at most it contributed to creating the opportunity for the loss to be sustained, but it did not cause the loss: (see e.g. Galoo v Bright Grahame Murray CA [1994] 1 WLR 1360 [AB/15/229]

34. Had the DAC cover been genuine, the Vessel would still have hit the mine, Oceanus would still have lost its security, and Lyra Mare's original insurance would still not have paid out because of the breach of warranty. But Lyra Mare could have claimed under the DAC, Oceanus would have been entitled to that money, and as a result Oceanus would not have needed to claim under the MII policy.

35. When a party sustains loss, the fact that they wrongly thought they had insurance for that loss does not affect what caused the loss in the first place.

(b) Oceanus's loss

36. Oceanus submits that this issue does not really turn on issues of causation, but rather a question of the characterisation of Oceanus's loss. Lloyd's' causation defence hinges on saying that (1) Oceanus's interest insured under the MII Policy was its rights as assignee of sums payable and loss payee under Lyra Mare's primary insurances *including the DAC* (2) Oceanus's loss was therefore the loss of an indemnity under the forged December Additional Cover; and (3) that loss was not caused by the breach of the Trading Warranties.

37. By trying to turn the Court's focus to loss of an indemnity under the forged DAC, Lloyd's is not meeting the case put by Oceanus. Oceanus accepts that it cannot recover for the loss of an indemnity under a non-existent insurance policy, but it is not attempting to do so.

38. The Judge found, correctly, that Oceanus's interest insured under the MII Policy was its interest as mortgagee of the Vessel **[J/50]**. That is an unassailable finding: [CB/8/102]

38.1. S.14(1) Marine Insurance Act 1906 provides that a mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage. [AB/1/3]

38.2. The MII Policy is exactly what it says it is: a **Mortgagee's Interest** Insurance policy. It is Oceanus's interest as mortgagee, not its interest as assignee and loss payee, that the MII Policy covers.

38.3. Indeed, the MII Policy specifically and repeatedly states that the interest covered is the interest as mortgagee: "***INTEREST:*** *MORTGAGEE[S] INTEREST*".

38.4. The insuring clause at 1.1 provides that the MII Policy will indemnify Oceanus for loss [to Oceanus] **resulting from** loss of or damage to the Vessel. The only loss that Oceanus could suffer as a result of loss of or damage to the Vessel is loss of its security interest as mortgagee.

38.5. Indeed, Lloyd's initially admitted that the MII Policy underwrote cover of Oceanus's interest as mortgagee **[J/50]**, and it was only at trial that Lloyd's changed its case, [CB/8/102]

presumably hoping that the new characterisation of the insured interest would help with its proximate cause and fortuity arguments.

38.6. However, Lloyd's new case does not work conceptually. Oceanus simply had no need to insure its interest as assignee of sums payable under Lyra Mare's insurance. As the Judge accepted at **[J/50]**, that interest is intact: if Lyra Mare is entitled to any benefit under those policies, Oceanus will get that benefit. [CB/8/102]

38.7. Lloyd's relies on the statement in R Merkin, Colinvaux and Merkin's Insurance Contract Law (2024) at B-804 that the interest insured under a mortgagee's interest insurance policy is the interest as assignee or loss payee (see Appellant's Skeleton, [17.1], note 9). That commentary should not be persuasive because: [AB/30/681] [CB/3/24]

38.7.1. The commentary is confused as to the interest insured under mortgagee's interest insurance. The preceding sentence is directly contradictory to the sentence Lloyd's seeks to rely on:

> *IMICH, cl.1, provides that the policy insures the interest of the assured, as the mortgagee, in a vessel or vessels which are set out in the schedule to the policy. That interest is the right to claim under the owner's marine or war risks policy (as the case may be) its* [SIC] *capacity as assignee or loss payee for loss or damage to the mortgaged vessel.*

38.7.2. The second sentence cites Piraeus Bank AE v Antares Underwriting Limited "The ZouZou" [2022] EWHC 1169 (Comm); [2022] 2 Lloyd's Rep 1 presumably referring to [231(v)]: "*The "Interest" insured under the MII Policy is the Bank's interest, not as mortgagee, but its interest "as Assignees and Loss Payees under the owners Policies and Club Entries (as defined in the Conditions hereto) …*". [AB/24/578]

38.7.3. As correctly accepted by the Judge **[J/51]**, that point was common ground in The ZouZou (see note 61) and was *obiter*. In any event, as Lloyd's acknowledges (see Appellant's Skeleton, [17.4], note 10), the relevant clause in The ZouZou was [CB/8/103] [CB/3/25]

markedly different from the clause in the MII Cover. It is therefore not a good source for the statement Lloyd's seeks to rely upon.

