Neutral Citation Number: [2025] EWHC 1591 (Comm)

Case Nos: CL-2023-000206 and CL-2023-000207

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2025

Before :

MR JUSTICE BUTCHER

- -

Between :

OCEAN CLAP SHIPPING LIMITED **Claimant**

- and –

(1) GLOBAL OFFSHORE SERVICES BV
(2) GLOBAL OFFSHORE SERVICES LIMITED

Defendants

AND BETWEEN

MT KAILASH SARL

Claimant

-and-

(1) GLOBAL OFFSHORE SERVICES BV
(2) GLOBAL OFFSHORE SERVICES LIMITED

Defendants

- -
- -

James Leabeater KC and Neil Dowers (instructed by **Stephenson Harwood LLP**) for the **Claimants**
Charles Debattista and Moeiz Farhan (instructed by **Watson Farley & Williams LLP**) for the **Defendants**

Hearing dates: 13-15 May 2025

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Approved Judgment

This judgment was handed down remotely at 10:00am on 26th June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BUTCHER

Introduction

1. There are two claims which are the subjects of this judgment. The first is a claim by the shipowner Ocean Clap Shipping Ltd ('**OCSL**') for sums due from Global Offshore Services BV ('**GOSBV**', also referred to as '**Charterers**') under a bareboat charterparty entered into on 31 December 2014 in respect of the M/V '**Ben Nevis**' (the '**Ben Nevis Charterparty**'). The second is a claim by the shipowner MT Kailash Sarl ('**MT Kailash**') for sums due from GOSBV under a bareboat charterparty entered into on 29 May 2014 in respect of the M/V '**Kailash**' (the '**Kailash Charterparty**'). I refer to the Ben Nevis and Kailash Charterparties together as the '**Charterparties**'. I refer to the Ben Nevis and the Kailash together as the '**Vessels**'.

2. OCSL and MT Kailash (together '**Owners**') also claim for the maximum guaranteed sum under two guarantees issued in respect of the Charterparties (the '**Guarantees**') by Charterers' parent company Global Offshore Services Ltd ('**GOSL**', also referred to as the '**Guarantors**'), a company listed on the Bombay Stock Exchange.

3. Both OCSL and MT Kailash are owned by Minsheng Financial Leasing Limited ('**Minsheng**'). They are SPVs whose only business is the leasing out of the relevant vessel.

4. Charterers are a company incorporated in the Netherlands. Their business was as an operator of offshore service vessels. As of 2015, Charterers' fleet was managed by Arena Ship Management Pte Ltd ('**Arena**').

5. The Guarantors are an Indian company which provides offshore and logistics services. At the time when the Charterparties were entered into, Charterers were 68% owned by the Guarantors and 32% owned by S2 Offshore Pte Ltd, a subsidiary of DVB Bank SE in Germany.

The Charterparties

6. It is convenient first to set out the broader financial background to the Charterparties.

7. Initially one of the Vessels was owned by Charterers and the other by the Guarantors. In 2014 Charterers entered into a sale and lease back arrangement with Owners under which the Vessels were purchased by Owners in order to be demise chartered back to Charterers. Mr Garware's evidence was that this was 'pushed for' by DVB Group companies.

8. There are two features of this sale and lease back arrangement which require mention. First, under a Sellers' Credit Agreement dated 31 December 2014 (the '**Credit Agreement**'), Charterers did not receive US$ 4.5 million of the purchase price of the Ben Nevis. This sum was a 'Seller's Credit', which it was intended should be deducted from the sum payable at the end of the Charterparties in order for Charterers to repurchase the Ben Nevis.

9. Second, facility agreements were entered into at around the same time as the Charterparties, between the respective Owners as borrowers, DVB Group Merchant Bank (Asia) Ltd ('**DVB**') as arranger, agent and security trustee, and a variety of financial institutions as lenders. I refer to these as the '**Facility Agreements**'. Owners granted various forms of security for the Facility Agreements to DVB including mortgages and the '**General Assignments**' of, inter alia, the Charterparties and the Guarantees which I will turn to later.

10. The Kailash Charterparty was a bareboat charterparty on the BARECON 2001 form with amendments and additions. It was in effect a hire-purchase agreement.

11. The Ben Nevis Charterparty (which was amended and restated pursuant to an agreement dated 10 April 2015) was on materially similar terms, except in respect of the dates and sums payable, and some differences in clause numbers. The following summarises key terms of the Ben Nevis Charterparty for convenience.

12. Under Clause 41 of the Ben Nevis Charterparty Charterers were due to pay three types of hire ('**Fixed Charter-hire**', '**Variable Charter-hire**', and '**Additional hire**'). These terms were defined in Clause 32. I summarise them as follows:
    i) Fixed Charter-hire was in essence repayment of the principal. It was payable monthly in amounts defined at Schedule I to the Ben Nevis Charterparty. As Fixed Charter-hire was paid the outstanding principal ('**Charter-hire Principal Balance**') accordingly decreased.
    ii) Variable Charter-hire was interest on the Charter-hire Principal Balance, linked to LIBOR plus a margin, payable at the same time as the Fixed Charter-hire.
    iii) Additional Hire was default interest, also linked to LIBOR plus a margin, payable on amounts due to OCSL under the Ben Nevis Charterparty which were not received by the due date.

13. Under Clause 36.1, the term of the Ben Nevis Charterparty was to be 72 months (the '**Charter Period**') commencing on the Delivery Date. The Ben Nevis was delivered to Charterers on 11 February 2015. The Kailash was delivered on 30 May 2014.

14. Under Clause 36.2, where OCSL terminated the Ben Nevis Charterparty in accordance with its terms, or where the Ben Nevis Charterparty expired at the end of its Charter Period then, subject to the Credit Agreement, '*the Charterer shall make full payment to the satisfaction of the Owner of the Termination Sum (including the Repurchase Price) and all other sum payable by the Charterer to the Owner on the date of termination or date of expiry of this Charter*'.
    i) The '**Termination Sum**' is defined in Clause 32 as '*the Owner's estimated amount of its losses as a result of the early termination of the Charter Period which is to be calculated as a sum being the aggregate of: a) the outstanding Charter-hire Principal Balance owing and/or payable (… the Charter-hire Principal Balance includes the Repurchase Price); b) any and all accrued Variable Charter-hire; c) any and all*

accrued Additional Hire…' plus miscellaneous other costs and expenses.

ii) The '**Repurchase Price**' will in most circumstances mean the '**Repurchase Price Net**', defined in Clause 32 as US$ 24.395 million. In the Kailash Charterparty the Repurchase Price is defined as US$ 14.35 million.

iii) Upon payment of the Termination Sum, Owners were to transfer their rights, title and interest in the Ben Nevis to Charterers on an 'as-is-where-is' basis.

15. Under Clause 55.1, Owners had the right to terminate the Charterparty upon the occurrence of a Termination Event. The Termination Events were listed in Clause 54.1, and included at subclause (b):

> Any Charter-hire or any other sum payable… to the Owner… is not paid when due unless, in the case of payment of any Charter-hire only, the failure of payment of such Charter-hire is caused by administrative or technical error and payment is made within three (3) Business Days after the due date…

16. Under Clause 33.1(b), the effectiveness of the Ben Nevis Charterparty was subject to Owners' receipt of the '**Security Documents**'. In Clause 32, Security Documents are defined to include (*inter alia*) the Guarantee, and the General Assignment.

The Guarantees

17. By a deed dated 14 July 2014, Guarantors guaranteed Charterers' obligations to MT Kailash under the Kailash Charterparty up to a maximum of US$ 6 million (the '**Kailash Guarantee**'). By a deed dated 10 April 2015, Guarantors guaranteed Charterers' obligations under the Ben Nevis Charterparty up to a maximum of US$ 7.5 million (the '**Ben Nevis Guarantee**'). The Ben Nevis Guarantee was revised on 12 June 2015. Both Guarantees were in materially similar terms. I will refer in more detail to the terms of the Guarantees in due course.

