JUDGMENT : Mr Justice Colman : Commercial Court. 14th July 2006

Introduction

1. Ullises Shipping Corporation ("Owners") were owners of a tanker called the Greek Fighter which in December 2001 was under time charter to Fal Shipping Company Limited ("Fal"). This is a claim by Owners against Fal for damages for breach of that time charter or alternatively for an indemnity in respect of their losses. The basis of the claim is that in December 2001 the vessel and its cargo were detained by the Coastguard of the United Arab Emirates ("UAE") at Khorfakkan and, having been under detention, the vessel was then confiscated by the UAE authorities and sold at public auction on 12 March 2003. The detention and subsequent confiscation and sale of the vessel and its cargo were said by the UAE authorities to be justified by the fact that the vessel had on board oil of Iraqi origin which Fal and/or its holding company, Fal Oil Company, were in the course of attempting to smuggle or deal with in contravention of the UN Sanctions then applicable to Iraq. Owners claim US$3,761,180 in respect of the loss of the vessel. They further claim a total of US$2,539,256 for (i) unpaid hire and (ii) in respect of the amount by which payment of hire was reduced under agreements made between Owners and Fal on 17 April 2002 ("the First Hire Agreement") and in July 2002 ("the Second Hire Agreement") together with various fees and disbursements of Hill Taylor Dickinson ("HTD") in Dubai (AED 674,183.30) and Piraeus (US$5,000) and of Gulf Agency Company, Owners' port agents in UAE (US$28,393.07).

2. Fal were using the vessel as an oil storage facility at anchor off Khorfakkan. They have consistently denied that they caused any Iraqi oil to be transferred to the vessel in breach of the United Nations prohibitions. During the period of detention of the vessel they pursued a number of claims in the UAE courts designed to bring about the release of the cargo. Owners, although they did not bring court proceedings in UAE, also attempted by negotiation to persuade the UAE authorities to release their vessel. They too challenged the Coastguard's allegations that Fal had transferred Iraqi oil to the vessel. However, by the time they commenced these proceedings in July 2003, Owners had taken the view on the evidence then available to them that at least part of the cargo transferred into the vessel by Fal was of Iraqi origin and was being unlawfully dealt with by Fal in contravention of the UN embargo and Oil for Food Programme and of UAE law. Whether the oil transferred into the vessel by Fal was indeed of Iraqi origin thus became the central issue in the case.

3. Owners further advance an alternative case. They submit that, even if Fal never illegally transferred Iraqi oil into this vessel, their other oil movements involving other vessels, both before and after the Coastguard first detained the vessel in December 2001, were such as to demonstrate or at least to arouse a justifiable suspicion on the part of the UAE authorities and the UN Maritime Intervention Force ("MIF") that Fal was involved in smuggling Iraqi oil. In this connection Owners say that Fal demonstrated an elaborate exercise in deception designed to give the appearance of innocence, including their conduct in commencing the various proceedings in the UAE courts and that they created an entirely fictitious transaction apparently involving their introducing on board the vessel quantities of oil acquired by a company called Palatex which was said to have purchased the oil at public auction in UAE. This transaction further involved the blending of the oil emanating from Palatex with oil which Fal had already transferred to the vessel. Fal does not admit that the Palatex cargo originated in Iraq. It goes no further than adducing evidence that Palatex had acquired that oil at public auction in UAE. It does not challenge the proposition that there would be a high probability that oil sold at public auction would have been confiscated by the UAE authorities because, having originated in Iraq, it was being smuggled in breach of the Oil for Food Programme. It will be necessary to consider later in this judgment whether the Palatex cargo or the underlying transaction ever existed. Owners' case is that Fal invented the transaction and the cargo transfer to the vessel in order to cover themselves against a finding that part of the cargo on board the vessel originated in Iraq and that it was aware of that origin. It is said that by ascribing the origin to the public auction with Palatex as purchaser and by introducing the blending operation, Fal's object was to provide itself with cover in case it should be suggestion that it was complicit in storing and then exporting Iraqi oil.

4. The Palatex cargo forms the basis of only one of a very large number of allegations advanced by Owners that Fal have presented bogus evidence to the MIF and in proceedings in the UAE courts and in these proceedings to cover up its true conduct in dealing in contraband cargo. Indeed, Owners have challenged the authenticity of a total of no less than 57 separate documents disclosed by Fal. These challenges have presented the court with unique problems of trial management and with difficult issues of evidential analysis.

5. It will be necessary to investigate Owners' allegations in some detail later in this judgment. This process unavoidably involves matters of considerable complexity.

6. The contractual basis of Owners' claim can be outlined as follows.

7. The time charter which was entered into on 23 January 2001 incorporated the Shelltime 4 form and was for an initial period of 3 months with charterers' option to extend for one or two additional periods of 4 months. In the event it was extended until 30 January 2002.

8. The brokers' fixture message of 18 January 2001 to Fal confirmed that the vessel was to be fixed on
"3 MONTHS TIMECHARTER FOR TRADING ALWAYS AFLOAT WITHIN IWL VIA SAFE PORTS/ANCHORAGES AG/GULK OF OMAN AREA EXCL. IRAN/IRAQ WITH LAWFUL CARGOES OF FUEL OIL/CRUDE OIL"

9. This was subsequently accepted. The fixture also incorporated the terms, conditions and exceptions of an immediately preceding time charter of the vessel between the same parties dated 16 March 2000. That time charter in turn incorporated the Shelltime 4 form which included the following:

"Owners agree to let and Charterers agree to hire the vessel for a period of ……. commencing from the time and date of delivery of the vessel for the purpose of carrying all lawful merchandise (subject always to Clause 28) including in particular….."

10. Owners say that on various occasions during the period from October to December 2001 Fal caused various cargoes of smuggled Iraqi oil to be loaded on board the vessel in breach of UAE law and that the loading of these unlawful cargoes caused the detention and ultimate sale of the vessel.

11. Clause 28 of Shelltime 4 provided: *"No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."*

12. Owners say that, even if the cargoes did not include oil that was contraband in the sense that it was being moved unlawfully in relation to the Oil for Food Programme, it exposed the vessel to seizure because the Palatex cargo was Iraqi origin oil but Fal was unable to demonstrate its legitimacy. In particular, its documents in relation to the previous sale of that oil at auction were forgeries and, even if it had been sold at auction, it was illegal to blend that oil with non-Iraqi oil. Further, Fal's cargoes were or were about to be transferred into the vessel from vessels called Gulf Prince and Julia II. There were suspicious features of those vessels, their cargoes and the circumstances in which they came alongside Owners' vessel. Fal did not have a convincing and coherent set of unforged documents capable of establishing the origin of their cargoes and its submissions to the Courts of Khorfakken and Abu Dhabi were therefore suspicious to the Coastguard. Further, some of Fal's previous cargo operations were such as to arouse the suspicions of the UAE authorities. Accordingly, in view of this background, there were characteristics of the cargo - namely its association with Fal – which presented a real risk of seizure by the UAE authorities. Consequently, even if the cargo on board at the time of seizure was not Iraqi, the fact that previous cargoes of Fal had been Iraqi and that Fal had made false submissions in court caused the loading of the cargoes in this case to present a risk of seizure. As to the burden of proof, since the UAE authorities claimed that it was the presence of Fal's cargo on board which brought about the seizure, the evidential burden of proving that the arrest of the vessel was in reality unrelated to that cargo rests on Fal which is in possession of knowledge of far more of the relevant facts than Owners.

