IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 142

Admiralty in Rem No 102 of 2021

Between

UBS AG

… Plaintiff

And

Owner of the vessel(s)
CHLOE V

… Defendant

And

Koch Shipping Pte Ltd

… Intervener

Counterclaim of Defendant

Between

Owner of the vessel(s)
CHLOE V

… Plaintiff in Counterclaim

And

UBS AG

… Defendant in Counterclaim

Version No 2: 07 Aug 2025 (10:55 hrs)

JUDGMENT

[Contract — Contractual terms — Contractual discretion — Whether clause requiring mortgagee bank's approval of charterparty subject to a contractual discretion]
[Contract — Contractual terms — Contractual discretion — Whether mortgagee bank exercised discretion reasonably in refusing to issue letter of quiet enjoyment in favour of charterer]
[Contract — Contractual terms — Contractual discretion — Whether mortgagee bank in breach of duty in refusing to issue any letter of quiet enjoyment in favour of charterer]
[Contract — Contractual terms — Implied terms — *Braganza* duty]
[Contract — Contractual terms — Implied terms — Restraints on the exercise of a contractual discretion]
[Contract — Contractual terms — Implied terms — Mortgagee's duty to not interfere with contractual performance by mortgagor]

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The "CHLOE V"

[2025] SGHC 142

General Division of the High Court — Admiralty in Rem No 102 of 2021
S Mohan J
1, 4–8, 11–13 November 2024, 14 February 2025

28 July 2025 Judgment reserved.

S Mohan J:

1 The present dispute arises out of banking facilities granted by the plaintiff bank to the defendant shipowner to, *inter alia*, finance the acquisition of a ship by the defendant. The financing was secured by, among others, a mortgage in favour of the plaintiff over the ship concerned. The plaintiff has already obtained summary judgment in this action in respect of its claim as mortgagee for the outstanding debts due from the defendant. The ship was judicially sold by this court, and the proceeds of sale have been paid out in partial satisfaction of the plaintiff's judgment.

2 This judgment is solely concerned with the defendant's counterclaim. The defendant is dissatisfied with the plaintiff's decision refusing to agree to issue what is termed a letter of quiet enjoyment ("LQE" or "QEL") to a prospective charterer of the defendant – a decision it says resulted in the loss of the charterparty, the defendant defaulting under the loan agreement with the

plaintiff, and which in turn led to the eventual arrest and judicial sale of the ship concerned.

3 Central to this dispute is a line of English authorities which subjects the exercise of a discretion conferred by contract to implied obligations not to exercise that discretion irrationally, arbitrarily, or capriciously. The defendant alleges that the plaintiff breached these obligations (amongst others) when it decided not to issue an LQE, and seeks to hold the plaintiff liable for the lost benefits of the charterparty and other alleged consequential losses.

4 For the reasons detailed in this judgment, I dismiss the counterclaim.

Background facts

The defendant and the Ghandour Family Group

5 For convenience, I will continue to refer to the plaintiff in the counterclaim as the "defendant", and the defendant in the counterclaim as the "plaintiff".

6 The defendant, Chloe Navigation Ltd ("Chloe Navigation"), was at all material times the registered owner of the vessel "CHLOE V" (IMO No. 9457452) (the "Vessel"). Chloe Navigation is a British Virgin Islands company[1] and the Vessel is a very large crude carrier ("VLCC") built in 2011 by Daewoo Shipbuilding and Marine Engineering Co Ltd ("Daewoo"), in South Korea.[2] The defendant considers her to be "fairly top of the range".[3]

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1 AEIC of Ghassan Ghandour filed 19 September 2024 ("Mr Ghandour's AEIC") at para 1 (4BAEIC 2045); 1ABOD 354.

2 Expert Report of Christopher Adrian Jones at para 9 (2BAEIC 761).

3 Defendant's Closing Submissions dated 17 January 2025 ("DCS") at para 1.

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7 Mr Ghassan Ghandour ("Mr Ghandour") is a founding member and head of the Ghandour family's group of companies (the "Ghandour Group") – I pause here to clarify that the Ghandour Group does not refer to a legal entity, but rather a loose description of the various companies owned and operated by Mr Ghandour and his family.[4] The Ghandour Group has investments in areas such as shipping, oil and gas, energy trading, art, and real estate.[5] Two of the companies in the Ghandour Group are relevant:

(a) The first is Hermes Shipholding Ltd ("Hermes Shipholding"), a holding company for the Ghandour Group and the ultimate owner of all the shares in Chloe Navigation.[6] Hermes Shipholding is in turned owned by members of Mr Ghandour's family, namely, his spouse and two daughters (I will refer to them as the ultimate beneficial owners, or "UBOs", of the defendant).[7]

(b) The second is Hermes Marine Management S.A. ("Hermes Marine Management"), the Vessel's manager and an agent of Chloe Navigation at all material times.[8]

8 During the course of the trial of the counterclaim, I heard evidence from the following factual witnesses for the defendant:

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4 Mr Ghandour's AEIC at paras 1, 5 and 9 (4BAEIC 2045 and 2046–2047).

5 Mr Ghandour's AEIC at para 1 (4BAEIC 2045).

6 Mr Ghandour's AEIC at para 7 (4BAEIC 2047).

7 Mr Ghandour's AEIC at para 9 (4BAEIC 2047).

8 AEIC of Ahmad Zehdi Sayadi filed 19 September 2024 ("Mr Sayadi's AEIC") at para 1 (4BAEIC 1996); 2nd Affidavit of Alexandros Lamprinakis filed 31 January 2022 ("2nd Affidavit of Mr Lamprinakis") at para 1.

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(a) Ahmad Zehdi Sayadi ("Mr Sayadi"), the Administrative and Financial Manager in the Ghandour Group's shipping business.[9] Mr Sayadi monitors hire collection, and runs the office and human resources at Hermes Marine Management.[10]

(b) Antonios Kaffas ("Mr Kaffas"), the Chief Financial Officer of the Ghandour Group's shipping business.[11] Mr Sayadi reports to him;[12] Mr Kaffas in turn reports to Mr Ghandour, and occasionally, also to other members of the family when they partake in discussions.[13]

(c) Mr Ghandour.

9 A fourth individual, Alexandros Lamprinakis ("Mr Lamprinakis") did not give evidence at the trial of the counterclaim, but he is worth mentioning here as he featured repeatedly in the proceedings, having filed multiple affidavits in his capacity as the in-house legal counsel of Hermes Marine Management.[14]

10 I also heard evidence from the defendant's expert witnesses:

(a) Robert Anthony Rice ("Mr Rice") gave evidence as a ship finance expert, in particular on the nature and role of LQEs.[15]

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9 Mr Sayadi's AEIC at para 1 (4BAEIC 1996).

10 Day 1 Transcript (Mr Sayadi) at p 12, lines 14–18.

11 AEIC of Antonios Kaffas filed 19 September 2024 ("Mr Kaffas' AEIC") at para 1 (4BAEIC 2010).

12 Day 2 Transcript (Mr Kaffas) at p 7, lines 10–11.

13 Day 2 Transcript (Mr Kaffas) at p 8, lines 4–9.

14 2nd Affidavit of Mr Lamprinakis at para 1.

15 Affidavit of Robert Anthony Rice filed 13 September 2024, containing his expert report at pp 7–91 ("Opinion of Mr Rice") at para 3 (4BAEIC 2067).

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(b) Nicholas John Willis ("Mr Willis") gave evidence as a ship valuation expert.[16]

(c) Christopher Isherwood ("Mr Isherwood") gave evidence on tanker charter rates at the material time.[17]

(d) Yash Kulkarni KC ("Mr Kulkarni KC") gave evidence on English law.[18]

The plaintiff

11 Credit Suisse AG ("Credit Suisse") is an international bank, with whom the defendant enjoyed banking facilities at the material time. Credit Suisse was also the mortgagee of the Vessel. UBS AG ("UBS") is the surviving entity following the merger between Credit Suisse and UBS.[19]

12 On 24 September 2024, UBS was substituted in place of Credit Suisse as the plaintiff in this action with effect on and from 31 May 2024, and with everything done in the course of these proceedings "hav[ing] effect in relation to UBS AG as they had in relation to Credit Suisse AG".[20] Accordingly, references to "the plaintiff" in this judgment may be taken as referring to UBS

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16 Affidavit of Nicholas John Willis filed 13 September 2024, containing his expert report at pp 6–32 (4BAEIC 2155).

17 Affidavit of Nicholas John Willis filed 16 September 2024, containing his expert report at pp 6–56 (4BAEIC 2187).

18 2nd Affidavit of Yash Kulkarni filed 13 September 2024, containing his first expert report (at pp 112–125; 5BAEIC 2351) and second expert report (at pp 7–23; 5BAEIC 2246) (respectively referred to as the "Opinion of Mr Kulkarni KC" and the "Updated Opinion of Mr Kulkarni KC").

19 AEIC of Claudio Francesco Borla filed 24 September 2024 ("Mr Borla's AEIC") at para 2 (1BAEIC 39).

20 HC/ORC 4873/2024 dated 24 September 2024.

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or Credit Suisse, as the context requires, but for clarity, it is to be noted that the events giving rise to this dispute all took place when Credit Suisse was the relevant entity.

13 The plaintiff's witnesses consisted of:

(a) Joshua Alexander Walter ("Mr Walter"), who was a Key Account Manager for Credit Suisse at the material time.[21] As Key Account Manager, he was responsible for managing the plaintiff's portfolio of shipping clients.[22] Mr Walter took over coverage of the defendant's account sometime in 2020.[23]

(b) Claudio Francesco Borla ("Mr Borla") was a member of Credit Suisse's credit risk management department ("CRM") at the material time.[24] The CRM has the function of monitoring Credit Suisse's "risk exposure in relation to its portfolio with its clients".[25] One of the teams within CRM is recovery management.[26] The recovery management team (the "CRM Recovery Unit") manages "[h]igh risk position[s] that [have] defaulted".[27] Mr Borla headed the "CRM Recovery Unit dedicated to International Wealth Management".[28]

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21 AEIC of Joshua Alexander Walter filed 13 September 2024 ("Mr Walter's AEIC") at para 2 (1BAEIC 4).

22 Mr Walter's AEIC at para 11 (1BAEIC 6).

23 Mr Walter's AEIC at paras 15–16 (1BAEIC 7).

24 Mr Borla's AEIC at para 6 (1BAEIC 40).

25 Mr Borla's AEIC at para 8 (1BAEIC 40).

26 Mr Borla's AEIC at para 6 (1BAEIC 40).

27 Day 5 Transcript (Mr Borla) at p 76, lines 8–11.

28 Mr Borla's AEIC at para 10 (1BAEIC 41); Day 5 Transcript (Mr Borla) at p 74, line 1.

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14 Also of note are the following employees of Credit Suisse who did not testify but also featured in the evidence:

(a) Christoph Schmid ("Mr Schmid") is the Head of Global Recovery Management; Mr Borla reports to him.[29]

(b) Thorsten Herling ("Mr Herling") reported to Mr Borla and was the recovery officer assigned to the defendant's account at the material time. The recovery officer handles the "day-to-day management of clients" in CRM.[30]

15 The plaintiff called three expert witnesses:

(a) Lars Kyvsgaard ("Mr Kyvsgaard") was its expert on ship finance and banking practice in the context of LQEs.[31]

(b) Christopher Adrian Jones ("Mr Jones") was the plaintiff's ship valuation expert.[32]

(c) Nicholas Addison Phillips, The Right Honourable The Lord Phillips of Worth Matravers KG, PC ("Lord Phillips") gave evidence on English law.[33]

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29 Mr Borla's AEIC at para 10 (1BAEIC 41)

30 Mr Borla's AEIC at para 10 (1BAEIC 41).

31 AEIC of Lars Kyvsgaard filed 13 September 2024, containing his expert report at pp 16–41 (1BAEIC 72) ("Opinion of Mr Kyvsgaard").

32 AEIC of Christopher Adrian Jones filed 13 September 2024, containing his expert report at pp 11–27 (2BAEIC 759); Supplementary AEIC of Christopher Adrian Jones filed 29 October 2024, containing his supplemental expert opinion.

33 AEIC of Nicholas Addison Phillips, The Right Honourable The Lord Phillips of Worth Matravers KG, PC filed 13 September 2024, containing his expert report at pp 15–45 (3BAEIC 1185) ("Opinion of Lord Phillips").

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16 While not called to testify, Sir Nigel John Martin Teare ("Sir Nigel Teare") provided an expert opinion in HC/SUM 5945/2021 (the plaintiff's summary judgment application),[34] which Lord Phillips made reference to in his own report.[35]

The loan facilities

17 Sometime in 2010, the Ghandour Group sought to acquire four VLCCs (including the Vessel). The acquisition was financed via a loan agreement with Credit Suisse dated 26 November 2010, comprising a term loan facility of US$145,630,000 and a revolving credit facility of up to US$10,000,000 (the "2010 Loan Agreement").[36]

18 As at 23 November 2011, there were outstanding sums due under the 2010 Loan Agreement comprising US$93,815,000 under the term loan facility, and US$5,000,000 under the revolving credit facility.[37] On 23 November 2011, the parties entered into an Amending and Restating Agreement of the 2010 Loan Agreement (the "Initial Facility").[38]

19 The Initial Facility was subsequently restructured via a Facilities Agreement dated 26 June 2019 (the "Facilities Agreement").[39] Under the Facilities Agreement, the plaintiff provided two term loan facilities for a total sum of US$48,627,828.91, comprising US$32,175,000 under Facility A and

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34 Affidavit of Sir Nigel John Martin Teare filed 3 March 2022 in HC/SUM 5945/2021, containing his expert report at pp 12–33 ("Opinion of Sir Nigel Teare").

35 Opinion of Lord Phillips at para 37 (3BAEIC 1200).

36 Mr Borla's AEIC at para 11 (1BAEIC 42).

37 1ABOD 59, "BACKGROUND", proviso (A).

38 1ABOD 57.

39 Mr Borla's AEIC at paras 15–16 (1BAEIC 43); 1ABOD 217.

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US$16,452,828.91 under Facility B.[40] The Facilities Agreement was secured by, amongst others, a First Preferred Marshall Islands Ship Mortgage over the Vessel dated 30 August 2019 (the "Mortgage").[41]

20 On 30 August 2019, the defendant drew down on its loan facilities under the Facilities Agreement for a sum of US$48,127,827.91.[42]

21 The Facilities Agreement was amended and supplemented by a Fee Letter dated 30 August 2019 (the "Fee Letter") and a Supplemental Agreement dated 23 January 2020 (the "Supplemental Agreement") (collectively, the "Loan Documents") – no dispute arises as to the effect of these agreements:[43]

(a) The Fee Letter provided that the defendant was to pay an arrangement fee of US$243,140 on the Utilisation Date (as defined in the Facilities Agreement), and another arrangement fee of US$486,310 on the date falling 24 months from the Utilisation Date.[44]

(b) The Supplemental Agreement provided for the reallocation of the loan amounts between the two facilities (*ie,* Facilities A and B) under the Facilities Agreement.[45]

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40 1ABOD 221 ("Advance A" and "Advance B").