The General Assignments

18. On 30 May 2014, the day after the Kailash Charterparty was entered into, Charterers entered into a general assignment (the '**GOSBV-Kailash General Assignment**') with MT Kailash under which Charterers assigned their rights to any income from the operation of the Kailash to MT Kailash. The income was to be paid into a designated earnings account and applied first to payment of hire due under the Kailash Charterparty.

19. On the same day MT Kailash in turn entered into a general assignment (the '**Kailash-DVB General Assignment**') with DVB, under which DVB acquired an assignment of MT Kailash's rights under the GOSBV-Kailash General Assignment, and MT Kailash's rights in the Kailash Charterparty and Kailash Guarantee. The recitals to the Kailash-DVB General Assignment record that the assignment was a condition precedent to MT Kailash being granted a credit facility of US$ 17 million under the Kailash Facility Agreement.

20. On 11 February 2015, general assignments similar to those described above were also entered into in respect of the Ben Nevis. The recitals to the OCSL-DVB General Assignment record that the assignment was a condition precedent to OCSL being granted a credit facility of US$ 29.7 million under the Ben Nevis Facility Agreement.

Charterers' Default

21. From late 2014 the price of oil fell sharply, which reduced the amounts which the Vessels could earn by way of hire. Charterers began exploring restructuring proposals in relation to the Charterparties from July 2015. Charterers paid Fixed and Variable Charter-hire as it fell due under the Charterparties until 28 December 2015 (Kailash) and 11 January 2016 (Ben Nevis). They made no payments under the Charterparties subsequently.

The issues and the parties' arguments

22. Owners claimed for sums due under the Charterparties, either as the Termination Sum or as sums otherwise owing. They also claimed for the maximum guaranteed amounts under the Guarantees.

23. The Defendants' defence under the Charterparties was that there was what was termed a '**General Agreement**', entered into by conduct around early 2016 or subsequently. The effect of this General Agreement, according to the Defendants, was that the Charterers' role would transition to one of technical and commercial management of the Vessels, and Owners would in effect re-take possession of the Vessels; the earnings of the Vessels would be used to meet operational expenditure and other overheads in respect of the Vessels; the Charterparties would be cancelled, and the Guarantees would no longer be called upon; and the account between the parties under the Charterparties would be 'zeroed' such that no monies were due from Charterers to Owners in respect of any historic debt that had built up under the Charterparties.

24. Alternatively, the Defendants submitted that there was a waiver or an estoppel (either promissory or by convention) to the effect that Owners gave up any right to claim accrued debts or enforce future obligations under the Charterparties.

25. Owners denied the existence of the General Agreement and argued that the Charterparties remained in force until their expiries at the end of the Charter Periods.

26. The Guarantors' defence to the claims under the Guarantees, other than reliance on the alleged General Agreement, was that litigation was required to be commenced within the Guarantee Period. Since litigation was not commenced until after the Guarantee Period had expired, Owners were not entitled to recover from the Guarantors.

27. Owners argued that the Defendants' proposed interpretation of the Guarantees was inconsistent with the language used.

28. Finally, there were a variety of more minor issues of liability and issues of quantum, many – but not all – of which were resolved in the course of proceedings.

The Alleged General Agreement

Parties' positions

29. The Defendants' case was that the General Agreement was entered into by the conduct of both Owners and Charterers from early 2016 onwards. Mr Debattista, in opening the case for the Defendants said that 'the central issue' in the case could be summarised 'in one word: conduct'.

30. The Defendants' witnesses gave evidence as to the existence of a General Agreement. On analysis, however, their evidence was significantly different as to how and when any General Agreement had been entered into, and did not rest only on 'conduct'. The evidence of one (Mr Garware) was, in essence, that the General Agreement was formed orally and by correspondence in December 2019, while that of the other (Mr Seewinck) was that it was formed orally or by other conduct in 2016.

31. Owners made several arguments as to why there was no such General Agreement between the parties.

32. In particular, Owners submitted that there was no conduct sufficiently clear and unequivocal to establish a contract by conduct.
    i) Owners relied on the inconsistency, both in the Defendants' pleaded case and between that case and the Defendants' own witnesses, as to when the General Agreement came into effect, and whether it was a contract formed by conduct, orally, or through correspondence, and contended that this inconsistency weighed heavily against the possibility that an agreement had been reached.
    ii) Insofar as the Defendants relied on an agreement entered into by conduct, Owners contended that the conduct relied upon was explicable by reference to the existing Charterparties and the Defendants' lack of money, not by there being a new agreement.
    iii) Insofar as the Defendants sought to rely on an agreement reached orally or in correspondence, on the evidence no such agreement was ever reached.
    iv) In light of the frequent draft restructuring proposals exchanged between the parties, the lack of a documentary record of any General Agreement itself weighed heavily against its existence.
    v) In order to avoid liability, the Defendants had to establish that the effect of the General Agreement was that no hire was payable from January 2016 onwards. All the draft restructuring proposals, at most, referred to deferral of hire payments.
    vi) Any argument in respect of waiver or estoppel was reliant on the same factual basis as the alleged General Agreement. Insofar as the Defendants' case on the General Agreement failed, then their case on waiver or estoppel would also fail.

Law

33. There was very little issue between the parties as to the legal principles which fell to be applied in this case.

Contract formation

34. As Leggatt J said in *Blue v Ashley* [2017] EWHC 1928 (Comm), which concerned an alleged oral contract, the essential elements of a contract are as follows [49]:

> It is possible under English law to make a contract without any formality, simply by word of mouth… (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable.

35. There was no dispute that a contract can be entered into by conduct, and there was nothing significant between the parties as to what must be shown in order to establish that a contract was entered into by conduct.

36. Specifically, it was not in issue that a contract may be formed in a way which does not, or does not readily, fit the traditional analysis of offer and acceptance, Thus in *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, Steyn LJ at 29f. said as follows:

> [I]t is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But [it] is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance…

37. The relevant conduct may occur over a period. In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), Andrew Smith J (who referred to *Percy Trentham* at [244]) said at [242] that:

> [T]he court will, if appropriate, assess a person's conduct over a period and decide whether its cumulative effect is that he has evinced an intention to make the contract.

38. It may also be the case that, where a contract has been entered into by conduct, it may be difficult to pinpoint the date on which the contract was made. In *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920, Eder J said at [33] that the impossibility of identifying a specific point in time at which a contract came into existence '*is inherent in most, if not all, cases of any alleged contract by conduct*'.

39. Helpful guidance as to the sort of conduct which may establish a contract by conduct was given in The *Aramis* [1989] 1 Lloyd's Rep 213. There the Court of Appeal considered whether a contract arose between a ship's owners and the

holders of bills of lading signed by the ship's master. Bingham LJ said as follows (at 224):

> The questions to be answered are, I think, twofold: (1) Whether the conduct of the bill of lading holder in presenting the bill of lading to the ship's agent would be reasonably understood by the agents (or the shipowner) as an offer to enter into a contract on the bill of lading terms. (2) Whether the conduct of the ship's agent in accepting the bill or the conduct of the master in agreeing to give delivery or in giving delivery would be reasonably understood by the bill of lading holder as an acceptance of his offer.
> I do not think it is enough for the party seeking the implication of a contract to obtain "it might" as an answer to these questions, for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.

40. Stuart-Smith LJ said as follows (at 230):

> If their conduct is equally referable to and explicable by their existing rights and obligations, albeit such rights and obligations are not enforceable against each other, there is no material from which the Court can draw the inference. It is only if their conduct is unequivocally referable to or explicable by one or more of the rights or obligations contained in the bill of lading that there is factual material from which the Court can draw the inference that a contract has been entered into between them.