13. Clause 13(a) and (b) of Shelltime 4 provided:

"(a) The master (although appointed by Owners) shall be under the orders and direction of Charterers as regards employment of the vessel, agency and other arrangements, and shall sign bills of lading as Charterers or their agents may direct (subject always to Clause 35(a) and 40) without prejudice to this charter. Charterers hereby indemnify Owners against all consequences or liabilities that may arise.

i) from signing bills of lading in accordance with the directions of Charterers or their agents, to the extent that the terms of such bills of lading fail to conform to the requirements of this charter, or (except as provided in Clause 13(b)) from the master otherwise complying with Charterers' or their agents' orders:

ii) from any irregularities in papers supplied by Charterers or their agents.

b) Notwithstanding the foregoing. Owners shall not be obliged to comply with any orders from Charterers to discharge all or part of the cargo

i) At any place other than that shown on the bill of lading and/or

ii) Without presentation of an original bill of lading unless they have received from Charterers both written confirmation of such orders and an indemnity in a form acceptable to Owners."

14. Further, as Fal accepted, the charter was subject to the usual implied indemnity against the consequences of complying with charterers' orders unless the loss was caused by some subsequent intervening event or arose from a risk which under the charterparty the Owner had agreed to bear. For that purpose, it was necessary only to show that the chain of causation between the charterers' orders and seizure was unbroken and "directness" of causation was unnecessary.

15. Owners submit that the orders to load the cargo caused the seizure and eventual sale of their vessel, whether or not that cargo included unlawfully traded Iraqi oil. Their primary case is that the cargo was wholly or partly Iraqi oil and it consequently attracted suspicion, whether or not it was in truth contraband. Further, part of the cargo which Fal caused to be loaded on the vessel came from two vessels the Gulf Prince and the Julia II, which were suspected of smuggling as shown by their subsequent arrest, confiscation and sale. The instructions by Fal that oil should be transferred into Owners' vessel from those two vessels and the commencement of that transfer were the immediate reason for the arrest of that vessel by the Coastguard.

16. Further, the nature of the cargo which Fal ordered the vessel to load was such that its untainted origins could not be effectively proved or documented and Fal was driven to falsifying documents in order to prove its innocence.

17. Even if the authorities in UAE victimised Fal without any proof of unlawfulness with regard to that cargo, or any other cargo, the clause 13(a) indemnity or the implied indemnity were still engaged, because it was the orders to load the cargo which caused Owners' loss of the vessel. In this connection, Owners strongly challenge the charterers' submission that, if the cargo were lawful, the indemnity could not be engaged. They say that, so confined, the indemnity would be in effect no more than an unlawful cargo term. They rely on ***The Island Archon*** [1994] 2 Lloyd's Rep 227 and contend that unjustifiable conduct by the Iraqi authorities would not necessarily break the chain of causation. In particular, if those authorities raised objection in advance to particular cargo being loaded on the vessel and those objections were ignored by the charterers, the indemnity would be engaged. Nor did it make any difference that the Iraqi authorities would not necessarily subject the vessel to

false accusations, but only did that sort of thing on a random basis. In both cases it was the order to the vessel to load in a port where there was a substantial risk of intervention by the authorities which caused an indemnifiable loss. In this connection, Owners refute Fal's reliance on clause 27(a) of the Charterparty. This provided:

"Further, neither the vessel, her master or Owners, nor Charterers shall, unless otherwise in this charter expressly provided, be liable for any loss or damage or delay or failure in performance hereunder arising or resulting from act of God, act of war, seizure under legal process, quarantine restrictions, strikes, lock-outs, riots, restraints of labour, civil commotions or arrest or restraint of princes, rulers or people."

18. They argue that under Shelltime 4 it was "otherwise … expressly provided" by clause 13(a) set out above.

19. In the alternative, Owners argue that the charterparty included a safe port warranty by reason of the express terms in the exchange of fax messages between the parties' representatives on 20 January 2001 as follows:

Charterers proposed:

"TRADING AREA: TRADING ALWAYS AFLOAT WITHIN IWL VIA SAFE PORTS/ANCHORAGES ARABIAN GULF/CHINA RANGE EXCLUDING IRAQ AS LONG AS SANCTIONS IN FORCE, INCLUDING RED SEA ALWAYS EXCLUDING AUSTRALIA AND NEW ZEALAND."

which Owners accepted.

20. Owners argue that, contrary to Fal's submission, the addendum agreed on 16 February 2001 by which it was provided:

"Vessel only to perform storage operations in the Khorfakkan area."

Did not displace the express safe port warranty. Further, the express safe port warranty superseded the qualified safe port warranty in clause 4 of Shelltime 4 which provided:

"Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, anchorages, submarine lines, alongside vessels or lighters, and other locations including locations at sea) where she can safely lie always afloat. Notwithstanding anything contained in this or any other clause of this charters. Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."

21. Owners submit that there was a breach of the express safe port warranty because:

i) the actions of the UAE Coastguard were unlawful under UAE law;

ii) the UAE courts should therefore have been able to order the release of the vessel;

iii) however, the failure of the courts to do so was due to their being subject to the decisions of Sheikh Hamdan, the Minister of Foreign Affairs, the son of Sheikh Zayed, the President of the UAE, and to the decision of Sheikh Hamdan to have the vessel arrested and subsequently, when Fal had commenced proceedings to obtain release of its cargo, to his causing there to be issued a decree – Decree 41/2002 – the purpose of which was to deprive the courts of jurisdiction over allegations of violation of the UN resolutions creating an Iraqi oil embargo and transfer to a ministerial committee under the chairmanship of Sheikh Hamden all such jurisdiction and which decree was reinforced by a letter dated 6 October 2002 from Sheikh Hamdan to the Minister of Justice of the UAE stating that the courts should be instructed not to accept and register any cases regarding importation of smuggled Iraqi oil as that fell outside their jurisdiction.

iv) the element of unsafety was therefore the inability of the judicial system to give adequate relief where a vessel was unlawfully detained by the Executive.

22. As to this submission, the lack of facilities for obtaining release of a vessel was not an abnormal occurrence but an intrinsic feature of the UAE judicial system. Further, the fact that all ports in UAE were similarly affected could not, contrary to Fal's submission, involve that Khorfakkan could not be unsafe: there was no general principle that if all the ports in one country were subject to political or legal unsafety no single one of them would be an unsafe port.

23. It is to be noted that Owners' unsafe port point operates even if Fal was completely innocent of shipping contraband oil.