41 1ABOD 381.

42 Statement of Claim at para 9; Defence and Counterclaim (Amendment No. 2) ("D&CC(A2)") at para 7.

43 Mr Borla's AEIC at para 18 (1BAEIC 44); 1ABOD 551 and 1ABOD 680.

44 Fee Letter at Clause 3 (1ABOD 551); Day 2 Transcript (Mr Kaffas) at p 59, line 25 to p 60, line 2.

45 Supplemental Agreement at Clause 5 (1ABOD 680); Day 3 Transcript (Mr Ghandour) at p 26, lines 14–18.

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22 The Facilities Agreement, the Fee Letter, and the Supplemental Agreement are all governed by English law.[46]

The charterparties

23 From 12 August 2018 to 14 May 2021, the Vessel was time chartered to Koch Shipping Pte Ltd ("Koch") pursuant to a charterparty dated 7 August 2018, as amended by an Addendum No. 1 dated 28 January 2019 (collectively, the "Original Koch Charterparty").[47] The Original Koch Charterparty was for an initial period of three years plus or minus 90 days (in Koch's option), with an option for Koch to extend the charter period for up to an additional three years (comprising three one-year extension options).[48] At the end of the initial three year charter period, Koch elected not to extend the Original Koch Charterparty and redelivered the Vessel on 14 May 2021.[49]

24 The defendant and Koch subsequently reached an in-principle agreement on the terms of a new charterparty on or around 19 May 2021 (the "New Koch Charterparty").[50] The New Koch Charterparty provided for an initial charter period of two years, with an option for Koch to extend the charterparty for two additional periods of one year each, for a total charter

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46 2nd Affidavit of Mr Lamprinakis at para 29.

47 Mr Kaffas' AEIC at para 11 (4BAEIC 2013); 1ABOD 150 (Original Koch Charterparty) and 1ABOD 201 (Addendum No 1).

48 Mr Kaffas' AEIC at para 11 (4BAEIC 2013).

49 Email from Pradhan, Sambit K (Koch) dated 14 May 2021 at 1.52pm, titled "CHLOE V-I0002 / KOCH TCP 07 AUG 2018 / REDELIVERY STATEMENT" (5ABOD 2044).

50 Mr Kaffas' AEIC at para 15 (4BAEIC 2014); 6ABOD 3138.

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duration of four years.[51] Crucially, the New Koch Charterparty was "subject" to a clause (the "LQE Condition") which stated as follows:[52]

> **LETTER OF QUIET ENJOYMENT**
>
> IT IS A CONDITION OF THIS CHARTER THAT OWNERS / THE VESSEL'S FINANCIERS CREDIT SUISSE WILL, IF REQUESTED BY CHARTERERS, PROVIDE A LETTER OF QUIET ENJOYMENT COVERING THIS CHARTER, WITH TERMS OF THE LETTER BEING ACCEPTABLE TO CHARTERERS IN THEIR REASONABLE DISCRETION.

25 While the nature of what an LQE entails remains a matter of debate between the parties, I understand the following baseline definition to be uncontroversial: an LQE involves a *contractual* undertaking by a lender/mortgagee to a charterer that it will not interfere with the charterer's quiet enjoyment of the mortgaged vessel.[53] I note for completeness that the LQE Condition did include an option for the *defendant* to issue an LQE, but this is not relevant to the present dispute.

26 Despite the defendant's request, Koch was unwilling to soften its position on the LQE Condition.[54]

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51 6ABOD 3139.

52 Mr Kaffas' AEIC at para 16 (4BAEIC 2015–2016); 6ABOD 3144.

53 Joint Expert Memorandum on Ship Finance Practice and Nature and Effect of Letters of Quiet Enjoyment at S/N 1 and 5 (Bundle of Joint Experts Memorandum dated 4 November 2024 ("Bundle of JEMs") at pp 6 and 15); Opinion of Mr Kyvsgaard at para 47 (1BAEIC 83); Opinion of Mr Rice at paras 27–28 (4BAEIC 2072−2073).

54 Email from Henry Liddell to Ghassan Ghandour dated 21 May 2021 at 11.38pm (7ABOD 3387).

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The LQE request and Clause 21.7.1 of the Facilities Agreement

27 This dispute centres around Clause 21.7.1 of the Facilities Agreement ("Clause 21.7.1"). Clause 21.7.1 required the defendant to obtain the plaintiff's approval before entering into certain charter commitments for the Vessel. Clause 21.7.1 is expressed in the following terms:[55]

> Save for the Charter and except with approval by the Majority Lenders, the Borrower shall not enter into any charter commitment for the Ship, which is:
>
> (a) a bareboat or demise charter or passes possession and operational control of the Ship to another person;
>
> (b) capable of lasting more than 12 months (including by virtue of any optional extensions);
>
> (c) on terms as to payment or amount of hire which are materially less beneficial to it than the terms which at that time could reasonably be expected to be obtained on the open market for vessels of the same age and type as the Ship under charter commitments of a similar type and period; or
>
> (d) to another Group Member.

28 On 20 May 2021, as required by Clause 21.7.1 (and specifically, Clause 21.7.1(b)), the defendant sought the plaintiff's approval to enter into the New Koch Charterparty (since it would last more than 12 months), as well as an in-principle agreement for the plaintiff to issue an LQE in favour of Koch.[56]

29 Discussions between the plaintiff and defendant as to the possibility of the plaintiff issuing an LQE occurred between 20 and 28 May 2021.[57] On 25 May 2021, Mr Walter sent an email to Mr Sayadi informing him that while

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55 1ABOD 288.

56 Mr Kaffas' AEIC at para 19 (4BAEIC 2017); Email from Mr Sayadi to Mr Walter on 20 May 2021 at 10.12am (8ABOD 3977).

57 Mr Kaffas' AEIC at para 20 (4BAEIC 2017).

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the plaintiff had no objection to the terms of the New Koch Charterparty, they would not be able to agree to the issuance of an LQE in favour of Koch; Mr Walter explained that:[58]

> Any such undertaking would necessarily limit our ability to exercise our rights under the Loan Agreement and the other Finance Documents, something we cannot agree to.

30 Following this, a conference call took place on 26 May 2021 between representatives from the plaintiff and the defendant.[59]

31 The discussions were not fruitful, and on 28 May 2021, Mr Walter finally informed the defendant via email that the plaintiff would "not be in a position to provide [an LQE] or any other form of comfort letter".[60] Mr Sayadi replied the same day, expressing the defendant's disappointment at the plaintiff's "unreasonable" refusal to accommodate Koch's request for an LQE.[61] As a portend of things to come, Mr Sayadi ended his email stating that the plaintiff's "negative approach" might "cause an otherwise very competitive charterparty to fail", in which case "both the Owner and the bank [would] have to bear the consequences".[62]

32 Needless to say, the New Koch Charterparty failed to materialise because the LQE Condition "subject" was not fulfilled.

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58 Email from Mr Walter to Mr Sayadi dated 25 May 2021 at 11.50am (10ABOD 5113).

59 Mr Walter's AEIC at para 65 (1BAEIC 23).

60 Mr Walter's AEIC at para 65 (1BAEIC 23); 11ABOD 5110 (Tab 258).

61 Email from Mr Sayadi to Mr Walter dated 28 May 2021 at 6.09pm (11ABOD 5110, Tab 258).

62 Email from Mr Sayadi to Mr Walter dated 28 May 2021 at 6.09pm (11ABOD 5110, Tab 258).

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Subsequent events

33 The subsequent events need only be briefly summarised.

34 The Vessel was arrested by Koch in Singapore on 30 July 2021, as security for claims it had against the defendant under the Original Koch Charterparty.[63] On 15 October 2021, the Vessel was released from Koch's arrest, but it was rearrested by the plaintiff in this action on the same day as security for its claim as mortgagee.[64] On 18 November 2021, the Vessel was sold pursuant to an order of court.[65]

35 The plaintiff's arrest was in respect of an outstanding sum of US$44,864,191.10 that had become immediately due and payable pursuant to the plaintiff's exercise of its acceleration rights under the Facilities Agreement on 15 September 2021.[66] The plaintiff exercised its acceleration rights following various events of default that had occurred under the Facilities Agreement:

(a) a failure to remedy the security shortfall (*ie,* the "Security Value" was lower than the "Minimum Value" as defined in the Facilities Agreement);[67]

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63 Mr Walter's AEIC at para 68 (1BAEIC 24); HC/ADM 64/2021.

64 Mr Walter's AEIC at paras 78–79 (1BAEIC 28).

65 Mr Walter's AEIC at para 79 (1BAEIC 28).

66 1st Affidavit of Joshua Alexander Walter filed on 18 October 2021 ("1st Affidavit of Mr Walter") at para 46; 14ABOD 6268 (Notice of Acceleration, Termination and Demand).

67 1st Affidavit of Mr Walter at paras 19–22.

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(b) a failure to maintain its "Minimum Liquidity Account" (as defined in the Facilities Agreement) above the minimum required level of US$850,000;[68]

(c) a failure to procure the Vessel's release from Koch's arrest within the prescribed time;[69] and

(d) a failure to pay the Arrangement Fee of US$486,310 as set out in the Fee Letter (see [21(a)] above).[70]

36 The plaintiff obtained summary judgment for its claim in this action on 21 March 2022.[71]

The parties' cases

37 I will only briefly outline the parties' respective cases here, reserving a more detailed discussion of the same for later in this judgment, when I analyse the issues at play.

38 The defendant argues that Clause 21.7.1 had the effect of conferring a contractual discretion on the plaintiff to approve the New Koch Charterparty, and by extension, "to consider the [d]efendant's request to issue an LQE to Koch in the context of such approval".[72] In exercising the discretionary power under Clause 21.7.1, the defendant submits that the plaintiff's exercise of

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68 1st Affidavit of Mr Walter at paras 23–28.

69 1st Affidavit of Mr Walter at paras 29–40.

70 1st Affidavit of Mr Walter at paras 41–44.

71 HC/ORC 1596/2022 in HC/SUM 5945/2021.

72 DCS at para 27.

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discretion is subject to various implied terms (collectively, the "Alleged Implied Terms"):

(a) "to act rationally, in good faith and consistently with its commercial purposes" (the "Good Faith Term");[73]

(b) "not to unreasonably withhold any approval" (the "Reasonableness Term");[74]

(c) "not [to] arrive at a decision that no reasonable person in the position of the [p]laintiff could make" (the "*Wednesbury* Term");[75] and

(d) "not [to] do anything to prevent the [d]efendant from performing its obligations under the Loan Documents" (the "Prevention Term").[76]

39 The defendant submits that the plaintiff has breached one or more of the Alleged Implied Terms. The plaintiff's decision refusing to issue an LQE was allegedly "unreasonable and/or irrational".[77] By dint of these breach(s), the plaintiff prevented the defendant from entering into the New Koch Charterparty with Koch and has thereby caused the defendant loss.[78]

40 The plaintiff on the other hand submits that Clause 21.7.1 does not even "grant any contractual discretion to issue an LQE".[79] Even if it does, the Alleged

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73 DCS at para 37; D&CC(A2) at para 17.

74 DCS at para 37; D&CC(A2) at para 17.

75 DCS at para 38.

76 DCS at para 41; D&CC(A2) at para 17.

77 D&CC(A2) at paras 14 and 18.

78 D&CC(A2) at paras 21 and 38–39.

79 Plaintiff's Closing Submissions dated 17 January 2025 ("PCS") at para 21.

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Implied Terms do not apply to the issuance of an LQE.[80] Even if the Alleged Implied Terms apply to the issuance of an LQE, the plaintiff did not breach any of the Alleged Implied Terms – its decision to refuse the request for an LQE was made reasonably, rationally, and in good faith.[81] Finally, even if the plaintiff is liable for breaches of the Alleged Implied Terms, there are "insurmountable difficulties" with the defendant's proof of its damages.[82]

English law

41 Notwithstanding that these proceedings have taken place in Singapore, I am tasked to decide this matter according to English law principles because the relevant contractual documents are governed by English law (see above at [22]). Procedural issues, of course, remain to be decided according to the law of the forum (*ie*, Singapore law): Yeo Tiong Min SC, *Commercial Conflict of Laws* (Academy Publishing, 2023) at para 11.017.

42 It is trite that foreign law must be proved as a matter of fact, and so I have received expert evidence on English law from both parties. However, I also bear in mind that the Singapore courts are able to apply English law without the aid of foreign experts when the legal position is similar in both jurisdictions: *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [63]. I consider the present case to be one such instance.

Issues

43 The following issues arise for my determination:

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80 PCS at paras 41–59.

81 PCS at para 60.

82 PCS at para 137.

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(a) whether the "approval" of a charter commitment under Clause 21.7.1 encompasses a decision to issue an LQE;

(b) if so, whether the exercise of discretion surrounding the issuance of an LQE is subject to any of the Alleged Implied Terms;

(c) if the exercise of discretion surrounding the issuance of an LQE is subject to any of the Alleged Implied Terms, whether the plaintiff has breached any of the Alleged Implied Terms; and

(d) assuming that the plaintiff has breached one or more of the Alleged Implied Terms, whether the plaintiff has caused the defendant loss and the extent of that loss.

44 To succeed in its counterclaim, the defendant must prevail on all four issues.

Whether an "approval" under Clause 21.7.1 includes a decision to issue an LQE

45 The first issue is one of construction – does the "approval" required or envisaged by Clause 21.7.1 encompass a decision by the plaintiff to issue or not issue an LQE? If it does not, then there is no relevant contractual discretion being exercised to speak of on which the Alleged Implied Terms can bite.

46 I reproduce the wording of Clause 21.7.1 here again for convenience:

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> Save for the Charter and except with approval by the Majority Lenders, the Borrower shall not enter into any charter commitment for the Ship, which is:
>
> (a) a bareboat or demise charter or passes possession and operational control of the Ship to another person;
>
> (b) capable of lasting more than 12 months (including by virtue of any optional extensions);
>
> (c) on terms as to payment or amount of hire which are materially less beneficial to it than the terms which at that time could reasonably be expected to be obtained on the open market for vessels of the same age and type as the Ship under charter commitments of a similar type and period; or
>
> (d) to another Group Member.

The parties' cases

47 On the defendant's case, the words "any charter commitment for the Ship" are broad enough to "include any commitment *relating* to the charter of the ship" [emphasis added] (*ie,* including the issuance of an LQE).[83] The "approval" under Clause 21.7.1 includes the decision to issue an LQE especially since the LQE Condition was a term or "subject" of the New Koch Charterparty. To put it another way, because the New Koch Charterparty was conditional upon the issuance of an LQE, the plaintiff could not "truly give [its] approval" for the New Koch Charterparty without also agreeing to the issuance of the LQE; without the LQE, the plaintiff's "non-objection to the terms of the New Koch Charterparty was of little value".[84]

48 The plaintiff submits that Clause 21.7.1 does *not* cover the issuance of an LQE:[85]

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83 DCS at para 30.