41. In his oral submissions, Mr Debattista phrased the question to be answered by the Court as '*was the parties' conduct sufficiently unambiguous such that it was consistent only with one contract, here the 'General Agreement', rather than another contract, here the Charterparties?*'. Owners agreed that that was a correct way to put the issue. I am content to proceed on that basis, but with this caveat or clarification. The question of whether there was the 'General Agreement' made by conduct depends on whether the conduct was only consistent with the existence of there being such a contract. The fact that conduct may not have been consistent with the terms of an undoubted contract – here the Charterparties – does not of itself show that there was a different contract made by that conduct. That conduct might, for example, have been and remained a breach of the undoubted contract.

42. The parties also referred to a number of other authorities which give guidance on the weight to be given to different factors in considering whether a contract has been formed.

43. In relation to the evidence which may be expected if a contract has been concluded, reference was made to *Edgeworth Capital v Aabar Investments* [2018] EWHC 1627 (Comm), where Popplewell J said at [34]:

> … in the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements and discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. Moreover where parties contemplate that they will instruct lawyers to draft detailed written agreements between them, there is a presumption that they intend the terms of their bargain to be those reflected in such carefully drafted agreements, not those in any prior or contemporaneous oral conversation, even in the absence of a boilerplate entire agreement clause.

44. The Defendants also adduced authority referring to the possibility that the parties might, notwithstanding an earlier reference to negotiations being 'subject to contract', nevertheless enter into a binding contract without the conclusion of the formal written contract which had been envisaged. Thus in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR, the Supreme Court held as follows (at [55]f.):

> [T]he question is whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier understanding or agreement…
> Whether in such a case the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term or understanding will again depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.

Waiver

45. The Defendants sought to rely in the alternative on there having been a waiver in the sense of a forbearance. There was no dispute between the parties as to following summary of the doctrine which appears in *Chitty on Contracts (35th ed.)* [26-043] and [26-045]:

> [26-043] Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.
> [26-045] The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered and, if the varied performance is made and accepted, damages cannot be claimed on

> the ground that performance did not take place in accordance with the terms of the original agreement.

46. At [26-047] *Chitty* adds:

> [26-047] A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. It may therefore be more satisfactory to regard this form of waiver, that is 'waiver by estoppel', as analogous to, or even identical with, equitable forbearance or 'promissory' estoppel. Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it.

Estoppel

47. The Defendants pleaded in the alternative that the parties' conduct, taken with the relevant discussions and correspondence, had given rise to either a promissory estoppel or an estoppel by convention. Again, there was no dispute as to what it would be necessary to establish for there to be either of these two forms of estoppel.

48. Thus, as set out in *Chitty* [7-031], the five elements which must be present to establish a defence of promissory estoppel are as follows:

> A legal relationship giving rise to rights and duties between the parties;
> A promise or representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship;
> An intention on the part of the former party that the latter will rely on the representation;
> Reliance on the representation by the representee;
> It must be inequitable for the former party to go back on their promise.

49. At [7-040] *Chitty* states:

> The promise or representation must be 'clear' or 'unequivocal', or 'precise and unambiguous'. This requirement seems to have originated in the law relating to estoppel by representation, and is now frequently stated in relation to 'waiver' and 'promissory estoppel.'

50. An estoppel by convention arises where the parties share an assumption as to facts or law, which one of the parties had relied on, and which it would be unjust for the other party to go back on. In *Tinkler v HMRC* [2021] UKSC 39 (at [42] – [53]), Lord Burrows JSC approved Briggs J's statement of principles in *Revenue and Customs Comrs v Benchdollar* [2009] EWHC 1310 (Ch) (as itself approved with one amendment in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch) and *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023). From those cases the five elements of an estoppel by convention may be summarised as follows:

> There must be a common assumption of fact or law between the parties, whether because they both expressed that assumption, or because one party expressed it and the other party said or did something which crossed the line sufficient to manifest an assent to the assumption.
> The party alleged to be estopped ('**D**') conveyed to the other ('**C**') that he expected that other to rely on the common assumption, such that D may be said to have assumed some element of responsibility for the C's reliance;
> C in fact relied upon the common assumption to a sufficient extent, rather than merely upon his own independent view of the matter;
> C's reliance occurred in connexion with some subsequent mutual dealing between C and D;
> C must have suffered some detriment, or D received some benefit, in such a way as to make it unconscionable for D to assert the true legal or factual position.

The facts relevant to the alleged General Agreement

51. The following are the material facts as they appeared from the documents put before the court.

52. As noted above, from late 2014 the price of oil fell sharply, which affected Charterers' financial position.

2015

53. In July 2015 Charterers proposed a restructuring plan to their lenders (including Owners) on an all-creditors basis. In September 2015 Charterers sent a further all-creditors restructuring proposal. These proposals included a debt repayment holiday, followed by a period in which a 'cash-sweep'/pay-as-you-earn mechanism would be applied to repay senior lenders/financial owners. The September 2015 proposal was sent in a letter from Charterers which also noted that Charterers were soon going to 'run out of cash'.

54. The proposals were rejected by some lenders, as acknowledged by Charterers in an email sent to Owners on 8 October 2015. Instead Charterers said that they would begin restructuring their debts lender-by-lender.

55. On 26 October 2015 Sidat Senanayake, a Vice-President at DVB, sent a restructuring proposal to Charterers, Owners and Guarantors containing terms which DVB was prepared to recommend to its directors. This proposal included an extendable pay-as-you-earn period, and service of interest from Charterers' shareholder funds.

56. Following negotiations on these terms, DVB agreed in principle to the proposal by 17 December 2015. Martin van Tuijl of DVB recommended that the parties instruct lawyers to draft detailed term sheets. It was subsequent to these negotiations that Charterers stopped paying hire under the Charterparties.

2016

57. On 25 January 2016 Mr van Tuijl of DVB informed Chen Zeping of Owners that DVB had received a draft term sheet from Charterers. It appeared from the

evidence that DVB negotiated with Charterers themselves in order to agree parameters within which they and Owners could then negotiate.

58. On 24 February 2016 Nick Blaauwendraad of Charterers and DVB sent Owners, and representatives of Charterers, a draft term sheet between Minsheng and Charterers. Under the term sheet, both DVB and Owners would grant a standstill period of three years (which term was pursuant to a request from Mr Garware of Charterers on 13 January 2016).

59. On 1 April 2016 Mr Seevinck of Charterers sent a letter to all Charterers' creditors, including Owners and DVB, explaining that final restructuring terms had not been agreed and requesting a three-month standstill period under the Charterparties and other financial arrangements.

60. On 22 April 2016 Mr Seevinck sent a new restructuring proposal to all Charterers' creditors. This proposal involved the Charterparties being novated to newly-created SPVs, a three-year standstill period, and other financial arrangements including the interest margin being reduced to 1%.

61. On 9 May 2016 there was an all-creditors meeting at DVB's offices in Amsterdam to discuss the proposed restructuring. On 13 May 2016 Charterers circulated amended proposed terms pursuant to the meeting, including a two-year standstill period, and an interest margin of 2%.

62. On 20 May 2016 there was another all-creditors call, not attended by Owners, following which Martin Vis of DVB sent an email to Charterers saying '*I think we can safely conclude that the attempt to come to a base agreement between all banks on margins and cash pooling etcetera has failed*'.

63. On 11 July 2016 an email was sent by Mr Senanayake of DVB to Owners, proposing a discussion of Charterers' latest proposals. It appears that this discussion went nowhere as the documents do not record any follow up. There was then a lull until Mr Sun of Owners met Mr Senanayake in Beijing on 9 November 2016. In an email to Mr Senanayake on 11 November 2016 Mr Sun recorded the terms on which Owners and DVB had agreed to make a proposal to Charterers. These terms included that the Charterparties would be novated to new SPVs, there would be a standstill until 31 Dec 2018, and an interest margin of 2%. On 16-17 November 2016 Mr Sun and Mr Senanayake continued to correspond regarding a draft term sheet, which Mr Senanayake then sent to Charterers.