38.7.4. Because Colinvaux and Merkin is a looseleaf, it is not possible to determine exactly when the second sentence was added, but Oceanus submits that it is likely it was added after The ZouZou was decided. Both sentences appear in the same form in R Merkin, Colinvaux's Law of Insurance (14th edn, 2025) at [24-005]. However, only the first sentence appears in the most recent edition before The ZouZou was decided (12th edn, 2019, at [24-005]. [AB/31/685] [AB/29/675]

38.7.5. Indeed, Professor Merkin's commentary contradicts itself further: in the 14th edition of Colinvaux's Law of Insurance at [24-008], the author states: "*In The Captain Panagos, Mustill J held that a mortgagee's interest policy which insured against non-payment following loss or damage to the vessel, was a marine policy and not a financial guarantee policy. This principle has been retained by cl.1* [of the Institute Mortgagees' Interest Insurance Clauses] *which specifically states that the policy insures the mortgagee's interest in the vessel as opposed to his interest in his liability*". [AB/31/687]

38.8. In Continental Illinois National Bank & Trust Co of Chicago v Bathurst "The Captain Panagos DP" [1985] 1 Lloyd's Rep 625, Mustill J considered a mortgagee's interest insurance policy covering "*Loss of or damage to the or liability of the Vessel*" (see p 627), coming to the conclusion that the "*general tenor and shape speak more of an insurance against physical damage to (and liability of) the ship, than against a financial damage to the mortgagee's interests*" (at p 630). [AB/9/128] [AB/9/131]

39. Oceanus's case is that the MII Policy insures Oceanus's interest in the Vessel as mortgagee, and therefore that insuring clause is engaged if Oceanus has suffered loss to that interest as a result of loss of or damage to the Vessel. Oceanus's loss is the loss of the value of its security interest in Vessel.

40. If, contrary to Oceanus's primary case, the Court takes the view that the MII Policy covers Oceanus's interest as assignee of Lyra Mare's insurances, then Oceanus's loss may better be

framed as the loss of an indemnity under Lyra Mare's insurance. If so, Oceanus has suffered that loss as a result of the breach of Trading Warranties.

41. But neither formulation of Oceanus's claim is based on the loss of an indemnity under the non-existent December Additional Cover. Indeed, it is difficult to see how a non-existent policy of insurance could possibly have caused loss to Oceanus or anyone.

(c) Proximate cause of Oceanus's loss

42. The insuring clause in the MII Policy requires two causal connections:

42.1. Oceanus suffers loss "resulting from" loss of or damage to the Vessel; and

42.2. There is non-payment by Lyra Mare's insurers "as a result of" any insured peril.

43. Both causal connections are satisfied in this case:

43.1. Oceanus has suffered loss resulting from the damage to the Vessel caused by the Mine Strike (whether that loss is the loss of its interest in the Vessel or the loss of an indemnity as endorsee of the War Risks Policy); and

43.2. The War Risks Policy has not paid out as a result of breach of the Trading Warranties, and that is an insured peril.

44. Accordingly, the judge was correct to find that Oceanus has suffered a loss falling within the insuring clause, subject to the question of privity.