84 2nd Affidavit of Mr Lamprinakis at para 27.

85 PCS at para 23.

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(a) First, Clause 21.7.1 "does not mention an LQE at all".[86]

(b) Second, the grant of a contractual discretion suggests that the grantee is empowered to do something which they ordinarily would have no right to do. The defendant's case would suggest that the plaintiff has no power to issue an LQE in the absence of the parties' agreement, which would be "absurd".[87]

(c) Third, the "business purpose" of Clause 21.7.1 is directed towards ensuring the defendant does not encumber the Vessel in long-term charterparties without the plaintiff's approval, and the charterer's quiet enjoyment and use of the Vessel has "nothing to do" with this purpose.[88]

(d) Fourth, it would be "anomalous" to grant the plaintiff a contractual discretion to issue an LQE for charterparties that are more than a year, but not for those which are less than a year.[89]

(e) Lastly, the requirement for an LQE does not affect the defendant's *entry* into the New Koch Charterparty, but is rather a facet of the defendant's *performance* of it.[90]

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86 PCS at para 22.

87 PCS at paras 24–25.

88 PCS at para 26.

89 PCS at para 27.

90 PCS at paras 31 and 33.

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Analysis

49 I agree with the plaintiff that the "approval" of a charter commitment under Clause 21.7.1 *does not*, on its proper construction, include the approval of a request to issue an LQE.

50 There is no mention in Clause 21.7.1 (or anywhere else in the Loan Documents for that matter) of an LQE, or any other document of a similar nature. A "charter commitment" is defined at Clause 1.2.1(l) of the Facilities Agreement, but the definition does not shed much light on the analysis:[91]

> **charter commitment** means, in relation to a vessel, any charter or contract for the use, employment or operation of that vessel or the carriage of people and/or cargo or the provision of services by or from it and includes any agreement for pooling or sharing income derived from any such charter or contract;
>
> [emphasis in original]

51 In the absence of clear guidance by the contract, the question falls to be answered in accordance with business commonsense, having regard to the purpose of the clause: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [21] and [25].

52 Clause 21.7.1 requires the approval of a charter commitment in four specified scenarios. These scenarios all represent situations where the plaintiff's security in the Vessel might be exposed to increased risk.[92] Thus, the purpose of Clause 21.7.1 is to impose restrictions on the *defendant (*as the shipowner/borrower/mortgagor) for the protection of the plaintiff. This construction is supported by the internal documentary context – Clause 21.7.1

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91 1ABOD 242.

92 Opinion of Lord Phillips at para 69 (3BAEIC 1210).

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sits within a wider set of clauses that all impose obligations on the manner in which the *defendant* can deal with the ship – Clause 21 itself is titled "Dealings with Ship".[93]

53 In my view, an "approval" within the meaning of Clause 21.7.1 can only reasonably be understood as approving the lifting of restrictions which the Facilities Agreement has imposed on the *defendant*. The relevant restriction here was on the *defendant's* freedom to enter into charters for the Vessel – the defendant would not have been required to obtain the plaintiff's permission *if not for* Clause 21.7.1.

54 Conversely, there was, on the plain language of the clause, no restriction imposed on the issuance of an LQE which had to be "approved". As I observed above (at [25]), an LQE contemplates (at the minimum) a contractual undertaking by the plaintiff to the charterer. Unlike the defendant, the plaintiff had complete freedom to contract – the defendant had no say in whether the plaintiff decided to enter into an independent contractual relationship with a third party via the issuance of an LQE, and accordingly, the plaintiff is and was at liberty to issue an LQE at any time (*whether or not* Clause 21.7.1 existed).

55 The "approval" in Clause 21.7.1 therefore cannot apply to the plaintiff's decision on whether to issue an LQE because it would be legally and commercially absurd to require the plaintiff to "approve" something it is already *empowered* to do (see [48(b)] above).[94] Additionally, the commercial purpose of Clause 21.7.1 would not be served as the "approval" would not protect the plaintiff in any meaningful or logical sense. Clause 21.7.1 operates solely for

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93 1ABOD 286.

94 PCS at para 25.

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the plaintiff's benefit *qua* mortgagee. Adopting the defendant's construction would mean that protections intended for the plaintiff's benefit are now being used to restrict the plaintiff's rights for the defendant's benefit – if the defendant's construction is accepted, it would turn the contractual scheme of Clause 21.7.1 on its head. Accordingly, I have little hesitation rejecting it.

56 Admittedly, there is some superficial attractiveness to the defendant's submission that the approval of the New Koch Charterparty cannot be separated from the approval of an LQE because failing to approve an LQE is substantially the same as failing to approve the terms of the New Koch Charterparty. The defendant buttresses this argument by pointing out that the LQE Condition was a "subject" which Koch had to "lift" before the charterparty could be entered into – this meant that the LQE was a pre-condition to *entering* into the charterparty.[95]

57 In response, the plaintiff takes the position that the LQE Condition was a "condition precedent to the *performance* of the contract, as opposed to … the *formation* of the contract" [emphasis added].[96] It cites *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR(R) 101 and *Bonsel Development Pte Ltd v Tan Kong Kar and another* [2000] 2 SLR(R) 967 for the proposition that it is "well-established in Singaporean case law" that a "subject" does not preclude the formation of a contract.[97] Reference was also made to Mr Ghandour's evidence at trial – the plaintiff says Mr Ghandour had acknowledged that a contract was formed with Koch.[98]

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95 Defendant's Reply Submissions dated 14 February 2025 ("DRS") at paras 39–41.

96 PCS at para 33.

97 PCS at paras 34–36.

98 PCS at para 37.

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58 The Singapore cases cited by the plaintiff are not of assistance as: (a) I am determining the matter under English law; and (b) they do not address "subjects" as used and understood in the specific charterparty context which is what I am concerned with. Lastly, Mr Ghandour is a layperson whose subjective evidence as to whether a contract had or had not been formed can shed only minimal light on what is meant to be an objective assessment.

59 I accept the defendant's argument that the LQE Condition was a pre-condition to the New Koch Charterparty: see *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd* [2022] 2 All ER (Comm) 732 at [83]–[87] (affirmed on appeal, in *DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd; The Newcastle Express* [2023] 3 All ER 580 at [34]–[41])[99]. A "subject" is also more likely to be classified as a pre-condition to contract when it "involves the exercise of a personal or commercial judgment by one of the putative contracting parties": *Nautica Marine Ltd v Trafigura Trading LLC; The Leonidas* [2021] 1 All ER (Comm) 1157 at [52]. In this case, the proposed LQE had to be approved by Koch "in their reasonable discretion" (see at [24] above).

60 However, I consider the LQE's status as a pre-condition to the New Koch Charterparty to be a red herring. Declining to issue an LQE may lead to the same *practical outcome* as failing to approve the New Koch Charterparty (*ie,* the non-formation of the contract), but that is simply the consequence of the bargain which the defendant has made with Koch.

61 The two "approvals" (*ie*, of the New Koch Charterparty and the LQE) remain fundamentally and conceptually distinct. At the risk of repetition, the

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[99] DRS at para 41.

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"approval" of the New Koch Charterparty arises pursuant to Clause 21.7.1 – without which the plaintiff would not have the "right" to control the defendant's freedom of contract. By contrast, the "approval" of an LQE is best understood as a decision or right whether or not to enter into contractual relations with a stranger, *ie*, the freedom to contract. This is an absolute right that the plaintiff already possessed.

62 In my view, the way to reconcile the LQE's status as a pre-condition to the New Koch Charterparty with the "approval" mechanism in Clause 21.7.1 of the Facilities Agreement is to understand that the plaintiff's approval merely needs to be sought for the *proposed* terms of the charter commitment.[100] It is then up to the defendant to finalise entry into the said charter by fulfilling the requisite pre-conditions. I do not think it can be seriously suggested that the plaintiff's approval of proposed charter terms means that they are also then obliged to assist the defendant with *fulfilling* pre-conditions imposed by the putative charterer.

63 The plaintiff approved the proposed charter terms and no more – in my judgment, the plaintiff was not required under Clause 21.7.1 to do anything more. Thus, no question arises as to whether the plaintiff was subject to any of the Alleged Implied Terms in considering whether to issue an LQE in Koch's favour.

Whether the exercise of discretion surrounding the issuance of an LQE is subject to any of the Alleged Implied Terms

64 Assuming I am wrong on the first issue and the approval/issuance of an LQE is the subject of an "approval" under Clause 21.7.1, the next issue is

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100 Opinion of Lord Phillips at para 67 (3BAEIC 1210).

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whether the exercise of discretion surrounding the issuance of an LQE is subject to any of the Alleged Implied Terms.

65 As a matter of structure, I will deal with the first three of the defendant's Alleged Implied Terms (*ie,* the Good Faith Term, the Reasonableness Term, and the *Wednesbury* Term) together. The Prevention Term is considered and analysed separately at the end of this judgment as it is a term that both parties accept may be implied as a matter of fact under the English law of contract independently of Clause 21.7.1. The other three Alleged Implied Terms, by contrast, can only arise by virtue of Clause 21.7.1. The arguments advanced by the defendant in respect of the Prevention Term are also different in some respects to those raised on the other three Alleged Implied Terms.

Whether the exercise of discretion surrounding the issuance of an LQE is subject to the Good Faith Term, the Reasonableness Term, and the Wednesbury Term

Analysis

66 These three terms all relate to and arise from the same line of English authorities governing the exercise of contractual discretions. The modern authority is *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 ("*Braganza*"), and I will refer to the implied duties set out in *Braganza* and the related authorities as the "*Braganza* duty". It is useful to first provide some background to the *Braganza* duty before turning to consider whether it arises in this case.

Overview of the Braganza duty

67 The facts of *Braganza* were as follows. Mr Braganza, the Chief Engineer on one of BP's oil tankers, had gone missing while the vessel was on the high

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seas. Mr Braganza's employers formed the opinion that he had most likely committed suicide, a finding which had the effect of depriving Mr Braganza's widow of his death benefits – Mr Braganza's employment contract provided that his death benefit would not be payable if "in the opinion of the company or its insurers", the employee's death arose from a "wilful act, default or misconduct" [emphasis removed]: *Braganza* at [1]. The United Kingdom Supreme Court reviewed the manner in which the employer had come to its opinion as to the manner of Mr Braganza's disappearance.

68 On the facts, the court was prepared to find that there existed an implied term that "the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose": *Braganza* at [30].

69 Rationality here includes "both limbs of the *Wednesbury* formulation" (*Braganza* at [30] and [53]) – this refers to the oft-cited principles of judicial review in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 ("*Wednesbury*"). The two-limb test in *Wednesbury* requires considering:

> (a) first, whether the decision-maker took "into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account"; and
>
> (b) second, whether notwithstanding that the first limb is satisfied, the decision-maker has "nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it" (*Braganza* at [24] citing *Wednesbury*).

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70 It would be apposite at this point to make a note on terminology. The *Braganza* duty has been the subject of various formulations: a duty not to exercise the discretion "arbitrarily, capriciously or unreasonably" (*Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2)* [1993] 1 Lloyd's Rep 397 at 404), "for a purpose unrelated to its legitimate commercial interests" (*Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 2 All ER (Comm) 695 at [169]), and a duty to exercise the discretion in accordance with "concepts of honesty, good faith, and genuineness" (*Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116 ("*Socimer*") at [66]).

71 In my view, these formulations are merely different ways of describing the same core duty and it would be neither principled nor practical to attempt to draw fine distinctions between them. A decision made arbitrarily following an exercise of discretion would more likely than not also be one that was made capriciously, irrationally, and not in good faith. Similarly, such a decision which has failed to take into account relevant considerations or has taken into account irrelevant considerations would likely also be considered arbitrary, irrational, or in bad faith: see David Osborne, Graeme Bowtle & Charles Buss, *The Law of Ship Mortgages* (Informa Law, 2nd Ed, 2017) ("*The Law of Ship Mortgages*") at para 8.5.1. For present purposes and for clarity of analysis, I consider that what has been said in *Braganza* (at [68]–[69] above) accurately represents the essence of the *Braganza* duty. I understand that both Mr Kulkarni KC and Lord Phillips are broadly in agreement that the relevant test is the two-limb *Wednesbury* test, and that there is a need to consider whether the decision is in line with the commercial purpose of the discretion.[101]

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[101] Joint Expert Memorandum on English Law ("JEM English Law") at paras 18-19 (Bundle of JEMs at p 42).

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72 As I prefaced at [66], it can be seen from the preceding discussion that the Good Faith Term, the Reasonableness Term, and the *Wednesbury* Term all find expression (and precedential support) in the various formulations of the *Braganza* duty which I have outlined above at [68]–[69]. For this reason and for ease of analysis, I will in the ensuing discussion refer to these three terms collectively as the "*Braganza* duty".

Whether the Braganza duty arises in relation to the decision whether or not to issue an LQE

73 The plaintiff does not dispute that the *Braganza* duty generally applies to contractual discretions granted to a contracting party,[102] but is subject to certain limitations.

74 First, not every contractual power or discretion is subject to the *Braganza* duty. The English law experts agree that the implied duties imposed under English law in relation to the exercise of a contractual discretion do not apply to a situation where the party concerned enjoys an unfettered choice (or absolute right) as to what course of action to take:[103] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200 at [83].

75 Second, the scope of the *Braganza* duty will depend on "the nature of the discretion and the construction of the language conferring it": *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] 4 All ER 907 at [37]; see also *UBS v Rose Capital Ventures* [2019] 2 BCLC 47 ("*Rose Capital*") at

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102 Respondent's Skeletal Submissions for Hearing of HC/RA 82/2022 dated 19 April 2022 at para 45; PCS at para 19.

103 JEM English Law at para 8 (Bundle of JEMs at p 40).

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[49]. Bearing in mind that the purpose of the *Braganza* duty is to prevent abuse by the decision-maker (*Braganza* at [18]), a contractual discretion will be subject to "more intense scrutiny" by the court (*Braganza* at [55]) if the decision-maker: (a) has a "clear conflict of interest"; (b) has a "role in the on-going performance of the contract" (such as the making of an assessment); and (c) where the contractual relationship involves an imbalance of power (the archetypal case being employment contracts): *Rose Capital* at [49]. Similarly, I am of the view that these factors will also be relevant to, and are likely to inform the assessment of, whether the *Braganza* duty should even apply in the first place (see above at [74]).