64. On 14 December 2016 Mr Seevinck of Charterers replied to DVB and Owners with comments on the draft term sheet. The draft term sheet was marked 'SUBJECT TO CONTRACT' and recorded that following execution of the term sheet, the parties would execute legally binding documentation.

2017

65. On 30 March 2017 Mr Senanayake of DVB confirmed to Owners by email that DVB had approval to proceed with the restructuring '*along the terms of the last term sheet*' and asked if Owners intended to instruct their own lawyers. On 4

April 2017 Owners confirmed that they would instruct their own lawyers in respect of the restructuring.

66. On 23 May 2017 Owners returned the draft term sheet to DVB with comments and suggested revisions. The draft term sheet was marked 'SUBJECT TO CONTRACT'. The suggested revisions included that i) Charterers make no repayment to other creditors without Minsheng or DVB's approval, and ii) default interest would be payable on interest not paid.

67. There was then another four-month break in discussions. On 27 October 2017 there was a call between DVB and Owners to discuss further revisions to the draft term sheet, and on 31 October 2017 Owners sent their comments on the draft term sheet. The draft term sheet remained marked 'SUBJECT TO CONTRACT'.

68. By 23 November 2017, following two further exchanges of comments, DVB and Owners had substantially agreed the terms which they were willing to propose to Charterers. Those terms were accordingly sent to Charterers on 30 November 2017 for review and signature.

69. On 30 December 2017 Mr Senanayake sent Charterers' further revisions to the draft term sheet to Owners.

2018

70. On 12 January 2018, pursuant to a proposal from Mr Lam of Berwin Leighton Paisner (Owners' lawyers), there was a conference call between DVB, Owners, Charterers and Guarantors. Mr Lam's note summarising the call recorded that there was a broad agreement as to the proposed restructuring. The draft term sheet was being reviewed by Charterers.

71. At this point, the parties appeared to focus for a period on the drydocking of the Vessels and on Minsheng's possible purchase of DVB's position in respect of the Vessels.

72. Around the end of February 2018 Mr Blaauwendraad of DVB and Charterers explained to Liu Wei of Owners that DVB might be willing to settle its position with Owners at a discount, since it was considering leaving the offshore market.

73. On 23 August 2018 DVB entered into a settlement agreement with MT Kailash, the effect of which was to reassign the Kailash Charterparty and Guarantee to MT Kailash. On 30 April 2019 DVB entered into a settlement agreement with OCSL the effect of which was to reassign the Ben Nevis Charterparty and Guarantee to OCSL.

2019

74. The minutes of a board meeting of the Guarantors on 6 August 2019 recorded that Owners '*have decided to return the Guarantees provided to them … against which they will take over the Vessels*' and '*in any case the entire BBC provided for as well as the Guarantees/Put Options provided to the Vessel Owners will stand cancelled and annulled*'.

75. On 26 August 2019 Charterers requested a letter ratifying the Kailash Charterparty in order to market the Kailash to sub-charterers.

76. From September 2019 a series of correspondence began, initially concerning repairs to the Kailash. In mid-September 2019 Mr Garware pressed Owners to set aside a budget and make payment to prevent the arrest of the Kailash at Hull, where she had arrived (at MMS Shipyard, '**MMS**') in August 2019 for repairs after Owners had consented to her reactivation. On 8 November 2019 Mr Wang of Owners confirmed that Owners had obtained approval for a US$ 1.05 million budget for repairs to the Kailash.

77. On 4 December 2019, in response to a request for the funds from Vinay Mohile of Arena the previous day, Mr Wang of Owners responded that Owners could not yet approve the payments and that the restructuring plan needed to be formalised:

> We may also need to sign formal documents between GOSBV and MSFL [Minsheng] regarding the restructure between GOSBV and us. We understand that you have discussed the restructuring & repair plan with our colleague before, but so far, we didn' t [sic] find any formal signed documents regarding on this. This is quite important and we need to solve this first.

78. On the same day Mr Garware of Charterers replied to Mr Wang in the following terms:

> While we await the technical documents for the repair plan, please also indicate how to wish to proceed on the commercial side.
> As I recall, based on discussions it was decided that all agreements with GOSBV/GOSL will be terminated and new agreements between owner and SPV's (for both Vessels) will have to be executed – based loosely on a minimum BBC with a cash sweep thereafter. This would be applicable to Kailash once she began earning. We had also decided that it would be the most commodious to set up the SPV's in the Netherlands and as a result I believe Bert has already started the process. Perhaps he can confirm the same as well.

79. On 10 December Mr Wang replied to Mr Garware to confirm that Mr Garware's recollection as to the restructuring discussions was accurate:

> We also confirm the discussions above, and now the urgent things [sic] is that, we need to signed the amendment according to the above, the key terms is the same as you mentioned:
> 1. All agreements with GOSBV/GOSL will be terminated
> 2. New agreements between owner and SPV's (for both Vessels) will have to be executed – based loosely on a minimum BBC with a cash sweep thereafter
> 3. The new spv set-up should be clarified in the amendment, and as soon as it's settled, will switch to the new spvs. Would you pls instruct your lawyer

> to draft the amendment asap and we could sign this as soon as we can, so that we can move on the following work after this.

80. On 13 December 2019 Mr Garware provided a draft 'general agreement' for the Kailash, requesting confirmation of acceptance from Owners and anticipating replication in respect of the Ben Nevis.

81. On 24 December 2019 Mr Wang replied to Mr Garware in the following terms:

> I've already submmited [sic] the agreement to our board and awaiting for the approval, as you mentioned about the ben nevis. please also provide the same like this and let me discuss it internally to see if we can accept the same.

82. On 27 December 2019 Mr Garware provided a draft agreement for the Ben Nevis. The draft agreements in respect of the Vessels were ultimately never executed.

2020

83. Guarantors' Audit Committee Report dated 10 February 2020 recorded:

> In the case of M.V. Ben Nevis and M.V. Kailash, the owners have expressed their intention to take the Vessels away from GOSBV and absolve GOSBV and GOSL of all their obligations towards the bare boat charter. This process is underway and an outcome should be known shortly. In the interim, M.V. Kailash has still not been activated, in view of the lack of budgets from owners for the same. We are constantly in dialogue with the owners and are pushing for reactivation of the Vessel. The Company hopes to receive a response on this issue within a week/10 days once Chinese New Year celebration are over.

84. On 11 May 2020 Mr Liu of Owners wrote to Mr Koli of Charterers regarding payments due in respect of the Kailash. Mr Liu stated that 'before making payment for any of these outstanding invoices, we need to amend the contract with GOSBV first', attaching draft 'Framework Agreements' in respect of both Vessels and seeking Charterers' comments on those drafts. The draft Framework Agreements referred to a suspension of Charter hire with Owners' option to resume or accelerate payments. Mr Garware responded on the next day seeking clarifications. On 13 May 2020 Mr Mohile of Arena wrote to Owners, cc Mr Garware, stating that while Minsheng board approval for work on the Kailash was awaited matters had escalated with two suppliers.

85. On 22 June 2020 the Kailash was arrested at Hull by MMS by order of the Admiralty Court. On 29 June 2020 MT Kailash entered into a settlement agreement with MMS under which they paid £91,800 directly to MMS in return for the Kailash's release. The Kailash was released by order of the Admiralty Court on 2 July 2020.

86. On 21 September 2020 and again on 25 November 2020, Manoj Koli of Charterers wrote to Owners to warn them that Charterers would soon run out of

money and be unable to pay expenses in connexion with either the Kailash or the Ben Nevis. On 25 November 2020 Mr Liu of Owners replied, stating '*the owner will honor all the debt, including the amount paid by the manager on the owner's behalf*'.

87. Guarantors' board meeting minutes dated 11 November 2020 recorded that discussions with Owners to absolve Charterers and Guarantors of their liability under the Charterparties and the Guarantees remained underway.