24. Owners further submit that Fal was in breach of its re-delivery obligation under the time charter:

"Redelivery I safe anchorage Khorfakkan free of cargo"

25. The vessel was never redelivered. She was lost on 12 March 2003 when the UAE Ministry of Finance sold her at auction. The charterparty had not been frustrated, as submitted by Fal, as at the date when the obligation to redeliver first arose, namely 30 January 2002, the vessel being under arrest at Abu Dhabi and could not be redelivered in the same good order and condition and free of arrest as when delivered or at Khorfakkan. The notification received from Fal on 25 November 2002 was not an effective notice of redelivery, as Fal contended, because the vessel was on that date incapable of being redelivered in the same good order and was not at Khorfakkan.

26. Owners' claim for unpaid hire is calculated up to the date of sale of the vessel at auction on 12 March 2003, that being the date on which she was lost for the purposes of clause 20 of the charterparty:

"Should the vessel be lost, this charter shall terminate and hire shall cease at noon on the day of her loss."

27. Alternatively, on 25 November 2002, Mr Ramzy Zakaria, in-house, legal adviser to Fal, wrote to Owners' solicitors, Hill Taylor Dickinson, Dubai ("HTD") asserting that Fal was not liable for hire from the first date of seizure of the vessel – 17 December 2001. Owners do not accept that this message was an informal redelivery of the vessel, but, if it did have that effect, they contend that hire is to be calculated up to the date of that letter – 25 November 2002.

28. If hire remains due, it runs from 25 April 2002 to 12 March 2003 and totals US$1,296,000, being the difference between that which became payable and was paid under the First Hire Agreement of 17 April 2002 and the Second Hire Agreement of July 2002 and the charter rate of hire.

29. Owners claim damages in respect of the loss of their vessel, expenses and, if necessary, loss of hire.

30. As to loss of the vessel, Owners rely on the evidence of their expert, Mr Kingham, who put the market value on 14 March 2002 at US$200 per lightweight ton, delivered at Alang. Making allowance for the cost of commission to the brokers, at about 2 per cent the price payable to owners net of commission would be $3,788,680 and the vessel would have cost $17,500. Accordingly Owners' net loss would be US$3,761,180. If the vessel would have needed to purchase bunkers to get from the Gulf to Alang, the cost would have to be deducted from the otherwise recoverable damages. However, it appeared probable that the vessel already had sufficient bunkers on board for that voyage.

31. Fal strongly denies that it was or ever had been in any way concerned with shipping contraband Iraqi oil. The foundation of its case is that there was absolutely no substance in the coastguard's claim. In particular, it contends that none of the laboratory tests demonstrates the presence of Iraqi oil and that in particular the ITS Caleb Brett survey report had been falsified and did not evidence the carriage of contraband.

32. The Palatex cargo, even if it did originate in Iraq, was not illegal because it had been sold at auction and was being blended and stored for the purchaser. In any event, it played no part in the coastguard's decision to detain the vessel. Nor did the presence of the Gulf Prince or The Julia II.

33. Although the analysis of the cargo on board those vessels was consistent with Iraqi origin, there was no other evidence that the oil was indeed of Iraqi origin.

34. Fal's case is that the coastguard simply had no legal basis for detaining the vessel or its cargo.

35. Fal further submits that Owners failed to mitigate their loss by failing to pursue proceedings in the local courts to obtain the release of the vessel. Owners' decision-taker was in reality their solicitor, Mr Edward Newitt of Hill Taylor Dickinson, Dubai. They alone could obtain the release of their own vessel, not Fal, yet they took an unduly passive line with the Coastguard and with MOFA and were generally of no assistance to Fal and indeed withheld from them relevant information. Owners were content merely to keep in formal touch with the Coastguard rather than to press MOFA, as they should have done because it would be at MOFA that the relevant decisions as to the fate of the vessel would be taken. Owners could have negotiated a deal with the coastguard in August 2002 whereby the vessel would have been released against payment by Owners of the coastguard expenses of the detention, yet Owners failed to conclude the deal. Owners should have commenced proceedings for the release of the vessel by reliance on the forged ITS Caleb Brett report. Such proceedings would not have been futile as submitted by Owners – on the grounds of Federal Decree 41/2002. That decree was never published and therefore was never brought into effect. Even if it had been published it would have been unconstitutional as an ouster of the jurisdiction of the courts. It had never been sanctioned by the Supreme Council of the UAE. The suggestion advanced by Owners' expert, on UAE law, Mr Ian Edge, that, in the face of that decree and of the letter from Sheikh Hamdan of 6 October 2002 to the Minister of Justice, any proceedings would have been stayed was wrong, as demonstrated by the continuance of the proceedings in Fal's action 204/2002 against the coastguard in the Abu Dhabi Federal Court of First Instance in which the court appeared to be continuing to hear evidence after October 2002 and since that decree was published had appointed a committee of experts for the purpose of finding facts with regard to what the analyses showed and with regard to the measurement of the value of the confiscated cargo.

36. Fal submits that the charter was frustrated by the detention of the vessel. The vessel was unable to perform any of the services required from the end of the charter period at the end of January 2002 until it was eventually sold at auction. Further the mere seizure of the oil would prevent performance of the charter. While accepting that if Fal's conduct caused the detention of the vessel there could be self-induced frustration, it is submitted that mere suspicion of smuggling or hostility on the part of the coastguard would not be enough unless Owners established that such suspicion or hostility by the coastguard was caused by Fal's trading activities.

37. In support of the proposition that the charter was frustrated Fal say that the detention of the vessel on false grounds for over a year followed by its ultimate sale at public auction was a situation well outside the contemplation of the contract and one that was not catered for by the off-hire clause.

38. Further, once the contract had been frustrated the views of the parties were irrelevant to the effect that any representation by Fal that the contract was still alive was irrelevant. Fal made no representation that the contract was not frustrated and, even if they had done so, that would not have founded an estoppel, as held by Robert Goff J. in ***BP v. Bunker Hunt (No.2)*** [1979] 1 WLR 783.

39. Fal submit in the alternative that if the charter was not frustrated earlier, it was frustrated by the sale of the vessel.

40. Fal submit that, if the charter was not frustrated by the detention of the vessel, it was off-hire and all hire overpaid is recoverable on the basis of a failure of consideration. It relies on clause 21(a)(v) of the charter which provides as follows:

"Clause 21(a) of the charterparty provides: 'On each and every occasion that there is loss of time (whether by way of interruption in the vessel's service, or from reduction in the vessel's performance, or in any other manner) … (v) due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulation by the vessel, the vessel's owners, or Owners (unless brought about by the act or neglect of Charterers); then … the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced …"

41. Fal's case is that there was a loss of time by way of interruption of the vessel's service due to the detention of the vessel by authorities abroad attributable to legal action against the vessel. They further invite rejection of Owners' suggestion that the detention was not attributable to legal action against the vessel within the meaning of the off-hire clause but to administrative action against the charterers as placing too narrow a meaning on that term.