76 With the foregoing in mind, I turn to consider whether the *Braganza* duty arises in this case. Assuming I am wrong on the first issue and the plaintiff's "approval" in Clause 21.7.1 does include its decision to issue an LQE, I am of the view that any discretion involving such "approval" from the plaintiff would be more in the nature of an unfettered discretion or absolute right and accordingly, would *not* be subject to any *Braganza* duty.[104]

77 Applying the principles set out above at [74] and [75], a decision pertaining to the issuance of an LQE does not strike me as falling within the concerns which the *Braganza* duty is meant to address:

> (a) First, there is no imbalance of power. The plaintiff and defendant are both sophisticated commercial entities dealing with each other at arm's length, and who both possess the ability to obtain legal advice. Any discretion exercised here will not strike at the court's conscience as it may in employment cases, which involve a wholly different dynamic:

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104 PCS at para 42.

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Braganza at [32]; *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 ("*Horkulak*") at [25].

(b) Second, the plaintiff's exercise of its "approval" rights would not have attracted a conflict of interest: *Braganza* at [18]. In *Braganza*, the employer might have been incentivised to make an adverse finding against the deceased in order to deny paying out his death benefit. Similarly, it may have been in the financial interests of an online foreign exchange to strike out lucrative trades made by customers by deeming them "Manifest Errors": *Shurbanova v Forex Capital Markets Ltd* [2017] EWHC 2133 (QB) at [81]. The same concerns do not exactly arise here. It was also in the plaintiff's interest for the defendant to enter into a lucrative charter as this would facilitate the service of its debt. Indeed, if there was any conflict of interest at all, it would be between the plaintiff and the *prospective charterer,* but with whom the plaintiff had no contractual relationship. That is not the sort of conflict of interest that would attract the implication of the *Braganza* duty.

(c) Lastly and relatedly, the fact that the plaintiff was being asked to issue a document that would have subjected it to contractual obligations to a party that was otherwise a stranger to it is another compelling factor that points away from the existence of any conflict of interest. Insofar as the plaintiff was exercising any "approval" rights on whether to issue an LQE, it would have been exercising its absolute right of freedom to enter into a contract – plainly, such a right is untrammelled and cannot be subject to the shackles of the *Braganza* duty.

78 For the foregoing reasons (singly or collectively), I find and hold that even if a discretion to approve a request to issue an LQE could be read into

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Clause 21.7.1, such a discretion was, in my judgment, an absolute one that was *not* subject to any *Braganza* duty. It therefore follows that the plaintiff's refusal to approve and issue the LQE required by Koch could not be faulted and would not be in breach of Clause 21.7.1.

79 Accordingly, the defendant's counterclaim fails and I dismiss it. I could end here but considering that parties have made extensive submissions on the other issues and in the event I am wrong in my conclusions above, I shall proceed to consider these issues.

Whether the *Braganza* duty was breached

80 This next issue assumes: (a) that the plaintiff's "approval" under Clause 21.7.1 *does* include a request for an LQE; and (b) that such "approval" is subject to the *Braganza* duty. In those circumstances, the question is whether the plaintiff breached said duty.

Scope of the Braganza duty

81 Before diving into the evidence and the rival contentions, a few preliminary points need to be made to define the exact scope of the *Braganza* duty.

82 First, it bears emphasising that the *Braganza* duty does not impose a duty to act in an objectively reasonable manner when exercising a discretion. The court is "not entitled to substitute its own view of what is a reasonable decision for that of the person who is charged with making the decision"; it is instead tasked to conduct "a rationality review": *Braganza* at [52]. Thus, the primary focus is not on the objective reasonableness of the *outcome*, but rather the rationality of the decision-making *process*, having regard to the above-

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mentioned concepts of good faith and commercial purpose; this is not to say that the actual outcome can never be a relevant consideration – the *Braganza* duty could still be breached if the "result is so outrageous that no reasonable decision-maker could have reached it" (*ie,* the second limb of the *Wednesbury* test): *Adrian Faieta v ICAP Management Services Ltd* [2017] EWHC 2995 (QB) ("*Adrian Faieta*") at [28].

83 Accordingly, "(un)reasonableness" in the *Braganza* sense does not refer to an objective standard (unlike cases relating to duties to take reasonable care, to arrive at a reasonable time, or to obtain a reasonable price). The concept instead refers to the more *limited* sense of *Wednesbury* unreasonableness, which refers to a decision which no reasonable decision-maker could have come to: *Socimer* at [66]; *Paragon Finance plc v Nash and another* [2002] 1 WLR 685 at [38] and [41]–[42].

84 In this regard, it is not clear whether the defendant's position is that withholding approval "unreasonably" as described in the defendant's Reasonableness Term involves an objective assessment, but there are hints of it in Mr Kulkarni KC's expert report which states that the Reasonableness Term involves undertaking a "broader assessment … to determine whether [the plaintiff's] conduct could be said to be unreasonable".[105] To the extent that its case is that the plaintiff was under a duty to act in an objectively reasonable manner when exercising a discretion, I disagree that such a duty can arise in the *Braganza* sense.

85 For completeness, if the defendant's case is that apart from the *Braganza* duty, there should be some *stronger* implied term that the decision to not issue

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105 Updated Opinion of Mr Kulkarni KC at para 27 (5BAEIC 2254).

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an LQE was an objectively reasonable one, I would also reject this. As I have already rejected the imposition of a *Braganza* duty in this case (at [77]–[78]) – *a fortiori*, there is nothing to support the imposition of a *more* onerous duty on these facts.

86 The second preliminary point I would make is that "good faith" as used in the *Braganza* sense refers to acting honestly, without malice,[106] and "consistently with [the plaintiff's] commercial purposes".[107] The defendant's Good Faith Term must be understood the same way. There has however been some confusion or lack of clarity on the defendant's part because one of the cases the defendant relies on for its discussion of the Good Faith Term is *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526 ("*Yam Seng*").[108] *Yam Seng* is an authority supporting a *general* duty of good faith in English contract law.[109] According to the defendant, it stands for the proposition that relational contracts may impliedly be subject to a duty of good faith which captures factors such as "a high degree of communication and expectations of loyalty".[110] Leaving aside the plaintiff's objection that a general duty of good faith has not been pleaded,[111] I agree with the plaintiff that good faith as understood in the *Braganza* sense is a more limited concept restricted to notions of honesty and acting in accordance with the principles set out in *Wednesbury*:[112] *Horkulak* at [30] ("the implication of the term is not the

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106 Plaintiff's Opening Statement dated 25 October 2024 ("POS") at para 53; Opinion of Sir Nigel Teare at para 48.

107 DCS at para 37; Updated Opinion of Mr Kulkarni KC at para 17 (5BAEIC 2251).

108 DCS at para 92.

109 Plaintiff's Reply Submissions dated 14 February 2025 ("PRS") at para 18.

110 DCS at para 92.

111 PRS at para 17.

112 PRS at para 20.

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application of a 'good faith' doctrine, which does not exist in English contract law"); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm) at [72] (good faith "connotes subjective honesty, genuineness and integrity, not an objective standard of any kind"). Thus, in assessing whether the Good Faith Term was breached by the plaintiff in this case, I proceed on the basis that "good faith" is to be analysed only in the limited *Braganza* sense I have set out here.

The parties' cases

87 I begin by setting out the plaintiff's case – what it says it took into account when deciding whether or not to grant the LQE:

(a) Issuing an LQE would have "effected a clog" on the plaintiff's ability to enforce the Mortgage against the Vessel.[113]

(b) At the time of the request for an LQE, there was a "high likelihood that there would be a security shortfall" under the Facilities Agreement.[114]

(c) Numerous events of default had occurred under the Initial Facility. These included: (i) the Vessel being subject to a claim and injunction issued by the Panamanian Courts in May 2014; (ii) the defendant failing to repay an instalment of US$1,485,058 due under the Initial Facility; (iii) the defendant allowing its charterers to deduct US$579,500 from hire payments without the plaintiff's approval; and (iv) the defendant failing to repay the final balloon instalment of

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113 Reply and Defence to Counterclaim (Amendment No. 1) ("R&DCC(A1)") at para 11(c).

114 R&DCC(A1) at para 11(d).

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US$48,627,827.91 under the Initial Facility, thereby causing it to be restructured into the Facilities Agreement.[115]

(d) The hire rate under the New Koch Charterparty would be insufficient to service the defendant's loan under the Facilities Agreement.[116]

(e) The defendant's poor financial situation / credit history.[117]

88 The defendant in turn raises the following arguments – I summarise the key contentions here and will delve into the arguments raised in further detail in the course of my analysis proper:

(a) The plaintiff failed to give reasons for its decision.[118] A rational decision-making process would have entailed conveying to the defendant the considerations which the plaintiff had in mind when deciding whether to issue the LQE, so that the defendant would be able to respond to the plaintiff's concerns; the plaintiff's failure to do so was a breach of the *Wednesbury* test.[119]

(b) The plaintiff was labouring under a misconception by assuming that an LQE would have effected a clog on its enforcement rights over the Vessel. The defendant's view is that there is "no rule of law as to what constitutes an LQE, and the LQE is flexible and allows for parties

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115 R&DCC(A1) at para 11(e).

116 R&DCC(A1) at para 11(f).

117 R&DCC(A1) at para 11(e); PCS at paras 96–121.

118 D&CC(A2) at para 18.

119 DCS at para 45.

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to amend as necessary".[120] The plaintiff should thus have entered into discussions and dialogue with the defendant to enable the latter to come to a workable solution.[121] It should have but failed to consider the possibility of alternative wording and carve outs in the LQE, or a lesser obligation such as a "comfort letter", which would have enabled the plaintiff to protect its position while still satisfying Koch.[122] In this regard, the plaintiff failed to consider that the principles set out in *The Myrto* [1977] 2 Lloyd's Rep 243 ("*The Myrto*") would also necessarily affect the plaintiff's rights of enforcement, and so issuing an LQE would likely have been in the plaintiff's interests as it would have provided it with more contractual certainty.[123]

(c) The defendant submits that the four considerations identified at [87(b)–(e)] were not specifically pleaded and were mere afterthoughts. Alternatively, they were irrelevant considerations which the plaintiff should not have taken into account.[124]

(d) The defendant's request for an LQE was not considered by person(s) with requisite authority.[125]

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120 DCS at para 51.

121 DCS at paras 91 and 104.

122 DCS at para 121.

123 DCS at para 130.

124 DCS at para 52.

125 DCS at para 81.

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Analysis

Alleged duty to give reasons

89 The defendant takes issue with the plaintiff's failure to give reasons. In particular, the plaintiff failed to communicate to the defendant that it allegedly would have considered the LQE more favourably if the defendant provided additional security.[126] The defendant highlights an internal email sent from Mr Herling to Mr Walter on 21 May 2021, in which Mr Herling requests Mr Walter to "additionally note to the client that in case of a shortfall in the future debt service we will look for corresponding compensations (e.g. collaterals) as we would like to keep the existing debt service".[127] It was put to Mr Walter at trial that he did not, as instructed by Mr Herling, convey this "additional note" to the defendant when the request to issue an LQE was declined.[128] Mr Walter took the position that there must have been some further discussion within the team which resulted in the plaintiff's reply email on 25 May 2021 being sent without the "additional note".[129] Further, he took the view that if the defendant was prepared to do so they should have "offer[ed] collateral by itself from the outset".[130]

90 On the other hand, the defendant contends that had the defendant been informed of this additional note, the parties would have "entered into a dialogue about additional security", which would more likely than not have led to the provision of additional security by the defendant – this would have in turn led

126 DCS at para 16.

127 9ABOD 4756.

128 Day 4 Transcript (Mr Walter) at p 167, lines 13–15.

129 Day 4 Transcript (Mr Walter) at p 168, lines 20–23.

130 Day 4 Transcript (Mr Walter) at p 170, lines 13–18.

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to the issuance of the LQE (with the plaintiff's concerns having been assuaged).[131]

91 The plaintiff submits that the allegations at [90] above have not been pleaded.[132] The allegations also rest on what they say is a misreading of Mr Thorsten's email. In its view, the "request for additional collateral is mentioned in the context of a shortfall in the future debt service and not in relation to an LQE".[133] Furthermore and in any event, the plaintiff says that it was under no duty to give reasons for the exercise of its discretion. It cites *AL Shams Global Ltd v BNP Paribas* [2019] 3 SLR 1189 ("*AL Shams*"), *McInnes v Onslow-Fane and another* [1978] 1 WLR 1520 and *Tay Eng Chuan v Professional Engineers Board* [1981-1982] SLR(R) 411 for this proposition.[134]

92 In my view, the plaintiff has the better of the argument. There is "no general duty, universally imposed on all decision-makers" to give reasons: *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300; see Harry Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at para 7-089. The English common law is however "moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so": *Regina (Oakley) v South Cambridgeshire District Council* [2017] 1 WLR 3765 ("*Oakley*") at [30].

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131 DCS at para 142.

132 PRS at para 70.

133 PRS at para 71.

134 PCS at para 124; PRS at paras 22−25.

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93 Putting the plaintiff's pleading objection to one side, the defendant's submission is, in my view, without merit. First, I find that the plaintiff was not required to give reasons in this case. The duty to give reasons has generally arisen in the context of judicial review where there is a "public interest in ensuring that the relevant decision-maker has considered matters properly": *Oakley* at [79]. This includes cases in which the decision-maker is exercising a judicial or quasi-judicial function (*Hasan (R, on the application of) v Secretary of State for Trade and Industry* [2009] 3 All ER 539 at [7]), or where the "failure to give reasons may frustrate a right of appeal" (*Oakley* at [31]).

94 There are no such public interest considerations in this case. To the contrary, there is an "understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context": *Braganza* at [20]. A stronger case might be made for treating a contractual decision-maker as akin to a public body where the considerations identified above at [77] apply (see *Braganza* at [57]; *Adrian Faieta* at [82]), but that is not the case here. It is difficult to conceive of a commercial entity dealing at arm's length being *duty bound* to provide reasons for a commercial decision: see the *obiter* remarks in *Rose Capital* at [72].

95 Second, reading Mr Herling's email at face value, it is entirely plausible that the additional note was simply intended to be a *separate and independent* reminder *internally* to Mr Walter for that point to be made to the defendant at the appropriate time, *ie*, for the defendant to keep up with its obligations under the loan given the impending and likely security shortfall. It was thus unrelated to the request for an LQE and accordingly, there was no "failure" to speak of on

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the plaintiff's part to raise the question of additional security with the defendant in the context of the discussions surrounding the issue of an LQE.[135]

96 Furthermore, the note from Mr Herling has to also be read in light of the evidence given at trial: Mr Walter said that the plaintiff *may* have considered an LQE more favourably if there was additional security forthcoming from the defendant;[136] Mr Borla explained that while the plaintiff "*may* have reconsidered the position" [emphasis added], the "bar would likely be very high" to issue an LQE.[137] These statements, which were not seriously challenged by the defendant, reveal that there was no certainty or even likelihood that any offer of additional security, even if made, would have moved the needle in favour of the defendant. It is also entirely speculative whether, even if the plaintiff had been prepared to receive additional security, the defendant would have been willing or able to provide such security, in a form and for a sufficient quantum to meet the "high bar" Mr Borla had alluded to. In these circumstances, the issue of whether the question of providing additional security ought to have been raised by the plaintiff strikes me as being too vague and indeterminate as to be capable of placing some form of obligation on the plaintiff under the rubric of a duty to give reasons; further, the alleged evidence relied upon by the defendant in support of its submission falls far short. Accordingly, I dismiss this argument entirely.