88. On 9 December 2020 the Ben Nevis was arrested in Rotterdam for non-payment of crew wages.

89. By 30 December 2020 Minsheng had decided to appoint CSM as the Ben Nevis's new managers in place of Arena.

2021

90. On 13 January 2021 Mr Liu of Owners wrote to Charterers and the Guarantors concerning the imminent expiry of the Ben Nevis Charter Period. This email had several aspects.
    i) Mr Liu stated that under Clause 36 of the Ben Nevis Charterparty, the Charter Period was due to end on 14 January 2021. On that date the Termination Sum and other outstanding sums would be payable by Charterers to Owners, and upon such payment title to the Ben Nevis would pass from Owners to Charterers.
    ii) Mr Liu recorded that as a result of Charterers' inability to pay the Termination Sum, Charterers had agreed to redeliver the Ben Nevis to Owners on 14 January 2021.
    iii) Mr Liu said that there had been three Termination Events under Clause 54 of the Ben Nevis Charterparty, namely Charterers' failure to pay Charter-hire since January 2016, Charterers' failure to pay crew wages, and Charterers' failure to arrange the discharge of the detention at Rotterdam within 21 days.
    iv) Owners required immediate payment of outstanding Charter-hire.
    v) Owners reserved all their rights and remedies under the Ben Nevis Charterparty and Ben Nevis Guarantee, including the right to give notice of termination of the Charter. Any payment of crew wages to lift the detention was without prejudice to Owners' right to recover that sum from Charterers.

91. On 14 January 2021 Wang Kun of Owners wrote to Charterers in the following terms:

> In the first quarter of 2020, we were discussing the restructure [sic] with your team according to your request and our lawyers has finished draft the Framework Agreement, and it is not signed yet due to the change of the whole plan.

92. On 19 January 2021 OCSL, Charterers and Arena entered into a tripartite agreement (the '**Tripartite Agreement**'). The Tripartite Agreement provided, in material part, as follows:

> (A) By a bareboat charter dated 31st December 2014 (the "Charter") Ocean Clap as Owner let the "Ben Nevis" (the "Vessel") to GOS for a Charter Period of 72 months which expired on 14th January 2021. This Agreement concerns the arrangements for the redelivery of the Vessel to Ocean Clap to take place on or about 28th January 2021.
> (D) Notwithstanding GOS's continued liability for operating expenses including crew wages, in order to lift the detention Ocean Clap is willing to provide funding for the crew wages on the terms agreed below.
> 6. GOS acknowledges that it remains liable to indemnify and reimburse Ocean Clap in respect of the Wages and Funds. All Ocean Clap's rights under the Charter are reserved.

93. On the same day, Owners instructed CSM to arrange the taking possession of the Kailash at Hull.

94. On 29 January 2021 the Ben Nevis was released from detention. OCSL took possession of her.

95. In June 2021 Owners and Charterers attempted to reach an agreement regarding outstanding liabilities under the Charterparties. No such agreement was reached.

96. On 28 September 2021 Owners served notices of termination of the Charterparties and demands for payment of the maximum guaranteed sum under the Guarantees. On 6 October 2021 Charterers and Guarantors replied in the following terms:

> In addition to the above, Charterers already had an agreement with you, as Owners for the said Charter to be cancelled way back in 2019, absolving the charterers of all its liabilities under the existing Charter with new Charter agreements being executed which would work on the principle of a "cash sweep" after OPEX, based on the charter the vessel had secured. This was never proceeded with by owners even though they had committed to the same.

Witness evidence

97. Three witnesses gave evidence in court.

Owners

98. For Owners Huang Mei was called. The Defendants did not cross-examine her and therefore her witness statement stood as her evidence. Ms Mei was not involved in any of the relevant decisions taken by Owners, and in fact did not join Minsheng's shipping department until 2018. Her evidence was to the effect that significant transactions at Minsheng would require board or Committee approval, and there was no record of board or Committee approval for entering into the General Agreement.

99. The Defendants argued that adverse inferences should be drawn from Owners' failure to call appropriate individuals to give evidence to the court, relying on *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) and *Efobi v Royal Mail Group Ltd* [2021] UKSC 33. In *Efobi* Lord Leggatt JSC, giving the judgment of the court, said as follows at [33]:

> Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.

100. In my view there are insufficient reasons to draw any adverse inferences from Owners' failure to produce more witnesses in this case.
    i) The Defendants' pleaded case fails to identify the actions or words of any individual on which they rely as concluding the General Agreement. Individuals are named but only as having participated in discussions as to market movements and the inability of Charterers to service Charter-hire, and the existence of such discussions was not in issue.
    ii) This is a matter of particular importance given that the burden lies on the Defendants to prove the existence of the General Agreement.
    iii) There is a considerable documentary record for the period, which is in evidence before the Court.
    iv) The Defendants did not identify with any precision what factual inference they were contending should be drawn from witnesses not having been called.

Charterers

101. For Charterers Aditya Garware and Steven Lambertus Seevinck were called.

102. Mr Garware remains a director of Guarantors and was a director of Charterers for the relevant period. He also appears to have been a director of Arena for the relevant period.

103. Mr Garware was an honest witness whose evidence could, for the most part, be relied upon. However, on occasion his evidence was inconsistent with itself, and with the Defendants' own pleaded case. Moreover, his evidence as to the import of communications between the parties could only be of limited value, in light of the objective nature of the exercise of ascertaining whether a contract has been entered into.

104. The core thrust of Mr Garware's evidence was to the effect that an agreement had been arrived at in late 2019 '*to cancel all the bareboat charterparty agreements, the guarantees, et cetera*'. This agreement was '*based first on that conversation which was minuted in the board meeting* [i.e. the board meeting of

the Guarantors on 6 August 2019] *and thereafter, I believe, in emails*'. This is not consistent with the Defendants' case that the General Agreement was entered into by conduct in 2016. I also regard it as difficult to reconcile with Mr Garware's admission that any agreement was only in principle, although he did emphasise that he nonetheless considered it binding.

105. Mr Seevinck was a director of Charterers throughout the relevant period and remains so to this day. He was a knowledgeable witness but reluctant to make any concessions even when they would have been appropriate. His evidence was principally to the effect that an agreement to end the Charterparties, and release Charterers from any obligations under them, had been reached orally in 2016. This was inconsistent with Charterers' pleaded case, and also with the documentary evidence. I did not regard this evidence as reliable.

Conclusions as to the General Agreement

Contract

106. The General Agreement, as alleged in the Charterers' pleadings and put in their opening Skeleton Argument, was an agreement under which the Owners would retake possession of the Vessels, apparently in 2016. The Defendants' witnesses, by contrast, appeared to contemplate that, pursuant to the General Agreement, the Vessels would be bareboat chartered to new SPVs set up by Charterers. In fact, neither happened. This is an unpromising start for the case of an agreement reached by conduct.

107. More significant still is the fact that while the Charterers, especially in Mr Debattista's opening, put the case as one where the General Agreement had been made by conduct, and not by way of an oral agreement, the evidence of the Charterers' witnesses appeared, in fact, to be that there was an oral agreement (albeit the two witnesses contended for oral agreements concluded at different times and on different terms). As no such oral agreements were pleaded, and the Charterers disclaimed any such oral agreements as the basis of their case, they cannot rely on such agreements. Anything which was said can, at most, be relied on as part of the 'conduct' of the parties, and the Charterers are not able to point to it as itself constituting an agreement.

108. There was also no clarity or consistency as to Charterers' case as to when any agreement by conduct had been concluded. Mr Garware initially said that the General Agreement was concluded in early 2016. However, he then accepted in his evidence that the Charterparties had continued in force after that. By the end of his evidence his position was that he understood that the Owners would cancel the Charterparties and Guarantees based on a telephone conversation in 2019, and emails in December 2019. Mr Seevinck's evidence that the Charterparties in effect no longer existed from 2016 onwards was clearly inconsistent with Mr Garware's and also with the contemporary documents which referred to the subsistence of the Charterparties after 2016.