42. It is common ground that if the detention of the vessel was justified on the grounds that the charterers had placed contraband oil on board, that would have the effect of disapplying the off-hire clause because the detention would then have been "brought about by the act or neglect of the charterers". However, Owners go further and submit that even if there were no lawful cargo on board, since the detention of the vessel was initially caused by the fact that Fal had loaded cargo and its continuation by Fal's inability to establish with valid documents that such cargo was lawful, the detention was still brought about by the act or neglect of the charterers. Owners also advance an alternative defence to the off-hire claim by contending that Fal had agreed by Capt Kyrimis's message of 15 January 2002 to continue to pay hire at the reduced rate of US$9500 per day, that Owners had relied on that representation and accordingly Fal could not go back on it. Further, once the First Hire Agreement had been entered into on 17 April 2002 there could be no question of the vessel remaining off-hire, even if it had been off-hire up to that time. Owners further claim back any such off-hire by way of damages for Fal's breaches of the charter.

43. Fal submit that it made no relevant representations by the 15 January 2002 message or by the hire agreements, such as would be capable of founding an estoppel and in any event Owners have not proved that they acted to their detriment by forbearing to sue. They are still able to sue for the hire now, just as if there had been no forbearance.

44. Alternatively, the hire agreements themselves were entered into on the mistaken assumption that the charter which they purported to vary had not already been frustrated. As it had already been frustrated by the detention of the vessel, those hire agreements were void for mutual mistake.

45. Accordingly, Fal claims back all the hire paid since the commencement of the detention of the vessel.

46. The hire agreements were not, as Owners suggested, compromise agreements, because at the time when they were entered into Owners had made no claim for unpaid hire.

The Facts

47. In the following chronology I shall set out the salient facts and evidence relating to what is the main issue in this case, namely what caused the detention of the vessel and its ultimate sale.

48. The first charter of the vessel was entered into on 16 March 2000, at a rate of hire of US$6,500 pd.

49. In April 2000 a vessel called Fal XVIII owned by Fal was detained by United States armed forces in the course of a laden voyage from Lavan, Iran, to Khorfakkan. The officer of the US Navy Inspection Team recorded in the vessel's log book that papers concerning the vessel and its cargo were found to be in order but that suspicions had been aroused which justified the search. The commanding officer of the US visiting ship directed that the Fal XVIII "be detained for the following reason: suspicious cargo".

50. Fal then commenced proceedings (claim 318/2000) in the Abu Dhabi Court of First Instance against the legal representative of the United Nations Allied International Forces in the Gulf and the legal representative of the United States Armed Forces in the Gulf Area. The claim document alleged that the vessel had loaded a full cargo of fuel oil produced from Lavan Refinery into empty tanks and the technical specifications showed that it was not Iraqi oil. Fal claimed delivery up of the vessel and its cargo and US2.5 million, being its loss due to a fall in the market value of the cargo.

51. On 16 May 2000 the Abu Dhabi Court decided that the vessel should be released from detention and allowed to sail. By its amended pleading served after 21 May 2000, the date of the vessel's release from detention, Fal relied on two analyses of the cargo-one by ABS and the other by Saybolt – which were similar to each other. However, according to a report dated 17 April 2000 from the General Manager of Saybolt, Abu Dhabi to Fal who compared those analysis results with results obtained from samples from a cargo of fuel oil of Iraqi origin, there was nothing to suggest that the two samples came from crude oil of the same origin. According to Dr Ramzy Zakaria, Legal Adviser to Fal, whose evidence on this part of the case I accept, Fal sent the reports of ABS and Saybolt to the US Navy with a request that the vessel be released. When this request was refused, Fal pursued its

proceedings. The two defendants challenged the jurisdiction over them of the Abu Dhabi court but did not oppose the release of the Fal XVIII from detention.

52. I find that there is no evidence before this court which suggests that the US Navy had any justification for detaining the Fal XVIII or for concluding that its cargo was suspicious.

53. On 23 January 2001 Fal entered into a new charter of the Greek Fighter with Owners at an increased rate of hire (US$12,250 pd, to be increased to US$13,250 if the Shell Terminal gave its approval to loading). Delivery under the new charter was effected on 30 January 2001. By Addendum No.2 to the charter entered into on 17 February 2001 it was provided as follows:

"IT IS HEREBY MUTUALLY AGREED BETWEEN OWNERS, ULLISES SHIPPING CORP OF LIBERIA AND CHARTERERS, FAL SHIPPING CO LTD, SHARJAH, THAT THE VESSEL IS FIXED IN DIRECT CONTINUATION FROM COMPLETION OF THE FIRST 3 MONTH PERIOD IE. FROM 30 APRIL 2001, 0300 HRS FOR A FURTHER PERIOD OF 6 MONTHS TIMECHARTER, 10 DAYS MORE OR LESS AT CHRTRS OPTION. VESSEL ONLY TO PERFORM STORAGE OPERATIONS IN THE KHORFAKKAN AREA."

54. On 30 September 2001 Addendum No. 2 was entered into which provided for a reduced hire of US$9500 pd. At the same time Fal exercised its option to extend the charter until 30 January 2002.

55. On 19 November 2001 Mina Zayed Ports Authority announced the sale of a total of 27,616 mt of fuel oil and 170 tons of gas oil by auction. The terms of the invitation to bid required that the buyer was to lift the quantities purchased within three days from the date of sale, otherwise the buyer's immediate down payment of 20 per cent would be forfeited. Further, the winning bidder was to export the consignment out of the UAE and was not allowed to put the oil up for re-sale within the local market and the buyer would bear all the consequences and responsibility for any prospective damages arising from violation of that requirement.

56. I find that it would be known by local oil traders reading this invitation to bid that the oil referred to had probably been confiscated by the UAE authorities as contraband Iraqi oil.

57. On 20 November 2001 the fuel oil the subject of the auction was sold to Palatex International. There is no evidence that Fal controlled this entity.

58. On 24 November 2001 Palatex International apparently issued a "letter of authorisation" which stated, as translated from Arabic:

"We Palatex International Abu Dhabi authorise FAL Oil Company Sharjah to receive quantity of 17,582,78 MT of fuel oil purchased through the public auction at the Port Authority, Mina Zayed, Abu Dhabi on 20-11/2001 which has been loaded on board the vessels JAGUAR 1, JAD DANIEL, NAVSTAR and FAIR MIKE for the same to be stored on board the vessel GREEK FIGHTER and to be blended commercially and exported for our accounts and to settle costs following the sale and receipt of the proceeds by FAL Oil Sharjah."

59. The reference to the oil having already been loaded was an error, as appears from a document dated 22 December 2001 issued by the Mina Zayed Seaport Authority which sets out the dates of lading of the four vessels mentioned in the letter of authorisation dated 24 November, the earliest of which is 28 November. Accordingly, that authorisation ought to have to have referred to fuel that "will have been loaded" on the four vessels.

60. A "contract of storage and authorisation to sell" dated 22 November 2001 had apparently been entered into by Palatex and Fal Oil Co Ltd under which Fal Oil agreed to accept for storage 16,000 mt of fuel oil, stated in it to be part of the quantity of fuel oil purchased in the public auction by Palatex (18000 mt). It was recited that Fal had the capability to store the oil on the Greek Fighter used as a floating store off Khorfakkan. The transfer of the oil to the Greek Fighter was to be done by tankers nominated by Palatex which was to bear all expenses. The oil was to remain the property of Palatex. Clause 6 provided:

"Sixth: The First Party authorises the Second Party to export the quantity belonging to the First Party whether in its current condition or after mixing with oil products belonging to the Second Party and according to the requirements and specifications of the Second party's customers."