97 Third, even if there was a duty to give reasons, the plaintiff *did* give a reason in its email of 25 May 2021, the relevant portion of which is reproduced

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135 PRS at para 71.

136 Day 4 Transcript (Mr Walter) at p 165, lines 15–19.

137 Day 6 Transcript (Mr Borla) at p 57, lines 18–22.

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here again for convenience (I note a similar observation was made in *AL Shams* at [60]):[138]

> …
>
> In addition, we are unable to agree to any quite [*sic*] enjoyment undertaking. *Any such undertaking would necessarily limit our ability to exercise our rights under the Loan Agreement and the other Finance Documents, something we cannot agree to.*
>
> [emphasis added]

98 While I note that the plaintiff did not set out *all* of their pleaded reasons here, in view of my findings above at [93], I do not think that any duty on the plaintiff to give reasons, assuming one existed, would have been a particularly onerous one – in my view, a single reason would suffice to discharge the duty, bearing in mind the commercial context in this case. The defendant has disputed the relevance of the reason given (see [88(b)] above), but that is a separate point – the fact remains that *a* reason was given. That would suffice to discharge any duty to give reasons. In any case, and for the reasons that follow, I disagree with the defendant that the reason expressed by the plaintiff was an irrelevant consideration.

Alleged misconception as to the nature of an LQE

99 The defendant disagrees with the plaintiff's submission that the "issuance of an LQE would result in the restriction of the enforcement of its rights as mortgagee against the Vessel".[139]

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138 10ABOD 5113.

139 PCS at para 6.

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100 The defendant's argument (summarised above at [88(b)]) is that issuing an LQE does not necessarily restrict the plaintiff's enforcement rights against the Vessel because this is ultimately "up for negotiation between the parties".[140] Mr Rice's opinion is that it is possible for the plaintiff to have agreed to an LQE which would not have "limited the existing enforcement options" available to the plaintiff, and in addition could have even incorporated "enhanced benefits" to the plaintiff *vis-à-vis* Koch, [141] such as requiring a charterer to "continue paying hire regardless of any defaults or non-performance by the owner".[142]

101 In my judgment, the plaintiff was not wrong, nor did it behave unreasonably or irrationally in viewing the LQE as necessarily restricting its rights of enforcement. An LQE creates a contractual relationship between lender/mortgagee and charterer (see above at [25]).[143] Mr Rice fairly acknowledges that an LQE would involve an "undertaking from the bank mortgagee not to disturb or interfere with the charterer's free and uninterrupted use and enjoyment of a vessel in accordance with the terms of the relevant charter".[144]

102 In my opinion, an undertaking not to interfere with the charterer's use and enjoyment of the vessel would, at the barest minimum, necessarily involve *some* interference with or curtailment of the mortgagee's enforcement rights and options. The defendant's argument that the same commercial purpose of recovering the loan debt by "different means, specifically, by avoiding an arrest

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140 Defendant's Opening Statement dated 25 October 2024 ("DOS") at para 13; DRS at para 7.

141 Opinion of Mr Rice at para 33 (4BAEIC 2074).

142 Opinion of Mr Rice at para 31 (4BAEIC 2073).

143 Opinion of Mr Kyvsgaard at para 47 (1BAEIC 83); DRS at para 6.

144 Opinion of Mr Rice at para 28 (4BAEIC 2073).

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and *changing the vessel's ownership without interrupting the charterer's right of enjoyment*" [emphasis added] is telling – there is an implicit acknowledgment by the defendant that an LQE *would* restrict the plaintiff's ability to arrest the vessel.[145] Mr Rice agreed under cross-examination that giving up the right of an arrest would mean that the bank loses a potential remedy.[146] The defendant might fairly suggest that less intrusive means would have been available to the plaintiff, but this is not the same as saying that the plaintiff's rights of enforcement would not have been curtailed.

103 Mr Rice referred to the Baltic and International Maritime Council ("BIMCO") QEL precedent as an example of a well-balanced LQE.[147] Clause 2 of the BIMCO QEL contains an undertaking by the mortgagee to the charterer that it will not exercise its rights in a manner that will disturb the charterer's use of the vessel. Clause 5 contains a reservation of the mortgagee's rights – it provides that the mortgagee may enforce its rights in respect of the vessel "on the basis that the Charter Party remains in place".[148]

104 As the plaintiff points out, on its face the BIMCO QEL *does* already impose at least *some* restriction on the plaintiff's enforcement rights because it "rules out the arrest and judicial sale of the vessel".[149] Mr Rice sought to get around this by explaining that if a default actually occurred, the bank would liaise with the charterer and the charterer would "actually come to the help of

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145 DRS at para 17.

146 Day 7 Transcript (Mr Rice) at p 95, lines 9–23.

147 DCS at para 106; 4BAEIC 2090.

148 4BAEIC 2091.

149 PCS at para 11.

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the bank and take over the ship".[150] In my view, that possibility is beside the point and seeks to speculate on what might happen after the event. The potential willingness of the charterer to engage with the bank to ensure the smooth transfer of the vessel's ownership with the existing charter in place is a possible theoretical outcome. But it does not change the fact that, if a QEL is issued, the bank no longer has the fairly straightforward *right* to arrest the vessel without the charterer's approval but instead has to now go down the more complicated path of arranging and structuring what is in effect a *novation* of the original charter between the mortgagor and the charterer. I struggle to see how this could be considered less pervasive than simply arresting the ship, or not be considered prejudicial to the bank's interests.

105 In this regard, the defendant has also made repeated references to the possibility of the plaintiff considering the issuance of a less onerous instrument such as a "comfort letter", or otherwise negotiating carve-outs or watered-down wording that would be amenable to both the plaintiff and Koch. In my view, this argument, in effect, seeks to impose on the plaintiff a *duty* to *negotiate* with Koch for the defendant's benefit. Such a duty would go even further than a duty to give reasons (which I have already rejected), and the defendant proffers no authority that has extended the *Braganza* duty to such an extent. A duty to negotiate, assuming one exists, also encroaches on the general duty of good faith and cooperation which I have already held above at [86] does not apply in this case.

106 Further, a carve-out which preserved the plaintiff's rights of enforcement would so substantially emasculate the efficacy of any LQE that in my view it would not even be considered an LQE at all. The concept of a

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150 Day 7 Transcript (Mr Rice) at p 99, lines 15–18.

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"comfort letter" was not defined by the parties but a strict definition is unnecessary as similar observations would apply: any "comfort letter" issued to a charterer which sought to impose restrictions on the plaintiff's rights of enforcement would have been reasonably rejected by the plaintiff; conversely, any "comfort letter" which so severely diluted the ordinary protections expected by a charterer would not have been able to satisfy the LQE Condition in the New Koch Charterparty. It is also entirely speculative whether Koch would have been willing to accept an LQE (or any lesser document such as a "comfort letter") on more relaxed terms, much less terms which altogether did not restrict the plaintiff's rights of enforcement. The sample LQE requested by Koch is in the evidence and is indicative of Koch's position – the material portion reads:[151]

> 3. In consideration of you consenting to and acknowledging the Mortgage [and the Charter Assignment], we (as mortgagee of the Vessel [for ourselves and in our capacity as agent for the [*creditors*]]) hereby irrevocably and unconditionally undertake to you that, from the time when the Vessel has been delivered to and accepted by you under the Charter, provided that no default by you under the Charter is continuing by reason of which the Owners would be entitled to terminate the Charter in accordance with its terms:
>
> > (i) we will not prejudice, disturb, or interfere with in any way or in any circumstances, your quiet and peaceful use, possession, and enjoyment of the Vessel;
> >
> > (ii) we will not enforce the Mortgage [or the Charter Assignment], or otherwise exercise any of our rights under the Finance Documents (or any of them) in a manner that may prejudice, interfere with, or disturb your quiet and peaceful use, possession and enjoyment of the Vessel under the Charter; and
> >
> > (iii) we will not assign or otherwise transfer our interest in the Mortgage [or the Charter Assignment] unless the assignee, transferee or

[151] 10ABOD 5204–5205.

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> successor-in-interest assumes all of our obligations hereunder or otherwise enters into a written agreement with you to the same effect that is in form and substance reasonably satisfactory to you.
>
> Your non-compliance with immaterial obligations of the Charter will not invalidate our commitment under this letter.
>
> …

107 During the trial, I asked Mr Rice whether, if he were acting for a bank in a transaction, he would have advised his client to accept the LQE in the form proposed by Koch in this case. Mr Rice was candid and unequivocal – his response is worth reproducing:[152]

> COURT: -- if you were acting for a bank in a transaction and you were being asked by your clients, the bank, should we issue it in this form, is this reasonable, what would your answer be?
>
> MR RICE: Absolutely not.
>
> COURT: Right.
>
> MR RICE: And I don't even think the bank would -- a shipping bank would not need to even ask a lawyer because it's written in such extreme terms. …

108 Mr Ghandour took a broadly similar position in an email he sent to Larry Johnson of Koch on 16 July 2021, *after* the plaintiff had rejected the LQE request on 28 May 2021. The material portion of the email states:[153]

> The request for a QEL was ***completely unreasonable*** on the grounds that (i) such document was not previously requested, (ii) Koch knew that financing was already in place and ***the mortgagee bank had absolutely no obligation under the existing finance documents to agree to limit their rights under a QEL***. Of course, Koch is free to ask for whatever document they want, ***but Owners or their financing bank should not be blamed for not being able to accommodate unnecessary and untimely requests***.

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152 Day 7 Transcript (Mr Rice) at p 72, lines 16–25.

153 12ABOD 5614 at para 4.

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> …
>
> [emphasis added in bold and italics]

109 In my view, this email gives the game away for the defendant, for it expressly betrays the defendant's recognition that the plaintiff was under no obligation at all to issue any LQE at Koch's behest. At trial, Mr Kaffas sought to explain away this email by suggesting that Mr Ghandour was simply saying what he needed to say in order to convince Koch to drop their request, and not because he personally believed that it was unreasonable.[154] I reject this suggestion – first, Mr Kaffas' evidence is irrelevant as it constituted his opinion on Mr Ghandour's thinking when that email was sent to Koch. Second, what is more important and relevant was the evidence of Mr Ghandour himself. While Mr Ghandour explained that he was trying to "navigate between the bank and the charterers", ultimately, he acknowledged and accepted that it was his view that Koch was being unreasonable.[155] To bear this out, I need only reproduce the following extracts from Ms Song's cross-examination of Mr Ghandour:[156]

> Q. Well, Mr Ghandour, I am suggesting to you that based on your own email to Mr Larry where you yourself take the view on the position, in writing, that it was an unreasonable request that was being made for the bank to put up an LQE, that that must have been your own view and your own position and thinking at that point in time. You can agree or disagree with me?
>
> A. As I said at the beginning, it is the question of being in the middle. I had to salvage the charterparty. So I have to navigate between the bank and the charterers in order to find the middle ground how they can execute the charterparty. The question of Letter of Quiet Enjoyment is unreasonable, but as it is a condition to the charterparty, we have to abide by it.
>
> …

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154 Day 2 Transcript (Mr Kaffas) at p 101, line 20 to p 102, line 1.

155 Day 3 Transcript (Mr Ghandour) at p 56, lines 1–5, and p 57, lines 2 –6.

156 Day 3 Transcript (Mr Ghandour) at p 55, line 19 to p 56, line 7, and p 57, lines 2–6.

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> Q. And looking at your email, what shouts out at me when I read this is that you yourself, deep down inside, you agree -- you take the view that Koch was being unreasonable and I ask you, do you agree with that?
>
> A. I agree that is what I said. I agree with you, yes.

110 The defendant attempts to explain away the inconsistency in its position – *ie*, in saying to Koch that the LQE request was unreasonable, but insisting that it was a reasonable request as it relates to the plaintiff. The defendant submits that Koch's request was unreasonable because it had not been required under the initial charter and had been made at the eleventh hour;[157] on the other hand, the plaintiff had acted unreasonably because it had not even considered the request.[158]

111 I disagree with the defendant that such a distinction can be validly made or that it offers an explanation for the inconsistent positions taken by the defendant *vis-à-vis* Koch and the plaintiff respectively. I do not think that there is any material difference between the LQE request as it relates to Koch or the plaintiff. In my view, the same reasons why Koch's request was unreasonable similarly apply to the plaintiff – the plaintiff had also not been requested to provide any LQE for the Original Koch Charterparty, and the request had also come in from the defendant at a late hour and with time pressure to respond.[159] More importantly, Mr Ghandour's statement to Koch that the "bank was under absolutely no obligation under the existing finance documents to agree to limit their rights under a QEL" hit the nail on the head (see above at [108]). His evidence that the LQE Condition was unreasonable was telling – that it was a

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157 DCS at para 103.

158 DCS at para 104.

159 Email from Mr Borla to Mr Walter dated 20 May 2021 at 11.07am (8ABOD 3976); Email from Mr Walter to Mr Sayadi dated 25 May 2021 at 11.50am (10ABOD 5113).

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term of the New Koch Charterparty that the *defendant* had to abide by is not to the point. In effect, the defendant was seeking to foist an unreasonable condition in the New Koch Charterparty onto the plaintiff.

112 Given the positions taken by the defendant's expert and Mr Ghandour himself, it is, in my view, unarguable that based on the LQE wording proposed by Koch, the plaintiff's decision to reject the request to issue the LQE proposed by Koch was entirely reasonable, rational and explicable. Further, I find that there was no duty on the plaintiff to negotiate the wording of the LQE with Koch or to go back to the defendant (or Koch) with proposed possible carve-outs or alternative solutions such as a "comfort letter". The question before me is whether the plaintiff's decision to reject the request to issue an LQE in favour of Koch was *Wednesbury* unreasonable or irrational – my answer to that question is "No".

113 Lastly, I come to *The Myrto*, which stands for the general proposition that a "mortgagee is not entitled to interfere with the performance of the charter by exercising its rights under the mortgage if the charterer does not prejudice the mortgage and the shipowner is willing and able to perform the charter".[160] The defendant says that even without an LQE, the principles in *The Myrto* would have enabled Koch to resist enforcement of the plaintiff's rights as mortgagee.[161] Accordingly, an LQE might have been *beneficial* to the plaintiff because this would have enabled it to "remove completely, or else to dilute, the common law protection against mortgagee enforcement rights otherwise afforded to a performing charterer".[162]

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160 Updated Opinion of Mr Kulkarni KC at para 58 (5BAEIC 2262).