109. To establish a defence to the claims under the Charterparties, the Charterers would need to establish an agreement that no hire was payable under those Charterparties from January 2016 onwards. It appears clear that there was no such agreement. The restructuring proposals and draft term sheets which were

communicated between the parties, at least until December 2019, anticipated only a deferral of hire payments until the market improved, and incorporated obligations whereby, in the end, all hire should be paid. There was no suggestion in the documents that hire should be written off until, at earliest, the draft agreements sent by Mr Garware on 13 December 2019 and 27 December 2019, and even they did not state clearly what it was proposed would happen to accrued debts. Those draft agreements were not executed, and instead the draft Framework Agreements sent by Owners in May 2020 contemplated that accrued hire was to be paid. Ultimately, indeed, I understood Mr Garware, in his evidence at Day 1/173 and Day 2/4, to have accepted that the Owners had not agreed to write off accrued hire.

110. In essence, the Defendants relied on two types of conduct on the part of the Owners in support of the making of the alleged General Agreement: one was that the Charterers did not pay hire, and the Owners acquiesced in that; and the second was that Owners paid some costs in respect of the operation of the Vessels. As to the latter, it is common ground that Owners did so in relation to the Kailash during the Kailash Charter Period when they paid £91,800 to MMS in order to obtain the Kailash's release from arrest in June/July 2020. They also assured Charterers that they would do so in relation to the Ben Nevis in November 2020. Owners did in fact pay the costs for the release and repair of the Ben Nevis after the expiry of the Charter Period.

111. Neither of the two matters (nor both together) is, in my judgment, conduct which is only consistent with the existence of the alleged General Agreement. On the contrary, both are consistent with, and in my view are more readily explained by, the Charterers simply having no money, and the Owners seeking to maximise cashflow under the Charterparties, avoid the immediate insolvency of Charterers and preserve the possibility of recovering at least the Fixed Charter-hire principal.

112. Furthermore, this was a case in which the parties were conducting negotiations on the basis that there would be a formal agreement drawn up. A series of documents noted that they were 'subject to contract' or referred to the need for formal documentation to be agreed for any restructured relationship. In my judgment there was never any conduct which manifested that, despite this, the parties were in accord that there should be a legally binding arrangement which was not the subject of formal documentation.

113. The Defendants made an attempt to distinguish between negotiations 'up above', which envisaged formal documentation, and the conduct of those 'on the ground', which was sufficient to enter into a General Agreement with Owners. I regarded this as artificial and incorrect. The Owners were SPVs which acted through Minsheng employees. The operational running of the Vessels was often conducted by the same personnel who conducted the restructuring negotiations. Key figures were both 'up above' and 'on the ground'. The organisations were too small for there to be any convincing suggestion that an agreement might have been concluded by the conduct of those 'on the ground' which was not subject to the terms of the negotiations which were being carried out 'up above'.

114. For completeness, I turn to the cases made by Charterers' witnesses of an oral agreement, notwithstanding that, as I have said, I do not consider that that case is open to Charterers.

115. Mr Seevinck's evidence was that an agreement was reached in discussions and correspondence by 2016. Various draft term sheets were exchanged in the first few months of that year. However on 20 May 2016 Mr Vis noted that negotiating efforts had failed to reach an agreement. That assertion does not appear to have been contested by any relevant party at the time. At the end of that year and into 2017, draft term sheets were exchanged between Charterers, Owners and DVB, marked 'SUBJECT TO CONTRACT'. The final draft term sheet in this round of negotiations was sent on 23 May 2017. Negotiations regarding the draft term sheet recommenced in 2017. All this is inconsistent with there having been a binding oral agreement by 2016.

116. Mr Garware's evidence was to the effect, as I have indicated, that the General Agreement was entered into by discussions in late 2019. There is, perhaps, a little more support for this in the documentary record. Mr Wang confirmed to Mr Garware on 10 December 2019 that Owners agreed that there had been an agreement in discussion that all agreements with GOSBV/GOSL would be terminated, that new agreements between Owners and further SPVs should be executed, and the new SPV set up should be clarified in the amendment, and there should be a 'switch' to the new SPVs. However, even from this it is apparent that any new agreement was predicated on the transfer of the Charterparties to new SPVs. No new SPVs were ever formed. Furthermore, the draft terms were submitted to Minsheng's board for approval, but were never signed.

117. To summarise, in my judgment the Charterers have not shown any oral or written agreement which was intended to be legally binding on the terms of, or any conduct which is explicable only by reference to there having been, a General Agreement of the nature for which they contended.

118. The Defendants did not develop their alternative cases that Owners' conduct and correspondence constituted a waiver or estoppel. I consider them briefly.

Waiver

119. The Defendants' case, which relies on the same conduct as that on which they rely for the purposes of their contract case, is that 'Owners waived any right … to contend that the Charterers or the Guarantor are liable to them on the basis of the original wording/obligations of the Charterparty and the Guarantee.' In my view, there was no conduct on the part of Owners which represented that, in the absence of a concluded written contract varying or replacing the Charterparties, that the obligations under the Charterparties and Guarantees would not be relied on. Certainly, and given the background of ongoing 'subject to contract' negotiations, Owners' conduct was not clear and unequivocal.

Estoppel

120. For similar reasons, I do not consider that either a promissory estoppel (if relevantly different from a 'waiver' in this area) or an estoppel by convention is made out. Owners' conduct was at most equivocal and that precludes there having been a promissory estoppel. In relation to estoppel by convention, I do not consider that it has been shown that the parties conducted themselves on the basis of a shared assumption that the Charterparties and Guarantees were no longer applicable. The fact that they continued to negotiate and exchange detailed proposals for a restructuring was inconsistent with a common assumption that the Charterparties and Guarantees had, in effect, already been cancelled.

Other Liability Issues under the Charterparties

121. There was an issue as to the repairs and maintenance necessary on Ben Nevis when it was released from arrest on 29 January 2021.

122. The Defendants' Skeleton Argument stated that it was not in issue that an amount of US$ 485,783.55 was incurred in repair and maintenance costs after Ben Nevis was redelivered. The works carried out included repairs to the navigation equipment, fuel tank cleaning, repairs to the main engine and an underwater survey. Owners claim these sums pursuant to the indemnities in clauses 45.1(b), 45.1(c) and/or 55.5 of the Ben Nevis Charterparty and/or as damages for breach of clause 50.1(b) or 55.4(e) thereof. The Charterers contend that the vessel was in satisfactory condition as at January 2021 and that none of the repairs and maintenance was required to be undertaken immediately.

123. It appears to me that it is inherently unlikely that any of the matters subject to repairs developed between redelivery on 29 January 2021 and the Condition Survey Report recommending the work on 15 February 2021, given that the vessel remained at Rotterdam, and there is apparently no evidence that she took on bunkers in the interim. The Owners have put in evidence from Mr Shortall that the repairs claimed were, save for the underwater survey, necessary to put the Ben Nevis into compliance with the Charterparties. I accept that evidence. There appears to be a small issue as to the amount of the costs which, even on this basis, can be said to be recoverable, in that the Owners' expert refers to a figure of US$ 445,565.52. It is that sum which I find that the Charterers are liable for.

124. There is an issue as to whether Charterers have pleaded a defence, separate from their defence based on the alleged 'General Agreement', to Owners' claim for an indemnity in respect of the costs incurred in respect of the Ben Nevis's arrest at Rotterdam. The question arises because of a reference in the Defence (at [24]) to an exchange of emails between Mr Koli of Charterers and Mr Liu of Owners dated 25 November 2020. I have concluded that no separate and independent defence is there pleaded. Accordingly, in light of my conclusions as to the General Agreement, I conclude that the sum claimed in respect of these expenses (at least in the sum of US$ 532,788.34, which is what emerges from the materials before the court) is due to the Owners.