(d) Lloyd's new case: prima facie cover

45. Lloyd's seeks to advance a new argument in this appeal: that the words in the MII Policy "*which*[…] *would prima facie be covered by the Owners' Policies and Club Entries, and not excluded therein*" must refer to the owners' "policy", whether valid or invalid, and whether real or fake, "*to which the parties were looking to provide the primary underlying cover*" (see Appellant's Skeleton,, [38] and [39]). [CB/3/33]

46. This case was not pleaded, nor argued at trial. On the contrary, it was common ground that "*damage from the Mine Strike would prima facie be covered under Clause 1.1 of the Institute War and Strikes Clauses 1 October 1983 form incorporated into the War Risks Policy*" **[J/24(ii)]**. There was no suggestion that an enquiry was necessary into the factual question of what policy "*the parties were looking to*". The Judge certainly cannot be criticised as "wrong" for failing to accept an argument Lloyd's did not make. And this Court should decline to exercise its discretion to permit the new point to be taken because it introduces an enquiry into the subjective intention of "the parties". Who "the parties" are, on Lloyd's case, is not clear. [CB/8/88]

47. As to the test for permitting a new argument to be raised on appeal see Pittalis v Grant [1989] QB 605 at 611, citing Sir George Jessel in Ex parte Firth (1882) 19 ChD 419: "*the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence*" (see also Notting Hill Finance Limited v Sheikh [2019] EWCA Civ 1337; [2019] 4 WLR 146, at [21]-[26]). [AB/13/200] [AB/3/10] [AB/21/408]

48. In any event it is a poor argument. "Owners' Policies" must be limited to insurance policies which Lyra Mare actually had, and cannot extend to a "policy" which Lyra Mare said they had but did not in fact have.[3]

49. In addition, the weakness of the new argument is demonstrated by posing this counterfactual: if exactly the same thing had happened, but Oceanus had *not* known about the existence of the trade to Ukraine and therefore had not insisted upon the December Additional Cover being placed, would the MII Policy have responded? Lloyd's counsel rightly accepted at trial that it would have **[J/75]**. [CB/8/114]

[3] "*Owners' Policies and Club Entries*" is a defined term and it means "*hull and machinery policies on terms equivalent to or wider than the current Institute Time Clauses Hulls or American Institute Hull Clauses, (if taken, increased value policies on terms equivalent to Institute Time Clauses - Hull Disbursements and Increased Value (Total Loss only and Excess Liabilities) or American Institute Increased Value and Excess Liabilities Clauses),* ***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*" (***emphasis*** added).

50. It is therefore clear that the crucial ingredient of Lloyd's case, on all three grounds, is the effect of Oceanus's knowledge. The effect of such knowledge is directly addressed in the MII Policy as part of the requirement of "no-privity", and should be resolved as such.

51. Lloyd's relies on The ZouZou at [264] in support of its analysis on *prima facie* cover (Appellant's Skeleton, [41]). In that paragraph, Calver J rejected the argument that the words "*prima facie cover*" required the party to establish that the underlying policy responded **without regard to exclusions in that policy**. In that case, the club rules in the underlying insurance excluded expenses resulting from action taken by public or local authorities under the criminal law or on the grounds of any alleged contravention of the laws of any state. The losses, arising out of the arrest of the vessel in criminal proceedings, were therefore excluded under the underlying policy. [AB/24/582] [CB/4/34]

52. The ZouZou is a very different case to this, in which Lyra Mare breached trading warranties in the underlying War Risks Policy. A warranty is not an exclusion. In any event, it would make a mockery of the MII Cover for Lloyd's to underwrite cover that expressly says it will pay out in the event of non-payment under Lyra Mare's insurance due to breach of trading warranties, but then turn around and deny a claim because (it says) the loss was excluded **by the Trading Warranties**.

F.2 Ground 2: did the breach of the Trading Warranties occur or exist with the privity of Oceanus?

(a) Introduction

53. The insuring clause at 1.1 is expressly made subject to a proviso that the insured peril "*occurs or exists without the privity of the Assured*". Lloyd's alleges that the breach of the Trading Warranties occurred or existed with the privity of Oceanus. Oceanus denies this on the basis that privity requires knowledge plus either consent or concurrence (which Oceanus says mean the same thing), and it did not consent to a trade to Ukraine at all, and certainly not in the absence of appropriate insurance, so that the insured peril (breach of the Trading Warranties) occurred without its knowledge and consent.

(b) Legal Principles

54. Oceanus is not aware of any other cases in which the courts have considered the meaning of a phrase such as "*without the privity of the insured*" in this precise context.