161 DCS at para 127.

162 Opinion of Mr Rice at para 34 (4BAEIC 2074–2075).

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114 I do not agree that an LQE would necessarily *improve* the plaintiff's rights compared to what it would have been subject to under *The Myrto*. One major exception to the rule in *The Myrto* is that it no longer applies if the mortgagor deals with the ship in a manner that impairs the mortgagee's security – for example if the mortgagor is impecunious: *The Law of Ship Mortgages* at para 13.2.17. Given the defendant's financial difficulties in relation to the loan, I do not think *The Myrto* would have presented much, if any, of an obstacle to the plaintiff. Additionally, Mr Rice acknowledged in cross-examination that *The Myrto* was in any event not a principle of universal application and it might not necessarily be applicable (or at the very least, "might be more difficult" to apply) in certain jurisdictions.[163] The plaintiff's position was that the alleged benefits of an LQE to the plaintiff were not so "obviously and significantly superior", and that a banker could "rationally and reasonably say that they will prefer to take their chances with the 'Myrto' restrictions because it clearly is not of worldwide application".[164] I find this a reasonable position to take and one that would accord with the plaintiff's legitimate commercial interest of keeping its enforcement options open. Even if other banks or financial institutions would have struck a different balance and preferred to take the LQE route, it bears emphasising, once again, that the plaintiff's conduct is to be tested on the scale of *Wednesbury* unreasonableness; it cannot be seriously suggested that the benefits of taking an LQE were so patently obvious that *no other bank or financial institution* would have taken the same position as the plaintiff.

115 In the circumstances, the plaintiff was not required, nor would it have been reasonable to expect it to, enter into negotiations with Koch on the wording

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163 Day 7 Transcript (Mr Rice) at p 92, line 24 to p 94, line 1.

164 PRS at para 68; PCS at para 16.

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of the LQE, simply for the defendant's benefit and potentially to its own detriment.

The four considerations raised by the plaintiffs

116 I come now to the four considerations which the plaintiff says it took into account in deciding not to issue the LQE. To recapitulate, these were: (a) an impending security shortfall; (b) the defendant's history of defaults; (c) the insufficiency of hire payable under the New Koch Charterparty; and (d) the defendant's poor financial health. Before delving into them substantively, I first address the defendant's argument that these four considerations were not pleaded and / or were mere afterthoughts.

117 The defendant contends that paragraph 11(g) of the plaintiff's Reply (Amendment No. 1) dated 5 December 2023 ("Reply (Amendment No. 1)") states that the only factors taken into account were those identified at paragraphs 11(a) to (d).[165] Those factors were that the LQE was not a condition for entering into the New Koch Charterparty, that the LQE would clog the plaintiff's enforcement rights, and that there was a likelihood of a security shortfall.

118 I am of the view that the defendant's objection, even if made out, is a purely technical one and the defendant has in any case suffered no prejudice. But more to the point, I do not even think the pleading objection is made out. The plaintiff had expressly referred to the possibility of a security shortfall at paragraph 11(d), the defendant's history of defaults at paragraph 11(e), and the insufficiency of hire at paragraph 11(f) of its Reply (Amendment No.1). The plaintiff then repeated paragraphs 5 to 25 of its Reply (Amendment No. 1) at

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165 DCS at para 49.

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paragraph 31 of its Defence to Counterclaim (Amendment No. 1). This disposes of any objection relating to these three considerations. While there was no *specific* reference to the defendant's "financial condition", I find that this allegation has been sufficiently pleaded. The facts relied on to support the allegation that the defendant was in dire financial straits are materially the same as those relied upon for the other three considerations. For example, Mr Borla was asked at trial what he meant by "poor financial condition". He referred to the defendant's "long history of defaults",[166] the lack of available cash flows to build up the defendant's financial position,[167] and the Vessel being the defendant's sole asset.[168] It is therefore incorrect for the defendant to argue that the four considerations raised by the plaintiff were not pleaded.

119 In any case, even if the four allegations had not been sufficiently pleaded, I would allow them to be raised. Parties are generally bound by their pleadings, but an unpleaded point may still be raised "where there is no irreparable prejudice caused to the other party in the trial that cannot be compensated by costs or where it would be clearly unjust for the court not to do so": *How Weng Fan and others v Sengkang Town Council and other appeals* [2023] 2 SLR 235 at [20]. Applying these principles, I would allow these four considerations to be raised as the defendant has suffered no prejudice. They have been part of the plaintiff's case since before the trial,[169] and the defendant addressed them in evidence and made extensive submissions in response.

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166 Day 6 Transcript (Mr Borla) at p 50, line 11.

167 Day 6 Transcript (Mr Borla) at p 50, lines 13–14.

168 Day 6 Transcript (Mr Borla) at p 51, lines 7–12.

169 PRS at paras 27–28.

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120 As for the contention that these considerations were afterthoughts, I will address the argument (where it has been raised) in the specific sections dealing with each of those considerations, and to which I now turn.

(1) Alleged security shortfall

121 By way of background, Clause 24 of the Facilities Agreement (titled "Minimum security value") contains a number of obligations that the defendant had to comply with throughout the loan period.[170] In particular, Clause 24.12 (titled "Security shortfall") provides that the plaintiff may require a deficiency to be remedied within 30 days if at any time after 24 months of the date of the Facilities Agreement the "Security Value is less than the Minimum Value".[171] The "Security Value" is defined as the amount of dollars being the aggregate of the Vessel's value and any additional security provided by the defendant.[172] The "Minimum Value" is the amount of dollars which is 130% of the Loan.[173] The "Loan" refers to the aggregate of the loans made under the Facilities "or the principal amount outstanding for the time being of such loans".[174]

122 The plaintiff's position is that there was a high likelihood of an impending security shortfall because the Vessel had been recently valued by the plaintiff at US$48.55 million as at 30 September 2020, while the outstanding loan amount at the end of April 2021 was US$44,519,611.91.[175] The

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170 1ABOD 296.

171 1ABOD 298.

172 1ABOD 238.

173 1ABOD 233.

174 1ABOD 232.

175 Mr Walter's AEIC at para 66(a) (1BAEIC 23).

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corresponding Minimum Value for this loan amount would have been approximately US$57.8 million.

123 The defendant argues that this was not a valid or relevant consideration for the following reasons:

(a) The security shortfall would in any event only have arisen on or around 26 June 2021, this being 24 months after the Facilities Agreement had been entered into.[176] No issue of security shortfall had arisen in May 2021 because the required valuation of the Vessel was only scheduled for June 2021.[177]

(b) The security shortfall consideration is an afterthought because it was not raised by the plaintiff's representatives at the material time (*ie,* between 20 to 28 May 2021).[178]

(c) The plaintiff took an erroneous measurement of the Security Value. It should have also taken into account other securities held by the plaintiff, such as a sum of US$1.5 million contained in the Cash Collateral Account maintained with the plaintiff, and the further sum of US$500,000 held in the Minimum Liquidity Account as at 14 May 2021.[179]

(d) Lastly, the plaintiff "failed to take steps to inform the Defendant or to discuss potential solutions".[180]

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176 DCS at para 71.

177 DCS at para 71.

178 DCS at para 72.

179 DCS at para 73.

180 DCS at para 74.

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124 Having considered the evidence and competing arguments, I agree with the plaintiff that an imminent security shortfall was a valid consideration. An LQE (at least in the form required by Koch) would have significantly restricted the plaintiff's enforcement rights for at least two years (being the minimum period of the New Koch Charterparty). The plaintiff would have been alive to the risk that it might need to exercise its enforcement rights while the LQE was in effect. In these circumstances, it would have been myopic and perhaps even foolhardy for the plaintiff to ignore the likelihood of a security shortfall (which, if it became a reality, would be an event of default) occurring in the near future while the LQE was in effect. The fact that the security shortfall had not yet occurred is immaterial because the plaintiff was deciding, at the material time in May 2021, whether it should give up *future* rights of enforcement against the Vessel – thus it was entirely legitimate, reasonable and rational for the plaintiff to take a forward looking view of the lay of the land in the event the security shortfall came to fruition.

125 The defendant next argues that the issue of the security shortfall was an afterthought as it had not been raised by the plaintiff at the material time.[181] While the issue may not have been raised and articulated to the defendant, I am satisfied that it had been considered internally by the plaintiff's executives. This is borne out by the contemporaneous documentary evidence:

(a) A set of presentation slides was disclosed in these proceedings, titled "UBO: Gandour Chloe Navigation Ltd. (1443096) Extension SCS Reporting", dated 19 November 2020 (the "SCS Reporting Presentation Slides").[182] These slides had been prepared and sent by Mr Herling to

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181 DCS at para 72.

182 2ABOD 762.

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Mr Schmid via email on 17 November 2020.[183] On the "Executive Summary" page of the presentation, under the heading "Exposure Overview", the "LTV" (*ie,* loan to value) is stated as "Gross: 94%".[184]

(b) On 27 May 2021, Mr Walter sent an email at 12.52pm to, amongst others, Mr Herling and Mr Borla. In this email, Mr Walter recommends repeating to the defendant that the plaintiff is not inclined to issue an LQE. Mr Walter highlights that the "valuations are likely to reveal a LTV-breach (ca. 85-90% rather than 130% ACR as required by the loan agreement)".[185] This was plainly a consideration of the possibility that a security shortfall was likely to occur in the near future. It also demonstrated clearly that the same issue flagged out in the SCS Reporting Presentation Slides some six months prior was still very much on the minds of the plaintiff's representatives.

126 On the next issue (at [123(c)] above), I find that the plaintiff was entitled to *not* take into account the other cash securities held by the plaintiff (*ie,* the sums in the Cash Collateral and Minimum Liquidity Accounts) when calculating the Security Value. As the plaintiff points out, the Cash Collateral and Minimum Liquidity Accounts are "maintained under Clauses 20.16 and 20.15 of the Facilities Agreement";[186] these accounts are also subject to the restrictions on withdrawal imposed by Clauses 26.3.3 and 26.4.3.[187] The Security Value is defined (in the Facilities Agreement) as only including

183 2ABOD 761.

184 2ABOD 763.

185 10ABOD 5309; PCS at para 72.

186 PRS at para 54.

187 1ABOD 301.

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security provided pursuant to Clause 24.[188] The terms of the Facilities Agreement are clear enough that the plaintiff was not under any contractual obligation to take into account the Cash Collateral and Minimum Liquidity Accounts when assessing the Security Value. Thus, the plaintiff did not fail to take into account relevant considerations in assessing the Security Value – the assessment was carried out in accordance with the express terms of the Facilities Agreement. The *implied Braganza* duty cannot apply in opposition to the *express* terms of the contract: see above at [75].

127 Lastly, the defendant's complaint that the plaintiff failed to take steps to inform the defendant of potential solutions is merely a reiteration of its general submission that the plaintiff failed to give reasons and / or negotiate with it on the matter. I have already rejected this argument above at [92]–[94] and [105]. Thus, this complaint also fails.

(2) Alleged history of defaults

128 The plaintiff points out that the defendant has a history of defaults:

(a) The defendant failed to make an instalment payment of US$1,485,058.00 under the Initial Facility which was due 26 May 2016; the defendant failed to make the payment even after an extension of time granted by the plaintiff.[189]

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188 1ABOD 238.

189 Mr Walter's AEIC at para 86(b) (1BAEIC 31); Credit Suisse's Letter to Borrowers dated 2 June 2016 (2ABOD 703) and Letter to Borrowers dated 27 June 2016 (2ABOD 706).

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(b) The defendant allowed Koch to deduct a sum of US$579,000 from hire payments due to the Vessel without the plaintiff's approval.[190]

(c) The defendant failed to repay the balloon payment of US$48,627,827.91 due under the Initial Facility on 26 November 2018.[191]

(d) The plaintiff has also highlighted an event where the defendant and the Vessel (when it was previously named the "Callisto Glory") were the subject of a claim and injunction in the Panamanian courts sometime in 2014.[192]

129 The defendant however submits that the plaintiff should not be able to rely on any of these events as they are ghosts of the past that have been superseded by later events – it challenges their relevance because these defaults had been "either successfully cured and/or subsequently resolved by … the Defendant entering into the new Facilities Agreement".[193] Further, one of Mr Lamprinakis' affidavits points out that in respect of the injunction identified at [128(d)] above, the Panamanian courts had ruled in the defendant's favour.[194] I do not understand the defendant to be disputing that the three other events of default occurred – the only disputes being how those defaults should be characterised and their relevance.

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190 Mr Walter's AEIC at para 86(c) (1BAEIC 31); Credit Suisse's Letter to Borrowers dated 12 July 2017 (2ABOD 710).

191 Mr Walter's AEIC at para 86(d) (1BAEIC 31−32).

192 Mr Walter's AEIC at para 86(a) (1BAEIC 30−31); Credit Suisse's Letter to Borrowers dated 30 September 2014 (2ABOD 700).

193 2nd Affidavit of Mr Lamprinakis at para 41.

194 2nd Affidavit of Mr Lamprinakis at para 42.

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130 Mr Kaffas said that the restructuring arose from a bid to "reduce the financing costs [of the Initial Facility]".[195] He also explained that the previous events of default were "technical-type" events of default, which had now been "successfully cured".[196] Mr Rice for the defendant similarly referred to "technical-type events of default" which he said were "not uncommon during the extended loan period of a ship finance transaction".[197]

131 For present purposes, I am prepared to accept that the Panamanian injunction was a "technical" event of default which should not be held against the defendant. In this regard, I have borne in mind that the injunction was eventually lifted[198] and further, that obtaining an injunction against a defendant might not in and of itself amount to an adverse finding against that defendant or its related parties (speaking loosely and without traversing into Panamanian law).

132 However, the same cannot be said of the other events of default identified above at [128]. Characterising the other defaults as "technical" breaches is to put it very generously. It is axiomatic that the essence of a loan is the "promise of repayment": *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR(R) 733 at [23], citing Clifford L Pannam, *The Law of Money Lenders in Australia and New Zealand* (The Law Book Company Limited, 1965). I cannot see how the failure to make substantial payments due under a loan (items (a) and (c) above) can be construed as "technical" defaults.

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195 Mr Kaffas' AEIC at para 9 (4BAEIC 2012).

196 Mr Kaffas' AEIC at para 38 (4BAEIC 2027).

197 Opinion of Mr Rice at para 46 (4BAEIC 2081).

198 2nd Affidavit of Mr Lamprinakis at p 472.

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133 The evidence also suggests that these defaults were persistent and unremedied. In a letter by Credit Suisse to the Borrowers dated 12 July 2017, reference is made to a "Second Forbearance Agreement" dated 27 December 2016, paragraph five of which purportedly "summarises various defaults … which had occurred (and which continue to exist) under the [Initial Facility]".[199] The Second Forbearance Agreement made reference to a "Second Forbearance Period" which had since expired.[200] While the Second Forbearance Agreement does not appear to be in the evidence before me, I do not understand that the defendant has disputed the claims made in this letter. Despite these repeated reminders, the defendant failed to make the final balloon payment of US$48,627,827.91 outstanding under the Initial Facility (point (c) above).