125. A further issue arises as to whether Charterers have pleaded a defence, independent of their defence based on the 'General Agreement', to Owners' claim for an indemnity or damages in respect of the Kailash's arrest at Hull. The Charterers have relied on an exchange between Mr Wang of Owners and Mr Garware on 8 November 2019. Whether or not that is a point separate from the alleged 'General Agreement' I am satisfied that it does not constitute an agreement by Owners to pay these costs outside the Charterparty framework. Any willingness of the Owners to bear these costs was because the Charterers had no funds, and arose in the context of Charterers' contractual obligations to maintain the vessel, and the ongoing subject-to-contract negotiations. These amounts totalled US$ 112,638.60, for which the Charterers are liable.

Quantum of Claims under the Charterparties

126. Subject to issues of liability, which I have addressed above, there is no dispute as to the following amounts payable by Charterers under the Charterparties:
    (1) Ben Nevis, Fixed Charter-hire: US$37,075,000
    (2) Ben Nevis, Variable Charter-hire: US$ 9,789,932.81
    (3) Ben Nevis, Additional Hire: US$5,448,657.68
    (4) Ben Nevis, Other Expenses: US$262,791.15.

127. I have resolved that the amount owing in respect of Ben Nevis maintenance costs was US$445,565.52, and that in respect of arrest expenses was US$532,788.34.

128. Though it is common ground between the parties that the Owners are required to give credit to the Charterers for the market value of the Vessels, there is a significant difference between the parties' assessments of those values. In the case of Ben Nevis, Owners contend that her fair market value on the date of repossession (taken as 29 January 2021) was US$7 million. Charterers contend that it was a value of at least US$ 22 million. Owners' figure is based on the expert evidence of Mr Sean Bate, which was not challenged. It appears to me that it is the best evidence of the amount of the relevant credit.

129. In the case of the Kailash, there is no dispute, subject to issues of liability already addressed, as to:
    (1) Kailash, Fixed Charter-hire: US$8,480,000
    (2) Kailash, Variable Charter-hire: US$ 6,330,156.08
    (3) Kailash, Additional Hire: US$ 3,222,091.70
    (4) Kailash, Charter-hire Principal Balance: US$ 14,350,000.

130. I have already found that the amount of the Arrest Expenses which Owners can claim from Charterers is US$ 112,638.60.

131. In relation to the credit for the value of the Kailash, Owners contend for a value of US$ 2,500,000 and Charterers for a value of US$ 7,500,000. Owners' figure is supported by Mr Bate's evidence, which I accept is the most reliable indication of the value of the relevant credit.

132. The Charterparties provide for contractual interest at the rate of LIBOR plus 8%.

The Claim on the Guarantees

133. Each of the Guarantees was in materially similar terms. The Ben Nevis Guarantee provided, in part, as follows:

> *1.2 **Definitions***
>
> *In this Guarantee, unless the context otherwise requires:*
>
> *[…]*
>
> *"**Guarantee**" includes each separate or independent stipulation or agreement by the Guarantor contained in this Guarantee;*
>
> *"**Guaranteed Liabilities**" means any and all obligations and liabilities (whether actual or contingent, whether as principal, surety or otherwise, whether now existing or hereafter arising, whether or not for the payment of money, and including, without limitation, any obligation or liability to pay damages) of the Charterer under the Bareboat Charterparty and the Security Documents owing and/or payable to the Owner;*
>
> *"**Guarantee Period**" means the period beginning on the date of this Guarantee and ending on the earlier of:*
>
> *(a) the date on which all the Guaranteed Liabilities and all obligations (whether actual or contingent) under or in connection with this Guarantee have been unconditionally and irrevocably paid and discharged in full; and*
>
> *(b) the date falling seventy-two (72) Months after the date of this Guarantee;*
>
> *[…]*
>
> *"**Maximum Liability**" means US$7,500,000.00* [Ben Nevis] [*US$6,000,000.00* (Kailash)]
>
> *[…]*
>
> *1.3.6 a certificate by the Owner as to any amount due or calculation made or any matter whatsoever determined in connection with this Guarantee shall be conclusive and binding on the Guarantor except for manifest error;*
>
> *[…]*
>
> ***2 GUARANTEE AND INDEMNITY***

2.1 Guarantor as principal Debtor; indemnity

2.1.1 The Guarantor irrevocably and unconditionally:

(a) guarantees to the Owner the due and punctual observance and performance of all the obligations of the Charterer under Bareboat Charterparty and the Security Documents and the due and punctual payment of all the Guaranteed Liabilities; and

(b) undertakes with the Owner that whenever the Charterer does not pay any amount of the Guaranteed Obligations when due, the Guarantor shall immediately on demand pay that amount as if it were the principal obligor; and

(c) indemnifies the Owner immediately on demand against any cost, loss or liability suffered by the Owner if any obligation guaranteed by it (or anything which would have been an obligation if not unenforceable, invalid or illegal) is or becomes unenforceable, invalid or illegal. The amount of the cost loss or liability shall be equal to the amount which the Owner, or as the case may be, would otherwise have been entitled to recover,

provided that the aggregate amount payable by the Guarantor under this Guarantee shall not exceed the Maximum Liability.

[…]

2.3 Interest

Any amount due to the Owner under this Guarantee shall bear interest from the date of demand until actual payment (both before and after judgment). Such interest shall accrue at the same rate and be calculated and compounded in the same way (mutatis mutandis) as interest under Schedule III of the Bareboat Charterparty.

2.4 Continuing security and other matters

The Guarantee is a continuing security and shall:

2.4.1 secure the ultimate balance from time to time owing to the Owner by the Charterer notwithstanding any settlement of account or other matter whatsoever;

[…]

3 GUARANTEE PERIOD

This Guarantee shall remain in full force and effect as a continuing guarantee for the duration of the Guarantee Period.

> …
>
> ***5. REPRESENTATIONS AND WARRANTIES***
>
> …
>
> *5.3* ***Repetition of Representations and Warranties***
>
> *On each day from the date of this Guarantee until all monies due or owing by the Charterer under the Bareboat Charterparty and the Security Documents and/or by the Guarantor under this Guarantee have been paid in full, the Guarantor shall be deemed to repeat the representations and warranties in Clause 5.1 as if made with reference to the facts and circumstances existing on each such day.*
>
> ***6. UNDERTAKINGS***
>
> ***6.1 General***
>
> *The Guarantor undertakes that, from the date of this Guarantee and so long as any monies are owing under this Guarantee, it will:*
>
> *…'*

134. The Guarantee Period ended on 14 July 2020 (Kailash) and 12 June 2021 (Ben Nevis).

The Parties' contentions

135. Even if unsuccessful in relation to its case as to the so-called General Agreement, and in the event that the Court concludes (as I have) that the Guarantees were not cancelled by the General Agreement and there was no relevant estoppel or waiver, Guarantors deny that they have any liability under the Guarantees.

136. Their case in this respect is that, for there to be a liability under either of the Guarantees, litigation in relation to that Guarantee had to be commenced during the Guarantee Period of that Guarantee. Here, the Guarantors point out, the present claims were not commenced until 14 April 2023, well after the expiry of both Guarantee Periods. There could therefore be no liability.

137. The Owners' case was that this was wrong for either of two reasons. In the first place, they contended that, on a proper construction of the Guarantees, clause 2.1.1(a) provided for a true guarantee of Charterers' performance under the Charterparties, and the Guarantors' liability arose upon Charterers' failure to make due and punctual performance thereunder and without need for a demand under the Guarantee. Alternatively they submitted that, even if they were required to make a demand on the Guarantees, they were entitled to do so after the expiry of the Guarantee Period, provided that the demand related to a Guaranteed Liability that arose during the Guarantee Period.