55. In a similar context, however, the Marine Insurance Act 1906 incorporates the concept of privity at s.39(5) **[AB/4]** (**emphasis** added): [AB/1/4]

> *In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where,* ***with the privity of the assured****, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*

56. That subsection has been considered in three relevant cases:

56.1. In Compania Maritima San Basilio v Oceanus Mutual Underwriting Association (Bermuda) Limited "The Eurysthenes" [1977] QB 49, all three Lords Justice of Appeal considered the meaning of "*with the privity of the assured*" in s.39(5). Denning MR stated at 68-C (**emphasis** added): [AB/7/85]

> *Such is, I think, the meaning we should attach to the word " privity " in section 39(5). If the ship is sent to sea in an unseaworthy state,* ***with the knowledge and concurrence of the assured personally****, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred.* **[AB/101]**

Roskill LJ stated at 76-D (**emphasis** added):

> *That must mean that he is privy to the unseaworthiness and not merely that he has knowledge of facts which may ultimately be proved to amount to unseaworthiness. In other words, if the ship is sent to sea in an unseaworthy state* ***with his knowledge and concurrence and that unseaworthiness*** *is causative of the loss, the time policy does not pay. There must be causative unseaworthiness* ***of which he knew and in which he concurred****.* **[AB/109]**

Geoffrey Lane LJ stated at 81-D (**emphasis** added):

> *For the owners to lose their cover it must be shown that the ship was sent to sea in an unseaworthy condition and that that was done with the privity of the assured.* ***"Privity" means "with knowledge and consent."*** **[AB/114]**

56.2. In Versloot Dredging BV v HDI Gerling Industrie Versicherung AG [2013] EWHC 1666 (Comm); [2013] 1 Lloyd's Rep IR 582, Popplewell J stated at [110] (**emphasis** added): [AB/20/382]

> *Section 39(5) of the Marine Insurance Act 1906 provides that where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.* ***The "privity of the assured" means with the assured's personal knowledge and consent****. The assured must: (i) know the facts constituting unseaworthiness; and (ii) realise that those facts render the ship unseaworthy. Knowledge for the purposes of section 39(5) includes "blind eye knowledge", consisting of a suspicion that the vessel might be unseaworthy combined with a conscious decision not to inquire for fear of confirming that suspicion.* **[AB/503]**

56.3. In Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd "The Star Sea" [2001] UKHL 1; [2003] 1 AC 469, the House of Lords considered when blind eye knowledge would amount to privity. Lord Scott cited with approval the judgment of Geoffrey Lane LJ (at [114]) before summarising at [116]: [AB/16/305]

> *In summary, blind eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist…the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity. That in my opinion, is not warranted by section 39(5)*

(c) The proper interpretation of "without the privity of the Assured"

57. Lloyd's appears to have abandoned its case that "privity" does not require consent, and appears not to challenge the Judge's summary of the law at **[J/70-71]**. [CB/8/112]

58. In any event, it is clear that privity means "knowledge and consent" or "knowledge and concurrence":

58.1. The authorities in the context of s.39(5) Marine Insurance Act 1906 are consistent that "privity" means "knowledge and consent". That statute addresses a closely analogous situation to the MII Policy: both scenarios concern marine insurance and a both concern a situation in which an insurer will be excused liability based on an act undertaken with the "privity" of the assured. In performing an interpretative exercise, the meaning given to "privity" in the context of the Marine Insurance Act 1906 should be highly persuasive.

58.2. In the specific context of an MII policy, where the insured mortgagee is in the position of a lender and is unlikely to have any significant control over the Vessel's activities (as the Judge accepted, in practical terms, Oceanus did not **[J/19]**), it would produce an absurd result if knowledge were equated with privity. The mortgagee may come to know of, e.g., a proposed breach of warranty and insist to the owner that they must not breach the warranty. If the Owner persists in the breach and the Vessel is damaged, it would be a striking and surprising result if the mortgagee's cover were invalidated by reason of a breach he did not agree to and which he did everything in his (limited) power to prevent. [CB/8/86]

58.3. Finally, Clause 7 of the Mortgagee's Additional Perils (Pollution) (LSW 489) policy, placed with the MII Policy, draws a distinction between mere knowledge and privity (**emphasis** added): "*any change of class, ownership, management or control of a Mortgaged Vessel of which* ***the Assured has knowledge or privity***" **[92]**. It is submitted that the parties must have meant something different by the word "privity" than they meant by mere "knowledge".