134 Accordingly, I reject the defendant's submissions that these breaches were merely "technical" in nature. I also reject the submission that by purportedly "curing" these breaches via a restructuring and refinancing of the initial loan, they lost their relevance when it came to the plaintiff deciding whether to issue an LQE. Mr Kaffas acknowledged in cross-examination that a borrower's credit history would be relevant to a lender,[201] but he sought to qualify this answer by explaining that the result of curing these breaches was that the plaintiff had agreed to no longer rely on these defaults,[202] and that they were also less relevant in this case because the "defendant's history [with the plaintiff] goes far beyond that".[203]

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199 Credit Suisse's Letter to Borrowers dated 12 July 2017 (2ABOD 710) at paras 1–2.

200 Credit Suisse's Letter to Borrowers dated 12 July 2017 (2ABOD 710) at para 2.

201 Day 2 Transcript (Mr Kaffas) at p 52, line 15.

202 Day 2 Transcript (Mr Kaffas) at p 53, lines 5–10.

203 Day 2 Transcript (Mr Kaffas) at p 54, lines 5–6.

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135 While I accept that the effect of "curing" these breaches is that the plaintiff could no longer *sue* on them, I do not see how this also means that the plaintiff could no longer consider them in respect of *future* business dealings with the defendant in the context of the request to issue an LQE in favour of Koch. Just as the plaintiff was entitled to take a forward view of its likely position *vis-à-vis* enforcement in the event of an unremedied security shortfall, it was equally entitled to look back and consider the defendant's credit/default history to enable it to undertake a holistic assessment on whether it should agree to issue the LQE.

(3) Alleged insufficient hire

136 Turning to the issue of insufficiency of charter hire, the plaintiff argues that the hire rate under the New Koch Charterparty would have been insufficient for the defendant to meet its obligations under the Facilities Agreement.[204]

137 Under the New Koch Charterparty, charter hire was set at US$24,700 per day for the first two years, US$26,700 for the first additional optional year, and US$28,700 for the second additional optional year.[205] For present purposes, I am prepared to accept the defendant's clarification that the hire rate per day for the first two years was intended to be US$24,700, and that there would be no deduction of US$4,100 per day to pay for the scrubber installation costs.[206]

138 A preliminary point made by the defendant is that the hire rate should have been acceptable to the plaintiff because it was substantially the same as the

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204 PCS at para 74.

205 8ABOD 3978.

206 DCS at paras 66–68.

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existing rate of US$24,800 under the Original Koch Charterparty.[207] I do not think this is an appropriate comparison to make. Assuming Koch had exercised its options to renew the Original Koch Charterparty, the defendant would have been entitled to a hire rate of US$27,750 per day, US$29,000 per day, and US$30,000 per day respectively for each of the three option periods.[208] As the SCS Reporting Presentation Slides show, the plaintiff had undertaken its financial calculations in contemplation of increased hire rates of US$27,750 in 2022 and US$ 29,000 in 2023 (*ie*, in accordance with the rates provided in the Original Koch Charterparty).[209] In my view, it was appropriate for the plaintiff to assess the proposed hire rate under the New Koch Charterparty against the higher rates it had expected to earn in its projections based on the Original Koch Charterparty.

139 The defendant also argued that the plaintiff could not have taken the insufficiency of hire into account because it ultimately approved the terms of the New Koch Charterparty.[210] In my view, these were not inconsistent positions. A bank might be more comfortable accepting a lower rate of hire if it has the benefit of enforcement against the security of the Vessel as a fallback should the debt service be insufficient. Conversely, in considering whether to issue an LQE which might in turn restrict its rights of enforcement, a bank might need to be more certain of the ability of the lender to service the loan; in those circumstances, the hire rate would then take on greater importance to the bank.

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207 Mr Kaffas' AEIC at para 43 (4BAEIC 2028); Opinion of Mr Rice at para 46 (4BAEIC 2081).

208 1ABOD 154, lines 175–177.

209 SCS Reporting Slides at p 3, table titled "NPV of expected future cash flows", and third bullet point of "Summary" (2ABOD 764).

210 Mr Kaffas' AEIC at para 44 (4BAEIC 2028).

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140 I turn now to the respective calculations proffered by Mr Kyvsgaard and Mr Kaffas.[211] Mr Kyvsgaard includes in his calculations the Arrangement Fee of US$486,310.00 payable on 30 August 2021, and the Dry Docking and Ballast Water Treatment System ("BWTS") costs of approximately US$3,500,000.00 due in late 2021 (collectively referred to as the "Additional Expenditure").[212] I note that Mr Kaffas uses the comparatively smaller figure of approximately US$2,684,000.00 for the Dry Docking and BWTS installation but the difference is not material for present purposes.[213]

141 The defendant submits that these items of Additional Expenditure are *capital* expenses, and that a proper analysis of the Vessel's earning potential should only take into account *operating* expenses.[214] This approach is reflected in Mr Kaffas' calculations, where he has included a section of "ADDITIONAL EXPENDITURE" in his cash flow estimate.[215] On this basis (*ie,* without including the Additional Expenditure), Mr Kaffas concludes that the hire rate under the New Koch Charterparty would have been sufficient to cover the defendant's repayment obligations.[216] Finally, the defendant argues that the plaintiff's consideration of the Vessel's expenses was an afterthought because

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211 Opinion of Mr Kyvsgaard at para 67 (1BAEIC 87−88), as amended in Exhibit P3 (Day 7 Transcript (Mr Kyvsgaard) at p 4, line 21 to p 6, line 8); 19ABOD 8186, Tab 621 (Mr Kaffas' calculations).

212 Opinion of Mr Kyvsgaard at para 67 (1BAEIC 87−88).

213 Mr Kaffas' AEIC at para 48(d) (4BAEIC 2030).

214 DCS at para 63.

215 19ABOD 8186, Tab 621.

216 Mr Kaffas' AEIC at para 47 (4BAEIC 2029).

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Mr Walter's email to Mr Sayadi on 20 May 2021[217] indicated that the plaintiff was only concerned with debt service.[218]

142 As a preliminary matter I reject the submission that the Vessel's expenses were an afterthought. Mr Walter's email was in the nature of a preliminary response[219] and did not seek to set out any firm set of calculations. Further, the SCS Reporting Presentation Slides reveal that the Additional Expenditure was always within the plaintiff's contemplation. On page four of the slides, titled "Impairment Test: Detailed Assumptions", the fifth bullet point states that the impairment test assumes that the defendant's share of drydocking costs are in the sum of US$1.5 million, and which are to be "spreaded [*sic*] evenly over the Opex until the next estimated Dry Dock date".[220] Those drydocking costs were incurred for the installation of, among others, ballast water treating systems onboard the vessel. Similarly, drydocking costs (estimated at US$1.5 million and incurred every 5 years) appear in the plaintiff's calculations at page eight, titled "Appendix: Implied charter rate calculation for MT Chloe V".[221] While the figure attributed by the plaintiff to the estimated drydocking costs might differ from the figures used by Mr Kyvsgaard and Mr Kaffas respectively, the underlying point remains that they did feature within the plaintiff's assessment of the Vessel's viability.

143 Returning to the calculations proper, I disagree with the defendant's approach as it is artificial. I find that the plaintiff was entitled to come to the

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217 8ABOD 3977.

218 DRS at para 63.

219 Day 4 Transcript (Mr Walter) at p 111, line 20 to p 112, line 8.

220 9ABOD 4773.

221 9ABOD 4777.

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view that the hire rate under the New Koch Charterparty was insufficient. There are three reasons supporting this finding.

144 First, I find that it was fair for the plaintiff to include the Additional Expenditure in its calculations. The defendant's approach is to focus only on its ability to repay the principal and interest,[222] but this misses the forest for the trees. Mr Kyvsgaard commented during cross-examination that dry docking is crucial to a ship's operation because it would not be possible to maintain the vessel's classification status without it.[223] The defendant did not challenge this evidence. In any case, there can be no serious disagreement that Mr Kyvsgaard's evidence is accurate, particularly so in the context of a vessel's scheduled or compulsory drydocking. Thus, a failure by a shipowner to arrange for its vessel to undergo a required drydocking would understandably have a detrimental impact on the Vessel's ability to trade and consequently, be chartered out.

145 It was thus not open to Mr Thomas Tan (counsel for the defendant) to seek to draw a distinction on the basis that the dry docking costs would not be paid to the bank.[224] The operating expenditure would also not have been paid to the bank, but all parties accepted that operating expenses (or "opex") would have to be deducted from the Vessel's earnings when calculating the sufficiency of hire. In the same vein, the drydocking costs were not in the nature of an optional expense which could be ignored when it came to assessing the long-term earning potential of the Vessel.

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222 DCS at para 62.

223 Day 8 Transcript (Mr Kyvsgaard) at p 38, lines 14–15.

224 Day 8 Transcript (Mr Tan) at p 30, line 14.

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146 Once the Additional Expenditure is included, the defendant's own calculations reveal that the hire under the New Koch Charterparty would be plainly insufficient. Mr Kaffas' calculations depend on an additional investment from the UBOs of US$3,190,767 in the first year alone.[225] An instalment of US$22,550,000 then falls due sometime in the middle of the first optional extension. From then on, it is reasonably clear that the defendant's financial position under the New Koch Charterparty would for all intents and purposes be unsalvageable.[226]

147 I pause at this juncture to address the defendant's argument that the UBOs and / or the Ghandour Group would have been willing and able to invest additional funds into the defendant to keep it afloat. The prospect of additional investment being forthcoming from the UBOs and / or the Ghandour Group has been a recurring theme in the defendant's case theory – it has been raised with respect to the sufficiency of hire,[227] the impending security shortfall,[228] and the defendant's poor financial situation.[229]

148 But the evidence of a willingness or the financial ability on the part of the UBOs and/or the Ghandour Group to inject additional funds into the defendant was far from adequate or convincing. First, *none* of the UBOs gave evidence in the present proceedings. Instead, I was left with assurances by Mr Ghandour in his AEIC and on the stand as to what the UBOs *would have* done. Mr Ghandour explained that he had "direct knowledge of the financial

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225 19ABOD 8186, Tab 621.

226 19ABOD 8186, Tab 621.

227 DRS at paras 64–65.

228 DOS at para 55.

229 DOS at para 56.

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capabilities of the [UBOs]" (presumably because they are, respectively, his wife and two daughters) but this is not the same as the UBOs themselves giving direct evidence as to their intentions at the material time.[230] In this regard, Mr Ghandour's evidence was technically hearsay and in a sense self-serving. That said, Mr Ghandour clarified to me at trial that he also considered himself to be a beneficial owner,[231] and so I am willing to give him the benefit of the doubt and consider his evidence on this point. Even so, the available evidence does not take the defendant's case very far.

149 Broadly speaking, the defendant makes the following three points to support its case that the UBOs would have been willing to inject further funds into the Vessel:

(a) The UBOs had a history of providing funds for the Vessel. Mr Ghandour gave evidence at trial that his family had put US$11.4 million in equity into the Vessel over the course of several capital injections.[232] The defendants also point to a previous investment of around US$8.7 million by the UBOs to purchase approximately 10% of the seller's credit owed to the shipbuilder, Daewoo.[233]

(b) The UBOs had sufficient resources to make further investments into the Vessel. I was provided with bank / investment account statements from Morgan Stanley Private Wealth Management, Partners' Capital, and Credit Suisse – these accounts were purportedly

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230 Mr Ghandour's AEIC at para 9 (4BAEIC 2047).

231 Day 4 Transcript (Mr Ghandour) at p 14, line 5.

232 Day 3 Transcript (Mr Ghandour) at p 154, lines 4–7.

233 DCS at para 144; Mr Ghandour's AEIC at para 31 (4BAEIC 2055).

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owned by the UBOs and were provided as evidence of the UBOs' financial capabilities.[234]

(c) It would "have made financial sense" to invest further sums into the Vessel due to its earning capacity, and the UBOs would have been able to "recoup its investment … with relative ease".[235]

150 In my view, none of these reasons were particularly cogent. Historical investments by the UBOs cannot shed light on what the UBOs would have been willing to do in mid-2021 because investment decisions are extremely fact specific. A willingness to invest under different (prior) circumstances sheds no light on the probability of further investment down the road. The mere fact that the UBOs had the financial means to inject further funds is also beside the point. There was no evidence that they would have utilised these funds *for the Vessel* and it would be speculative for me to assume so without credible evidential backing – for one, the funds may have been earmarked for any one of the other projects in the Ghandour Group. Mr Ghandour also said that the UBOs were "standing by to make the necessary preparations to inject additional funds".[236] However, as I was not brought to any contemporaneous documents or communications (for example, an email instructing their bankers to set aside funds) showing that that was indeed the UBOs' intentions at the material time, Mr Ghandour's assertions were nothing more than bare statements. Lastly, the assertion that it would have made financial sense to invest further sums into the

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234 Mr Ghandour's AEIC at paras 27–28 (4BAEIC 2054); 13ABOD 6058–6060 (Morgan Stanley); 16ABOD 6914 and 17ABOD 7066 (Partners' Capital); 16ABOD 6879 (Credit Suisse).

235 Mr Ghandour's AEIC at para 25 (4BAEIC 2053).

236 Mr Ghandour's AEIC at para 26 (4BAEIC 2054).

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Vessel is difficult to justify in light of my earlier findings as to the Vessel's financial situation (above at [146]).

151 In any case, I do not think that focusing on what the UBOs would or would not have done is the right way to approach this issue. To recapitulate, the *Braganza* duty only requires a court to review the plaintiff's decision-making process in exercising its discretion (see above at [82]). Thus, there would only be a breach of the *Braganza* duty if, based on the weight of the evidence available to the plaintiff then, the likelihood of additional investment by the UBOs and/or the Ghandour Group was so strong that the plaintiff's failure to appreciate it or take it into account would render the decision to refuse to issue the LQE *Wednesbury* unreasonable or irrational. The court assesses the plaintiff's decision-making process on the basis of the information and evidence available to it at the material time – in this case, the material time would be between 20 and 28 May 2021. There is nothing in the contemporaneous objective evidence available at the material time to suggest that the plaintiff was or ought to have been aware that there was a likelihood of additional financial support from the UBOs.

152 In these circumstances, it would have been entirely speculative for the plaintiff to take into consideration the likelihood of additional funds from the UBOs. Nor would I consider it the *plaintiff's* duty to ask the defendant if its UBOs and / or the Ghandour Group would be prepared to inject additional investment into the defendant – that is not part of the *Braganza* duty and to hold otherwise would be stretching it too far.

153 For these reasons, I reject the notion that the plaintiff was required to consider the possibility of additional investment by the defendant, the UBOs and/or the Ghandour Group when deciding whether to issue the LQE. To be

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clear, I reach this conclusion also in relation to the other considerations taken into account by the plaintiff such as the impending security shortfall (at [124] above) and the defendant's poor financial situation (at [158] and [161] below).