138. In somewhat more detail, the arguments were these. Guarantors pointed to Clause 3. They contended that, as the Guarantee was to remain in full force and effect for the duration of the Guarantee Period, the corollary was that, once the Guarantee Period ended, the Guarantee was no longer in full force and effect,

which must mean that, after that point, the Guarantors were no longer liable under the Guarantee.

139. The Guarantors' case was that that meant that there was no liability, after that date, even if, under Clause 2.1.1(a), a liability under the Guarantee accrued without the need for a demand. Alternatively, the Guarantors contended that there was no liability under the Guarantee, whether pursuant to Clause 2.1.1(a) or (b), without a demand, and if there had been no demand before the end of the Guarantee Period, then there could be no liability. As part of this argument, it was said that Clause 2.1.1(a) had to be read with Clause 2.1.1(b): they were effectively one obligation, not two, and that a demand was a necessary feature of both parts of the dual obligation. Were that not the case, as Mr Farhan said in his attractive submissions, then the Guarantee would have no clear expiry date, which would be commercially inconvenient, as would the fact that the representations and warranties referred to in Clauses 5 and 6 would continue for an extended period. Further, unless read in this way, the requirement for a demand in Clause 2.1.1(b) is rendered entirely ineffective.

140. For the Owners, reference was made to *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited* [2021] EWCA Civ 1147, at [22]-[23], where Popplewell LJ said:

> [22] Suretyship can be traced back to Old Testament times and before, and in the modern era has come to be known more commonly as a guarantee. A traditional guarantee by way of suretyship is an undertaking by the guarantor to be answerable for the debt or obligation of another if that other defaults. Traditional guarantees by way of suretyship are sometimes called "see to it" guarantees, following the dictum of Lord Diplock in *Moschi v Lep Air Services Ltd* [1973] AC 331, 348 that the nature of the guarantor's obligation was "to see to it that the debtor performed its own obligation to the creditor". Where the debt or performance obligation arises under a contract between the obligor/debtor and obligee/creditor, the essential feature of such a guarantee, for present purposes, is that the liability of the guarantor depends upon there being a liability of the obligor/debtor. The guarantor's liability is secondary, in the sense that it is contingent upon the obligor's continuing liability and default. Such guarantees, however, sometimes describe the guarantor's obligations as those of a primary obligor, to make clear that the default of the obligor gives rise to an independent and primary liability of the guarantor, who is liable and in breach of his obligation by the very fact of default by the obligor without more; hence the "see to it" characterisation of the guarantor's obligation. I shall refer to such an instrument as a surety guarantee.
>
> [23] Security for performance of a payment obligation may also be provided by an undertaking to pay a sum on demand, or within so many days of a demand, irrespective of whether the obligor/debtor is under a liability to make the payment. Such undertakings are also commonly termed guarantees, but their defining characteristic for present purposes is that they are payable on or by reference to an event, namely the demand, and without reference to the obligor's liability. The demand may have to be in prescribed form, and/or may have to be accompanied by prescribed

> documents, but it is the demand which triggers the liability to pay. I shall refer to such undertakings as demand guarantees. Surety guarantees sometimes require a demand as a trigger for the payment obligation, in addition to the condition of obligor liability, so that the presence in the instrument of a requirement for a demand is not itself determinative; but a demand in surety guarantees is a variation of the standard suretyship arrangement under which the guarantor is a primary obligor and assumes liability simply by reason of the default of the obligor without the need for a demand against it; whereas a demand is of the very essence of a demand guarantee. The defining characteristic of a demand guarantee, for present purposes, is that the guarantor's obligation to pay arises by reason of the demand, without the beneficiary having to establish a liability of the obligor.

141. In the present case, Owners submitted, even if Clause 2.1.1(b) of the Guarantee was regarded as creating a demand guarantee, where a demand was a trigger for a liability to pay under the Guarantee, Clause 2.1.1(a) was a 'see to it' obligation. It was not unusual for Guarantees to include guarantee and indemnity obligations some of which are, and others of which are not, made conditional on the making of a demand: an example of where this was the case is *Re Taylor; ex parte Century 21 Real Estate Corporation* [1995] FCA 1335, a decision of Burchett J in the Federal Court of Australia. Given that Clause 2.1.1(a) is a 'see to it' obligation, a liability accrued under it when the Charterers failed to perform obligations under the Charterparties without the need for a demand on the Guarantees, and nothing in Clause 3 put an end to that liability at the end of the Guarantee Period. The result was analogous to that in *Euler Hermes SA (NV) v Mackays Stores Group Ltd* [2022] EWHC 1918 (Comm), where there was liability under the guarantee for deferred amounts outstanding at the termination of the guarantee notwithstanding that demand was only made after that.

Conclusions as to liability issues on Guarantees

142. The issues which I have to decide in relation to the Guarantees depend on their proper construction. Decisions on differently worded documents are of limited assistance, as Hobhouse LJ said in *Bank of Credit and Commerce International SA v Simjee* [1997] CLC 135 at 136.

143. In my judgment, Clause 2.1.1(a) is a 'see to it' obligation and liability under it is not made conditional or dependent on a demand. It is expressed to be a separate obligation to that in Clause 2.1.1(b), and they are separated by the word 'and'. It also makes sense, grammatically and syntactically, as a separate obligation. The argument that that construction makes Clause 2.1.1(b) redundant is not an argument of any great weight given the clear terms in which Clause 2.1.1(a) is expressed, including its manifest failure to mention the need for a demand.

144. Clause 3 does not provide that there should be no liability under the Guarantee for any amount demanded after the end of the Guarantee Period. Instead, in providing that the Guarantee 'shall remain in full force and effect as a continuing guarantee for the duration of the Guarantee Period', what it conveys

is that, after the end of the Guarantee Period, it will no longer be a continuing guarantee, and thus that it will not respond to any liabilities arising after the end of the Guarantee Period.

145. For those reasons, I consider that Guarantors' argument must fail. Under Clause 2.1.1(a) there can be a liability, notwithstanding no demand having been made, and Clause 3 does not mean that no such liabilities subsist after the end of the Guarantee Period. It is accordingly not strictly necessary to deal with the Owners' alternative argument that, even if Clause 2.1.1(a) can be read as requiring a demand, it is not necessary for the demand to be made within the Guarantee Period. I consider, however, that that argument is correct as well. There is no reference in Clause 2.1.1(b) to when the demand has to be made; and it might be commercially inconvenient for a demand to have to be made within the Guarantee Period when it might not be known what are the relevant Guaranteed Liabilities (or 'Guaranteed Obligations' as they are referred to in Clause 2.1.1(b), which is presumably intended to be a reference to Guaranteed Liabilities) which are due. In this context it is to be noted that Guaranteed Liabilities includes 'any obligation or liability to pay damages', and that is a type of obligation where it might well not be known with any degree of assurance during the Guarantee Period whether there is such an obligation and if there is, what its quantum is.

146. Accordingly I conclude that Owners are entitled to recover under the Guarantees.

Quantum of claim on Guarantees

147. The Owners are entitled to the maximum guaranteed sums under each of the Ben Nevis Guarantee (US$ 7,500,000), and the Kailash Guarantee (US$ 6 million).

148. The Guarantees each provide for interest to accrue at the same rate as provided for in the Charterparties, and the Owners are entitled to this.

Overall Conclusions

149. In summary, therefore, I reject the Defendants' defence based on the 'General Agreement', and Guarantors' defences under the Guarantees.

150. Charterers are liable under the Kailash Charterparty to MT Kailash for an amount of US$ 29,994,886.28, together with contractual interest. Charterers are liable under the Ben Nevis Charterparty to OCSL for US$ 46,554,735.50 together with contractual interest.

151. Guarantors are liable to OCSL under the Ben Nevis Guarantee for US$ 7.5 million, together with contractual interest; and Guarantors are liable to MT Kailash for US$ 6 million under the Kailash Guarantee, together with contractual interest.

152. I trust that the parties will be able to agree an order reflecting the conclusions expressed in this judgment.