61. Clauses 7 and 8 provided that Fal was obliged to account to Palatex for the proceeds of resale of the fuel - for export outside the country – whether mixed with Fal's own fuel oil or sold unblended after deduction of Fal's storage charges. Further, Palatex agreed to issue a written authorisation in favour of Fal authorising it to receive the purchased fuel oil from tankers and to export it for the benefit of Palatex. The document referred to at paragraph 68 above is that letter of authorisation.

62. I refer to Palatex having "apparently" entered into that agreement and having "apparently" issued the letter of authorisation because Owners submit that the Palatex transaction was a sham designed by Fal to provide an innocent explanation for the presence of some oil of Iraqi origin on board the Greek Fighter.

63. It is to be observed that the certificate issued by the Mina Zayed Port Authority on 22 December 2001 refers to the same four vessels having lifted the fuel oil purchased at auction by Palatex as those referred to in the letter of authorisation issued by Palatex on 24 November 2001. Of these vessels the Jaguar 1 belonged to Fal but the others did not. The Fair Mike did not in the event discharge into the Greek Fighter. Fal have not disclosed any relevant documents relating to the Jaguar 1. It says that none could be found in the time available, Owners' case

that no Palatex cargo was loaded on board only having emerged for the first time at the start of the trial. Fal says it has no documents for these transfers.

64. Fal's case is that Jaguar 1, Jad Daniel and Navstar duly delivered Palatex's fuel oil to the Greek Fighter. That fuel was then blended with other oil on board and exported from the Greek Fighter by a vessel called Mint Prosperity, leaving 719 mt remaining on board.

65. According to the witness statement of Ammar Zakaria, commercial manager of Palatex, who, due to ill health, was unable to attend the trial, Palatex did indeed enter into the storage contract with Fal to which I have referred. Further, Palatex specifically asked the Port Authority if the use of the cargo purchased at auction as part of an exported blended fuel oil would be permissible under the terms of the auction sale and the Port Authority confirmed that this would be perfectly all right. Dr Zakaria further explained that Palatex sold off 2000 mt of the cargo purchased at auction to a disappointed bidder and therefore did not require to stem a fourth vessel – the Fair Mike – for the purposes of transfer to the Greek Fighter. The total cargo delivered to the Greek Fighter by the other three vessels was 15,744 mt. According to the Mina Zayed Port Authority certificate of 22 December 2001, the Jad Daniel lifted 5460.892 mt of the auctioned cargo on 28 November 2001, the Navstar 2703.763 mt on 30 November and the Jaguar 1 7579.346 mt on 4 December 2001.

66. Owners submit that the evidence leads to the inferences that the Jaguar 1 and the Navstar never transferred any cargo to the Greek Fighter and that Jad Daniel did not transfer 5460.892 mt of fuel oil to that vessel but a different cargo and a different quantity. The foundations for this submission are as follows:

i) Although there was an internal transfer receipt ("ITR") dated 4 December 2001 which on the face of it evidenced the delivery from Jaguar 1 to Greek Fighter of Light Fuel Oil of 09550 density, according to the evidence of Cap Kyrimis, chartering manager of Fal, Jaguar 1, although owned by Fal, had not been chartered to Palatex.

ii) By 6 December 2001, according to the evidence of Mr Das of Oil Lab Marine Surveyors Co Ltd, the Jaguar 1 was involved in ship to ship transfer alongside another vessel Sea Pride I.

iii) There were two separate ITRs for the Jaguar 1. Capt Eldin explained this in cross-examination by saying that at the time when he signed the first one No. 0760 dated 4 December 2001 on behalf of Fal the exact cargo quantity had yet to be calculated form the ullage measurements and density and so was left blank. There was then to be a second and final ITR showing the calculated tonnage transferred with the density obtained from a sample analysis carried out. That was the ITR No. 7903 dated 6 December 2001. That was apparently signed by the Fal representative on board, Mr Datinguinoo, and was stamped with the stamp of Jaguar 1 but signed over the stamp by someone who was not the master. It showed a quantity of 7579.346 mt of fuel oil with a density of 0.9490. That last density was identical to that on ITR 7902 apparently issued by Fal to the Jad Daniel and apparently also signed by Mr Datinguinoo and ITR 7901 apparently issued by Fal to the master of the Navstar. This could not be explained by Capt Eldin except to say that it was all the same fuel oil. He was also unable to explain that while the log books of the Greek Fighter referred to the Jaguar 2 having come alongside on 3 December 2001 and having loaded cargo from the Greek Fighter, there was no reference in them whatever to the Jaguar 1 having discharged into the Greek Fighter. That the Jaguar 1 was not at Khorfakkan on the date of the ITR dated 4 December 2001 is further suggested by a certificate issued at the request of Fal in June 2005 by the UAE Seaports Authority at Port Khalid which states that the Jaguar 1 was anchored off Khorfakkan Port limit from 1500 on 5 December to 0950 on 7 December.

iv) There is an ITR No. 7902 dated 2 December 2001 apparently evidencing a transfer to the Greek Fighter of 5460.892 mt fuel oil to the Jad Daniel. It appears to be signed on behalf of Fal by Mr Datinguinoo. It also shows a density of 0.9490. However, a certificate of quantity issued by GeoChem laboratory, Dubai, shows an identical quantity transferred but a density of 0.9265. A manuscript schedule disclosed by Fal and in its Capt Velis's handwriting shows that on 1 December the Jad Daniel transferred to Greek Fighter 12,382 mt. According to the log book, the Jad Daniel started transferring cargo into the Greek Fighter on 1 December 2001, continuing with interruptions on 2nd and completing at 0900 on 3 December.

v) Dr Audrey Giles was called as a handwriting expert appointed in the course of the trial upon the direction of the court. She produced two reports. In the Report dated 13 July 2005 she was asked to compare the signatures of Mr Datinguinoo on five ITR's with undisputed examples of his signature. The five ITRs included No. 7901 (Navstar) dated 3 December 2001, 7902 (Jad Daniel) dated 2 December 2001 and Jaguar 1 dated 6 December 2001.

vi) Dr Giles concluded that the signatures of Mr Datinguinoo were so similar on the three ITRs in question, as well as on two further ITR's examined that there was conclusive evidence that they had not been signed independently by Mr Datinguinoo. At least four of the five copies of ITRs bore montages of the signature. Those relating to the three vessels under discussion were all montages. In other words, a genuine signature had been copied and superimposed on the pre-existing ITR copy. When it was suggested to Mr Datinguinoo in cross-examination that he never signed any of the ITRs and that he could not explain how his signature came to be there, he agreed.