(4) Alleged poor financial position / credit history

154 I turn back now to address the last of the four considerations raised by the plaintiff – the defendant's poor financial position / credit history. The parties disputed the financial health of the defendant and its credit history. Many of the arguments have already been canvassed in the preceding analysis. Accordingly, I summarise the main points here.

155 The defendant argues that the plaintiff cannot regard the defendant as being in a poor financial position due to its history of defaults, which have now been cured.[237] The Vessel was a valuable asset whose valuation at the material time exceeded the outstanding loan of US$42.5 million after taking into account the cash collateral held by the plaintiff.[238] The defendant also allegedly had substantial cash assets / security held by the plaintiff – in particular, a cash balance of US$1,690,534 in May 2021 and US$1.5 million in the Cash Collateral Account.[239] Finally, the Ghandour Group was said to be in a "healthy financial condition".[240]

156 I have already dealt with the defendant's history of defaults above. In particular, I note that the plaintiff has also obtained summary judgment in respect of the defaults identified at [35] above, which includes a failure by the

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237 DCS at para 78.

238 DCS at para 79.

239 DCS at paras 76–77.

240 DCS at para 80.

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defendant to maintain its Minimum Liquidity Account above the minimum required level. My observations above go to the plaintiff's assessment of the defendant's credit history as well.

157 While it is true that the defendant owned a valuable asset (*ie,* the Vessel), overall financial health must necessarily also be measured by reference to the outstanding liabilities of the defendant. Even if I accept that the Vessel's value might have exceeded the outstanding loan at the material time, that value still fell far short of the required loan to value ratio. Bearing in mind that the value of the Vessel would fluctuate over time, I think it was reasonable for the plaintiff to come to the view that a failure to maintain the requisite loan to value ratio was indicative of poor financial health.

158 The issue of sufficiency of hire under the New Koch Charterparty similarly cannot be divorced from an assessment of the defendant's broader financial situation. Even if I assume that the defendant had cash in its Earnings and Cash Collateral Accounts which it could in fact freely utilise, Mr Kaffas' own calculations still required a further investment by the UBOs of at least US$2 million[241] – the prospect of which I have found to be entirely speculative on the evidence (above at [152]).

159 As for the Ghandour Group's financial health, that would not be a relevant consideration. The defendant is an independent legal entity with a single asset. The Ghandour Group's financial capacity cannot be the subject of any legal claim by the plaintiff. Any consideration of the Ghandour Group's financial capacity would only arise and be relevant in the context of further (voluntary) investments by the UBOs into the defendant – again, this is an

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241 19ABOD 8186.

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argument which I have already substantially rejected (above at [152]). Thus, the financial health of the wider Ghandour Group could not have had any relevant bearing on the plaintiff's assessment of the defendant's financial condition.

160 More importantly, by all accounts, the defendant was a troubled customer of the plaintiff. It had been placed in the "Defaulted Credit Rating" category by the plaintiff,[242] and this rating continued even after the refinancing; this was because the restructuring and refinancing was, in Mr Borla's words, a "troubled debt restructuring" or "distressed restructuring".[243] Mr Walter believed that the defendant's account had "already spent more than half of its life in [the plaintiff's] CRM Recovery Unit"[244] – a contention that was not seriously challenged by the defendant.

161 In these circumstances, I find that it was more than reasonable and rational for the plaintiff to take the view that the defendant was not in the pink of financial health.

Authority issue

162 The last allegation raised by the defendant is that the decision not to issue the LQE was one made by someone in the plaintiff without the requisite authority.

163 As the defendant puts it, Mr Borla gave evidence at trial that he could decide whether a decision required formal credit approval from his superior, Mr Schmid. In this case, Mr Borla had taken the view that neither the decision

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242 Day 5 Transcript (Mr Borla) at p 76, lines 17–18.

243 Day 5 Transcript (Mr Borla) at p 96, lines 10–18.

244 Mr Walter's AEIC at para 86 (1BAEIC 30).

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to approve the New Koch Charterparty nor the decision to refuse the LQE required Mr Schmid's approval. This is because the New Koch Charterparty was an operational issue while the refusal of the request to issue an LQE would not result in any deterioration in the plaintiff's contractual position. Accordingly, such decisions did not require approval by Mr Schmid.[245] The defendant takes the view that it is "incredulous" for Mr Borla to decide on whether Mr Schmid's approval is required – instead, Mr Schmid should at the least "decide on whether he should participate in the process".[246]

164 I reject this submission. First and foremost, the authority argument was not part of the defendant's pleaded case. I had made a similar observation in my oral remarks dealing with HC/RA 144, 145, and 146/2023. These were Registrar's Appeals against various orders made below in the specific discovery process, and I had rejected the defendant's attempts to obtain discovery of documents pertaining to this point on alleged lack of authority.[247] In any case, it is common in any organisation for those at lower levels of authority to decide whether any given matter exceeds their authority and needs to be escalated up. This fact alone does not give rise to any concern over Mr Borla's authority, and nothing else in the evidence suggests that he had acted otherwise than in accordance with the plaintiff's internal policies. I also accept Mr Borla's evidence that in this case, since the decision was made not to issue an LQE, there was no adverse impact on the rights of the plaintiff and accordingly this was a decision he could make without seeking Mr Schmid's approval. In addition, there is no evidence to suggest that Mr Schmid was not aware of the

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245 DCS at para 86.

246 DCS at para 87.

247 Notes of Evidence for HC/RA 144/2023, HC/RA 145/2023, and HC/RA 146/2023 dated 30 August 2023, at p 6, lines 9–18; PRS at para 78.

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plaintiff's eventual decision not to issue the LQE, or that he had expressed any concerns or disagreement over the decision that was made. In my view, in advancing this argument, the defendant was raising a storm in a teacup.

165 For these reasons, I reject the defendant's arguments on the lack of authority issue. Accordingly, even if a *Braganza* duty applied to the plaintiff's decision whether or not to issue an LQE, I find that no part of the plaintiff's decision-making process breached the *Braganza* duty. The decision reached by the plaintiff was rational, reasonable, was not made maliciously and was one made in pursuit of the plaintiff's legitimate commercial interests.[248] Nor was it a decision that no reasonable mortgagee would have arrived at in the circumstances then prevailing. Thus, even if the case had turned on this issue, the counterclaim would still have failed.

The Prevention Term

166 The final issue touches on the existence and alleged breach of the Prevention Term. Both English law experts agree that under English law "a term will often be implied that a party will not perform a positive act that will have the result of preventing the performance of the contract".[249] The Prevention Term is implied in fact, and I was referred to the applicable principles as set out in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 8th Ed, 2024) ("*The Interpretation of Contracts*") at para 6.65.[250]

167 Where the experts disagreed was whether the Prevention Term could be said to extend to *require* the performance of a *positive act* which is necessary

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248 JEM English Law at paras 18 and 20 (Bundle of JEMs at p 42).

249 JEM English Law at para 1 (Bundle of JEMs at p 39).

250 JEM English Law at para 4 (Bundle of JEMs at p 39).

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for the performance of the contract.[251] The plaintiff also raises a preliminary objection; it submits that the defendant has taken an inconsistent position on this issue.[252] The plaintiff contends that the defendant had previously taken the position in HC/RA 82/2022 (which was an appeal by the defendant against summary judgment being granted in favour of the plaintiff)[253] and HC/SUM 3848/2023 (which was an application for the determination of questions of law and construction of documents)[254] that the plaintiff was *not* under any positive obligation to issue an LQE and that it was not the defendant's case that the plaintiff was under any such duty – instead, the defendant's complaint was targeted solely at the reasoning *process* by which the plaintiff came to its decision.[255] The defendant now however submits that the Prevention Term can extend to requiring the "performance of positive acts [*eg,* the issuance of the LQE] that are necessary if the contract is to be performed".[256]

168 It is not necessary for me to decide on this preliminary objection because, as I have found below, the Prevention Term does *not* extend to the performance of positive acts, and in any case, it does not arise for consideration on the facts before me.

169 Mr Kulkarni KC's position is that it would be impractical to draw clear distinctions between positive acts and omissions when it comes to the operation

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251 JEM English Law at paras 6–7 (Bundle of JEMs at pp 39–40).

252 POS at para 15.

253 Notes of Evidence of HC/RA 82/2022 dated 26 April 2022, p 2 at lines 9-10.

254 Defendant's Written Submissions for HC/SUM 3848 dated 25 January 2024 at para 30; 14th Affidavit of Alexandros Lamprinakis filed 26 January 2024 at para 30.

255 Notes of Evidence for HC/RA 82/2022 dated 26 April 2022, p 2 at line 10.

256 DCS at para 43.

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of the Prevention Term.[257] He points out that in an export and import licensing scenario, the Prevention Term might require one of the parties to maintain an import license, which would be a positive act.[258] For this proposition he cites a passage from *Chitty on Contracts* (Hugh Beale gen ed) (Sweet & Maxwell, 35th Ed, 2024) ("*Chitty*") at para 17-029 in which the authors observe that in international trade it may be necessary to imply a term imposing a duty to maintain the relevant license on one of the parties; in this example, that party would be under a duty to use his best endeavours to obtain a license, and "both parties are under an obligation to co-operate with each other to the extent that is necessary for the obtaining of a licence".[259]

170 With respect, I do not think that this passage aids Mr Kulkarni KC's interpretation of the Prevention Term. The passage in *Chitty* on export and import licenses sits within a section titled "Illustrations of Particular Implied Terms", and where the authors also discuss, amongst others, the implied duty to co-operate (at para 17-027), the Prevention Term (at para 17-028), and the implied restriction on contractual discretions (at para 17-030). The authors of *Chitty* were not intending the passage on licenses to reflect a facet of the Prevention Term. Rather, it was a standalone example of implied terms that may arise in a specific situation, hence sitting within its own section at para 17-029.[260]

171 I am, on the other hand, inclined to accept Lord Phillips' and Sir Nigel Teare's views that the Prevention Term does not require or extend to the taking

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257 Updated Opinion of Mr Kulkarni KC at para 35 (5BAEIC 2256).

258 Updated Opinion of Mr Kulkarni KC at para 37 (5BAEIC 2256−2257).

259 Updated Opinion of Mr Kulkarni KC at para 38 (5BAEIC 2257).

260 5BAEIC 2277–2279.

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of a positive step.[261] For this proposition I was referred to *Wild Duck Ltd v Smith* [2017] EWHC 1252 (Ch) (at [154])[262] and *Taylor v Rive Droite Music* [2005] EWCA Civ 1300 (at [157]–[159]),[263] with which I agree. Further, as Sir Nigel Teare observed in his report, the taking of a positive step would be better understood as part of an implied duty to co-operate, which is a *separate* type of implied duty (see *Chitty* at para 17-027) and which the defendant itself accepts is not part of its pleaded case.[264]

172 On the facts of this case, I am of the view that the Prevention Term cannot be implied into the plaintiff's decision not to issue an LQE. My reasons are as follows:

(a) The act which the Prevention Term seeks to bar must "*itself be wrongful*, either as being a breach of the express or implied terms of the contract, or wrongful independently of the contract (e.g. tortious)" [emphasis added]: *The Interpretation of Contracts* at para 6.134. The decision not to issue an LQE was not inherently wrongful, and I have already set out above why the *Braganza* duty does not apply or was in any event not breached by the plaintiff. Further, the wrong referred to by Lewison in *The Interpretation of Contracts* cannot, logically, refer to a breach of the Prevention Term itself as that would be circuitously self-justifying.

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261 Opinion of Lord Phillips at para 50 (3BAEIC 1204); Opinion of Sir Nigel Teare at para 41.

262 Opinion of Sir Nigel Teare at para 41.

263 Opinion of Lord Phillips at para 51 (3BAEIC 1205).

264 DRS at para 42; Opinion of Sir Nigel Teare at para 41.

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(b) I agree with Lord Phillips that the Prevention Term requiring the issuance of an LQE would be inconsistent with the express terms of the Facilities Agreement, which have conferred on the plaintiff certain rights of enforcement against the Vessel.[265]

(c) It is not necessary as a matter of business efficacy to imply the Prevention Term to the issuance of an LQE. The LQE Condition is not part of the Facilities Agreement. It only arose as a result of the defendant's negotiations with Koch. As such, it would be absurd to find that the plaintiff was under a duty to facilitate the defendant's performance of contractual obligations which it had undertaken on its own volition with a third party.

173 Even if, purely for argument's sake, the Prevention Term arose on the facts, I would be prepared to find that it had not been breached. The Prevention Term seeks to restrain positive acts and does not apply to mere omissions − the decision by the plaintiff not to issue an LQE falls within the latter characterisation and accordingly, would not be caught by the Prevention Term in any event.

174 For these reasons, the defendant's reliance on the Prevention Term also fails.

Conclusion

175 Clause 21.7.1 has no application to an LQE and even if it did, any discretion conferred on the plaintiff on whether or not to issue an LQE was

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[265] Opinion of Lord Phillips at paras 58–59 (3BAEIC 1207).

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absolute. For these reasons alone, the counterclaim fails and stands to be dismissed.

176 In any event, none of the defendant's Alleged Implied Terms (in the form of the *Braganza* duty and/or the Prevention Term) arose on the facts of the case. Even assuming they did arise, I would nevertheless have been prepared to find that none of the Alleged Implied Terms had been breached by the plaintiff.

177 The defendant has consistently maintained that it was not part of its case that the plaintiff was, pursuant to Clause 21.7.1, under a positive obligation to issue an LQE. Yet, the defendant's continued reliance on the Prevention Term and the manner in which it ran and argued its counterclaim left me with the distinct impression that, in fact, nothing would have satisfied the defendant unless the plaintiff had agreed to issue and did issue an LQE or "comfort letter" in a form that would have enabled the New Koch Charterparty to materialise. Unfortunately for the defendant, while it may have been saddled with the LQE Condition in the New Koch Charterparty, that was the product of its own negotiations with Koch which had nothing to do with the plaintiff. That, however, afforded no justification for the defendant to, in essence, pressure the plaintiff into acceding to its demands to issue an LQE or "comfort letter". Having failed to do so, there was also no justification for the defendant to seek legal recompense, essentially via the backdoor, for the consequences of the New Koch Charterparty not coming into operation.

178 The defendant's counterclaim is accordingly dismissed in its entirety. Having failed on the issue of liability, the question of damages claimed by the defendant falls away and does not need to be decided.

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179 I will hear the parties separately on costs.

S Mohan
Judge of the High Court

Song Swee Lian Corina, Liang Junhong Daniel and Thomas Benjamin Lawrence (Allen & Gledhill LLP) for the plaintiff;
Tan Boon Yong Thomas, Lieu Kuok Poh and Shantini d/o Jeyathasan Krishnan (Haridass Ho & Partners) for the defendant.

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