(d) Oceanus was not privy to the breach of the Trading Warranties

59. Oceanus was not privy to Lyra Mare's breach of the Trading Warranties for three reasons:

59.1. Any "consent" that it is possible to infer on the part of Oceanus was vitiated by fraud; or

59.2. Any such consent was at most conditional on appropriate insurance cover being put in place prior to breaching the Trading Warranties; and in any event

59.3. Oceanus did not in any real sense have a choice as to whether Lyra Mare breached the Trading Warranties.

60. Fraud: The Judge found that Oceanus was deceived into agreeing to the voyage to Ukraine because it was provided with a forged cover note; any consent was given on that basis alone **[J/74]**. Oceanus was duped by the forgery and had no reason to be suspicious **[J/75]**. [CB/8/113] [CB/8/114]

61. In the circumstances, the Judge was plainly correct in her conclusion at **[J/75]** "*any consent or concurrence on the part of Oceanus was clearly obtained by fraud and in such circumstances, it would* [be] *wrong to say that Oceanus was privy to the breach of the Trading Warranties*". There is no suggestion that Oceanus turned a blind eye to any suspicion, or even that it was negligent (which would not in any event be sufficient to establish privity).

62. As the Judge observed at **[J/75]**, it would be a perverse outcome if Oceanus were to be put in a worse position because it had been positively deceived than it would be had it simply been kept in the dark. [CB/8/114]

63. Conditional consent: Alternatively, any consent it is possible to infer on the part of Oceanus was clearly conditional on Lyra Mare or its charterers obtaining appropriate war risks cover for the voyage to Ukraine. Oceanus relies on the evidence summarised at **[J/15-19]**. [CB/8/85]

64. Properly interpreted, that condition was a contingent condition precedent to Oceanus's consent, such that Oceanus's consent was only valid once the condition was satisfied. English contract law recognises parties' ability to put conditions on their agreements (see, e.g., Schweppe v Harper [2008] EWCA Civ 442, at [64] per Dyson LJ; H Beale (Ed), Chitty on Contracts (35th edn, 2023), at [4-198]). That condition was not satisfied and so the voyage was not performed with Oceanus's consent. [AB/18/335] [AB/28/664]

65. No real choice: Oceanus was presented with a *fait accompli* and had no real or practical opportunity to prevent Lyra Mare from trading the Vessel to Ukraine **[J/19]**, **[J/74]**. [CB/8/86,113]

(e) The relevance of case law on sexual consent and Californian torts

66. Lloyd's has maintained on appeal its attempt to draw a distinction between "collateral" conditions to consent and conditions relating to the performance of the relevant act itself. This distinction is drawn by reference to the law of consent as a defence to sexual crimes and to two Californian tort cases concerning the law of consent as a defence to the tort of battery.

67. The central point of Lloyd's submission is that consent is not vitiated by non-fulfilment of a condition that concerns "*…the occurrence or existence of the breach of trading warranties or only the risks or consequences thereof*" (Appellant's Skeleton, [53]). Oceanus rejects this as an inappropriate restriction on the broad freedom commercial parties have to place conditions on their consent or agreement. For example, a seller may impose a condition precedent that a buyer open a letter of credit before the seller is obliged to load goods (Kronos Worldwide Ltd v Sempra Oil Trading Sarl [2004] EWCA Civ 3, [2004] 1 Lloyd's Rep 260, at [08] **[AB/263]**, [19] **[AB/435]**, per Mance LJ); although that condition has no relevance to the performance of the act of loading itself, the commercial law has no problem recognising it as a condition precedent to loading. [CB/3/38] [AB/17/312, 314]