67. Owners further draw attention to Dr Giles's conclusions in relation to two other ITRs not involving the three vessels said to have discharged Palatex cargo, namely No. 7904 dated 12 November 2001 in respect of the Gulf Discovery and No. 7906 dated 7 December 2001 in respect of the Phaeton. She observes that four of the ITRs – those relating to the Navstar, Jad Daniel, Jaguar 1 and Gulf Discovery – bore signatures less complete than that

on the Phaeton ITR dated 7 December 2001 and might have been copies of that signature to which they were all identical. This observation is of some significance. The evidence established that these ITRs would have been torn off a sequentially numbered pad. Consequently, the assumption would be that, since on the evidence the pad was kept by Fal on board the Greek Fighter, the ITRs would be filled out and signed sequentially. However, of the six ITRs put before Dr Giles, No.7901 is dated 3 December, No. 7902 is dated 2 December, No. 7903 is dated 6 December, No. 7904 is dated 12 November and No. 7906 is dated 7 December. If the first four signatures are copies of the last and the last was made on 7 December, all the others must have been made on or after 7 December. Further, they could not have been detached from the pad in the same order that cargo operations were completed because the dates and page numbers are out of sequence. Since the evidence was that an ITR would be issued to the master of a delivery vessel immediately after completion of discharge, the disparity between the sequence of dates on the ITRs and that of the page numbers cannot be explained by pre-preparation of pages. If the signature on the earlier four by date were copied from the signature on No. 7906, the dates on the four cannot be correct.

68. It was suggested by Mr Davey in the course of his final submissions on behalf of Fal that a possible explanation for the apparently identical characteristics of the signatures on the ITRs was that, based on the originals of the ITRs for the Navstar and the Jad Daniel, obtained temporarily from the Khorfakkan court file, the signatures were not the result of the montage but of their having come through an earlier ITR as a result of the receipts being carbons. Mr Datingiunoo must have signed the top ITR of a pile of ITRs which, having already been removed from the pad, were out of date order and his signature must have been transmitted down through the pile. I therefore directed that Dr Giles should be asked to prepare a further report with regard to this possibility. By her second report dated 1 August 2005 she concluded by the method of microscopic examination of the originals of ITR 7901 and 7902 that the signature of Mr Datinguinoo on both had been produced by ink-jet printing – an image of the signature and associated handwriting having been scanned from another document and then ink-jet printed on to each of the original ITRs. Further, having regard to the fact that images produced in carbonating systems using either a chemical "No Carbon Required" system or carbon paper, show diminishing clarity as one went down the pile and that it would be most unusual for a carbon copy signature to be clearly reproduced five documents down from that bearing the original writing, the appearance of the signatures and associated handwriting on the other three ITRs – Nos. 7904, 7903 and 7906 - indicated that these were unlikely to be carbon copy images.

69. Reference to the Greek Fighter's log books shows the following:

i) there is no entry recording delivery of oil from the Gulf Discovery on 12 November 2001 (ITR No. 7904);

ii) there are entries recording delivery of oil from the Jad Daniel on 2 December 2001 (ITR No. 7902), completing at 0900 on 3 December;

iii) there is no record of the Navstar transferring any oil on 3 December 2001 (ITR No. 7901) or at all;

iv) there is no record delivery of the Jaguar 1 discharging into the Greek Fighter on 6 December 2001 (ITR No. 7903) or at all;

v) there are entries recording delivery of oil from Phaeton on 7 December 2001 (ITR No. 7906).

70. In his second witness statement Mr Datinguinoo referred to the fact that the ITR for the Gulf Discovery, although dated long before that for Navstar, Jad Daniel or Jaguar 1, bore a number (7904) following the numbers of the receipts for those other vessels. He stated that Gulf Discovery sailed on completion of discharge without the issue of the ITR and, by the time he left the Greek Fighter on 7 December 2001 to sail on the Fal vessel Mint Prosperity, none had been issued. He therefore drew one up late – on 7 December – and sent it to the Master of the Gulf Discovery to sign and to forward it to Fal's Operations Department. As to the Navstar and Jad Daniel, not being vessels owned or managed by Fal, he would not have issued ITRs. However, he was specifically requested to do so in these two cases by Fal's Operation Department (probably Capt Kokolakis) because Fal would not be receiving any cargo documents from those vessels.

71. It is accepted on behalf of Fal, on the basis of Dr Giles's evidence, that Mr Datinguinoo's signature could not have been written by him on to any of the five ITRs examined by Dr Giles. These included the Gulf Discovery, the Navstar and the Jad Daniel. If his witness statement is true, Mr Datinguinoo must therefore have issued those three ITRs with a concocted signature. Yet he expressly states that ITR 7904 (Gulf Discovery) was *"in fact written and signed*" by him and it is implicitly stated that it was he who issued (and therefore signed) the ITRs for Navstar and Jad Daniel. Yet when he was asked to explain the concocted signatures in cross-examination, he could not do so.

72. In these circumstances, even making every allowance for the fact that the specific forgery point only emerged at the trial, I regard Mr Datinguinoo as a completely unreliable witness. He has either given false evidence in his second witness statement, which was prepared after Owners had already challenged the authenticity of those ITRs, or he knows perfectly well the circumstances in which his signature was concocted and has failed to disclose them.

73. I further find that he personally signed none of the five ITRs examined by Dr Giles and that it is more probable than not that Fal's Operation Department created the five ITRs for purposes other than providing the delivery vessel with evidence of receipt of the oil.

74. That, however, still leaves open the question whether any of those vessels ever did deliver anything, let alone Palatex oil, to the Greek Fighter. Owners submit that these ITRs were concocted for the purposes of legal proceedings to which I shall refer later in this judgment, commenced in the Khorfakkan court and that they were

put in evidence to support Fal's evidence that oil of Iraqi origin derived from the Palatex auction purchase was transferred to the Greek Fighter as an explanation for sample analyses which might suggest that the vessel carried Iraqi oil. The occasion for the addition of Mr Datinguinoo's signature could have been that for some unexplained reason the ITRs were not signed at the outset by Mr Datinguinoo and that when on about 23 December 2001 Fal started collecting the documents needed to prove the origin of the cargo found on board the Greek Fighter at the time of its detention, he was not available to sign, so making it necessary to insert his signature by photocopying. On that date, the Shipping Manager at Fal, Capt Velis, sent a memo to Dr Ramzy Zakaria, the Legal Advisor at Fal, explaining that at the beginning of December Fal had received on board 13040.238 mt from Jaguar 1 and Jad Daniel which was stored in No. 2C tank and Port and Starboard slops, that such quantity was blended to 120 cst and exported leaving about 600 mt remaining on board mixed with other products in No.2C and Port and Starboard slops. "Supporting documents" were enclosed. The letter makes no mention of the Navstar parcel, but the total amount said to have been discharged from the Jaguar 1 and the Jad Daniel corresponds with that derived from the ITRs and that shown against those vessels in the Mina Zayed Seaport Authority dated 22 December 2001 referred to at paragraph 59 above. The memo of 23 December 2001 was over-written with manuscript notes in English – the language in which Capt Velis and Fal communicated – with words to be inserted after the names of the two vessels "light fuel loaded at Abu Dhabi port from the auction". I infer that this is a contemporaneous addition inserted by someone at Fal, probably Dr Zakaria. It is unclear why only two vessels are referred to, there being no reference to the Navstar.