68. Oceanus says that the law of consent as a defence to sexual assault or the tort of battery is inapposite to an analysis of consent or agreement in a commercial context. Consent for the purposes of the law of sexual crimes is codified in statute in s.74-77 Sexual Offences Act 2003 in an area where the law seeks to balance complex and competing priorities, including the right to bodily autonomy and the imposition of criminal responsibility. Likewise, the tort of battery seeks to balance bodily autonomy with the imposition of civil liability in circumstances where the relevant tort closely mirrors the criminal law. None of those considerations arise in the case of a commercial contract, which is more sensibly analysed by reference to the well-established contractual principles as set out above. [AB/2/6]

F.3 Ground 3: Was the existence or occurrence of the insured peril (the breach of the Trading Warranties) fortuitous? If not, what are the consequences of that?

(a) Legal principles

69. As summarised by Dias J in Delos Shipholding SA v Allianz Global Corporate and Specialty SE [2024] EWHC 719 (Comm), [2024] Lloyd's Rep IR 525, at [75]: [AB/25/600]

> *It is not controversial that insurance is concerned with the risk or uncertainty of loss. This does not mean that coverage is limited to events which are unexpected or unforeseeable; it can include loss caused by events which are both probable and foreseeable. Nonetheless, it does not protect the assured against losses which are certain to result or which are caused by ordinary wear and tear or are deliberately caused by the assured and it is in this sense that it is said that a loss must be fortuitous in order to be covered.*

70. The Judge's decision on fortuity was not challenged on appeal (in Delos Shipholding SA v Allianz Global Corporate and Specialty SE [2025] EWCA Civ 1019, [2025] Lloyd's Rep IR 505). [AB/26/629]

71. A loss may not be fortuitous if it is incurred as the ordinary consequence of a deliberate choice by the insured (see Ikerigi Compania Naviera SA v Palmer – The "Wondrous" [1991] 1 Lloyd's Rep 400, at 416, per Hobhouse J, and subsequent discussion in Delos, at [88]-[89], per Dias J). [AB/14/225] It is not sufficient that the loss is a permissible and possible result of the choice; it must be "*akin to inevitability*" (Delos, at [92], [97], per Dias J). [AB/25/603]

(b) The fortuity of the loss

72. Oceanus's loss was the loss of Oceanus's interest as mortgagee as a result of damage to the Vessel. That was clearly fortuitous. The Mine Strike was not an inevitability and did not result from any choice on Oceanus's part.

73. If, alternatively, Oceanus's loss is properly characterised as the loss of the indemnity under the War Risks Policy, that loss was also fortuitous as regards Oceanus:

73.1. Oceanus did not choose for Lyra Mare to breach the Trading Warranties. The decision to do so resulted from Azov's entering into a contract with Maxgrain SA ("**Maxgrain**") obliging the Vessel to call at Ukrainian ports and/or Maxgrain's orders to call at Ukrainian ports, both of which were entirely fortuitous as regards Oceanus, which had no knowledge of or say in in those decisions whatsoever, and no practical means of preventing the trades once it found out **[J/19]**. [CB/8/86]

73.2. Oceanus did not make a deliberate choice for Lyra Mare to breach the Trading Warranties. Oceanus's "consent" was obtained, and therefore vitiated, by fraud.

73.3. In any event, Oceanus imposed a condition on any consent to the trade to Ukraine that appropriate additional insurance be put in place before any such trade. In the circumstances, it was not inevitable that Lyra Mare would choose to breach the Trading Warranties; it may have decided not to do so. Lyra Mare's decision to breach the Trading Warranties was therefore fortuitous as regards Oceanus.

74. Lloyd's argues that it was a known certainty to Oceanus that, if the Trading Warranties were breached, the War Risks Policy would not respond. That does not assist Lloyd's. It is often inevitable that, if an insured peril occurs, loss will result: e.g. if a fire starts somewhere it is not supposed to, it is inevitable that will cause some loss. That does not mean that the loss is irrecoverable. The question is whether the loss resulted in the ordinary course of events from Oceanus's conscious choice. For the reasons given in the preceding paragraph, it did not.

G Relief Sought

75. Oceanus seeks an order dismissing the appeal and upholding the Judgment.

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