75. In addition to these documents relating to what is said to have been Palatex cargo, there is a certificate of quantity issued by GeoChem of Dubai in respect of the cargo discharged from the Jad Daniel into the Greek Fighter on 3 December. The measurements were verified by an onboard surveyor. It was certified that 5460.892 mt had been discharged into the M2, 5 wings and slop wings of the Greek Fighter. It states that discharging was temporarily stopped. Bunkering vessel Fal IV was given bunkers from 2C while the Jad Daniel's discharging was suspended. The entries in the vessel's log are consistent with this. It is to be observed that the quantity of 5460.892 exactly corresponds with the quantity shown to have been loaded onboard from the Jad Daniel in the Mina Zayed Seaport Authority certificate.

76. On the whole of this evidence I find that:

i) Both of the vessels Jaguar 1 and Jad Daniel discharged into the Greek Fighter the quantity of fuel oil shown in relation to each in the Mina Zayed certificate.

ii) It is unclear why there is no reference to the discharge on to the Greek Fighter of 2703.763 mt from the Navstar in the vessel's logs nor in the memo dated 23 December 2001 from Capt Velis; however, having regard to the fact that the Navstar parcel was included in the Palatex Authorisation of 24 November 2001 and in the Mina Zayed Seaport Authority certificate of 22 December 2001, as well as in the ITR of 3 December 2001, and that such vessel's presence off Khorfakkan on 2 and 3 December 2001 has been certified by reference to specific times of arrival and departure by an anchorage certificate dated 29 June 2005 issued by the Senior Harbour Master of the UAE Seaport Authority, it is more likely than not that it was at least initially intended to discharge the Navstar cargo into the Greek Fighter, since it is most improbable that Fal would have concocted one cargo transhipment but not the other two. There might possibly be an explanation for concocting all three, but not merely the smallest of the group. I do not accept the submission on behalf of Owners that the anchorage certificates were false. It may be that the relevant log entry was inadvertently omitted or that Fal withheld the Navstar cargo but for some unknown reason fabricated the Navstar ITR. Certainly Fal instructed its legal representatives who drafted the statement of claim in proceedings commenced before the Court of First Instance of Khorfakkan on 25 December 2001 that the Navstar cargo had been transhipped to the Greek Fighter. If it were necessary to decide that issue, I would find that the transfer took place, albeit subsequent aggregate tonnage calculations are difficult to reconcile with this extra 2703.673 mt.

iii) It is unclear why the ITR's bore a concocted signature. On balance, however, I infer that the most likely explanation is that at some stage after the detention of the Greek Fighter and its cargo those at Fal considered that Fal's case would be improved if the ITRs were shown to have been signed by Mr Datinguinoo as well as the masters of the three vessels and Mr Datinguinoo could not be available for this purpose, probably because he had to accompany the Minit Prosperity (another Fal ship) to Pakistan from 7 December 2001.

iv) The origin of the cargo transferred to the Greek Fighter from the two vessels and from the Navstar assuming that too was transhipped was that which Palatex had purchased at auction on about 20 November 2001. In this connection, I reject the submission that the Palatex transaction was fictitious. The contemporary documents provide adequate evidence that links the cargoes transferred to the Greek Fighter with the fuel oil acquired by Palatex from the auction. The terms of the contractual arrangements between Fal and Palatex are not, in my judgment, so intrinsically improbable as to be incredible.

77. On 8 December 2001 the Greek Fighter commenced and completed loading from the Mint Prosperity. On the same date the vessel started discharging cycle oil into the Mint Prosperity, that operation being completed on 9 December.

78. On 10 December 2001 the Greek Fighter started loading from the Julia II. Loading was completed and hoses disconnected on the same day.

79. On 11 December 2001 the Gulf Prince berthed alongside the Greek Fighter and commenced discharging fuel oil into the Greek Fighter that morning. After 45 minutes cargo transfer was interrupted due to an operational problem on the Gulf Prince, but was resumed at 15.50. Between 12.40 and 15.50 the Fal XIV was loading a cargo of fuel oil from the Greek Fighter.

80. At 16.00 on 11 December 2001 the Greek Fighter was boarded by officers of the UAE Coastguard. They ordered the Gulf Price, which had just recommenced discharging, to cease discharging and they took samples from the Greek Fighter's No. 2C and Slops Port and Starboard and took possession of all the vessel's statutory certificates. By the time when the Coastguard officers were on board approximately 130 mt of fuel oil had been discharged from the Gulf Prince into the Port and Starboard slop tanks of the Greek Fighter where it had been segregated.

81. Eight samples were taken by the Coastguard that day, as recorded in the delivery order of Akron Trade and Transport, local shipping agents; one from the No. 2 C, one each from the S and P slop tanks, one from Fal XIV, two from Gulf Prince and two from Julia II. The bottles were not sealed and no samples were provided to the master. These were delivered by Akron to Intertek Testing Services, Caleb Brett with a request to analyse for density, viscosity and sulphur. The results were received back by fax on the same day. That report was numbered 14948/01. The fax simply listed readings for each of the three properties for each of the eight samples. It did not indicate the origin of the fuel oil. The principal of Akron, Mr Bakhos, claimed in May 2002 that Akron had sent on to the Coastguard the fax received from Caleb Brett without amending it.

82. On 12 December 2001 cargo operations on the Greek Fighter continued, but at 09.30 the Coastguard once again boarded the Greek Fighter. On this occasion they interviewed the master, Capt Doukas, and he was asked specifically why he had accepted fuel oil from the Gulf Prince and what was the origin of that cargo. He said that he did not know the origin of that cargo. He was then presented with a hand-written form in Arabic script which he was asked to sign. He refused to do so because he did not understand Arabic. He was then forced to sign it and place his fingerprint on it at gun-point. He managed to write on it that he did not understand Arabic and therefore had no knowledge of what he was signing. He was not allowed to make a copy when he requested to be permitted to do so. The Coastguard officers did not suggest that the vessel had Iraqi oil onboard.

83. I interpose that, in accordance with the time charter, Fal kept a representative on board the Greek Fighter whose function was to supervise cargo operations and act as a medium of communication between the Greek Fighter and vessels which were loading or discharging oil from or into that vessel. The Master and Chief Officer of the Greek Fighter needed to be kept informed of the arrival of such vessels, the quantities and nature of cargoes to be discharged or loaded, density and other properties so that they could decide in what tanks the incoming cargo could be stowed having regard to stability considerations. They also needed this information in cases where Fal required blending operations to be carried out onboard. The Fal representative on board at that time was one Abdul Alim. He told Capt Doukas that Fal did not seem concerned about the actions of the Coastguard and was looking into the matter. Cargo operations resumed with cargo transfer from Jaguar II after the Coastguard had left.

84. On the following day – 13 December 2001 – Sea Pride II came alongside but cargo operations never commenced because the Coastguard returned and instructed the Greek Fighter to cast off the Sea Pride II. This time the Coastguard vessel was accompanied by a UAE Navy vessel. The Coastguard ordered by VHF radio that all the crew should be assembled on the forecastle of the Greek Fighter as thee was to be a search of the vessel. They then told the master that he was required to take the Greek Fighter to Abu Dhabi for further investigation. The Master explained that at present this was not possible because the engine could not be started as the starter mechanics needed repairs and spare parts were awaited.

85. The Coastguard said that the vessel would have to be towed to Abu Dhabi by ocean going tugs. The master replied that this might not be possible as the vessel might not be able to generate enough steam to raise the anchor winch. The Coastguard told him that if necessary they would cut the anchor chain.

86. Later on 13 December the Coastguard contacted the master by radio and told him that there was nothing wrong with his vessel, but that he would have to await instructions from them before cargo operations could be resumed.

87. On the evening of 13 December, Capt Kevin Leach Smith, a marine consultant of Aquarius International Consultants Ltd, acting on behalf of Owners' P and I Club, went aboard the Greek Fighter and surveyed and took running samples from all 14 of the cargo spaces except where the ullage was so great that in practice the depth of oil only admitted of a one level sample. The samples, to which I shall refer as "the Aquarius samples" were taken by Capt Leach Smith and kept in his office in Dubai for 6 months, but were then moved into a store (Chemstore) where for 18 months they remained in crates mixed with other samples. Unfortunately the number of sample bottles cracked in the crates and the contents partially spilled out. The sample bottles were extracted and resealed before being sent to England early in 2005. I shall have to refer to the analysis of these samples later in this judgment. Capt Leach Smith also interviewed Capt Doukas.

88. In a letter dated 13 December 2001 written by Mashal Shipping Agency, managers of the Gulf Prince, to the Commander of the Coastguard it was explained that the vessel had salvaged some "petroleum materials and contaminated matters" from a vessel disabled in Iranian waters and then proceeded to Khorfakkan where, in order to have its cargo spaces empty and ready to go into dry dock in Dubai, it negotiated with a vessel at

Khorfakkan to clear its tanks to avoid jettison the contents into the sea. However, the master of the other vessel refused to take delivery of the remains as they were of no use.

89. According to Capt Doukas, the Gulf Prince had begun to discharge into the Greek Fighter on 11 December when the Coastguard boarded the Greek Fighter. Further, Capt Doukas confirmed that the operation with the Gulf Prince, as with the Julia II, was carried out on Fal's instructions.

90. There are clearly inconsistencies between the account of the Gulf Prince operation given by Captain Doukas and that contained in the letter from Mashal Shipping Agency. The latter gives the impression of a deal directly with the master of the Greek Fighter to enable the Gulf Prince to get rid of unwanted residues taken off the distressed vessel in Iranian waters. This explanation for the Gulf Prince operation was taken up in the evidence of Dr Zakaria of Fal. He produced statements to the Coastguard made by the master of the Gulf Prince in January 2002 in which the master claimed that en route from Iranian waters to Dubai and eight miles from Khorfakkan, he contacted the vessel's agent in Dubai who advised him to discharge the distressed oil cargo into the Greek Fighter at Khorfakkan. He stated that such discharge had already commenced when the Coastguard boarded the Greek Fighter and ordered discharge to stop. Dr Zakaria stated that both this operation and that which was to involve the Julia II were set up by the master of the Greek Fighter without Fal's knowledge or consent.

91. The entries in the Greek Fighter's log book clearly indicate the Gulf Prince operation. Further, according to a message from Capt Leach Smith to Owners' Club Dubai representative sent on 18 December 2001, he had been informed by Capt Velis of Fal that the Gulf Prince "was unloading slops and not cargo" on 11 December 2001. Capt Doukas's evidence is that the Fal representative onboard, Abdul Alim, instructed him to load the Gulf Prince cargo. Mr Alim's evidence was that he was not on board on 11 December and for two days after that due to illness. His doctor's certificate was produced and showed that he was examined in Khorfakkan on 11 December and found to be suffering from severe UTI and to be unfit for duty for 3 days. Mr Alim stated that he was at home on the evening if that day when he received a call from the master of the Greek Fighter on his mobile phone. The master asked him to return to the vessel as soon as possible because of problems with the Coastguard. Alim stated that he was off sick for another two days and the master would have to sort things out himself. Alim admits that he was back on board two days later when on 13 December Capt Leach Smith was on board.

92. A memorandum on Fal-headed paper made at some stage after 26 December 2001, which I find to have been written by Capt Velis because it is in his very recognisable handwriting, lists the Gulf Prince as amongst those vessels that discharged into the Greek Fighter. It records a date of 10/12 and a quantity of 2257 mt alongside which appears in a bracket ("total declared 4000 T"). The Julia II is also listed against 9/12 and no tonnage is shown but there appears the note "arrested not discharged. Due to pumps problem"). There is nothing in this document to suggest that the appearance of those two vessels was unauthorised by Fal. Nor is there any evidence of Fal having protested to Owners about the master's conduct. In my judgment the irresistible inference is that they were authorised to discharge by Fal.

93. If the master did in truth telephone Alim on the evening of 11 December and ask him to return to solve the problem with the Coastguard, that would be completely inconsistent with the master having set up the Gulf Prince operation, as indeed is the perfectly open entry in the log book recording that vessel's presence, as well as that of the Julia II.

94. I find that the Gulf Prince and the Julia II were both vessels which Fal directed to discharge into the Greek Fighter. It is difficult to perceive what advantage they hoped to derive from having raised the allegation that the master of the Greek Fighter had caused the appearance of the two vessels other than to gain an advantage in the present proceedings. However, since this allegation could not have been believed to be true by those in the Fal Operations Department with responsibility for providing the evidence in this case, I shall have to take this conduct into consideration in deciding other disputed issues of fact. To the extent that Dr Zakaria's evidence repeated what he had been told by others at Fal in relation to this matter of the Gulf Prince and Julia II, his evidence is to be rejected. Similarly, I am left in no doubt that Mr Osman's evidence to this court about the memo referred to in paragraph 92 above was substantially untrue.

95. On 14 December 2001 the Greek Fighter was inactive, awaiting the orders of the Coastguard.

96. On the following day the Coastguard took samples from No. 2C and Port and Starboard slop tanks.

97. On 16 December the Coastguard ordered the Chief Engineer to go ashore with them in order to answer questions.

98. On 18 December Capt Leach Smith reported that the vessel remained under 24 hour surveillance from a coastguard launch moored close by. In a report that day to the Club's agents he gave the following account of the telephone conversation with Capt Velis of Fal already referred to at paragraph 91 above.

"We have also spoken to Captain Velis, Shipping Manager of Fal, and understand that they are in contact with the coastguard and making efforts to resolve the situation without the requirement to move the vessel to Abu Dhabi. Captain Velis also stated that the coastguard has advised him that whilst they have suspicions that Iraqi oil is carried on board Greek Fighter, they have not found any evidence as a result of their analysis of either their first or second samples."

99. On 19 December 2001 Saif Saeed bin Saaid, Undersecretary of the UAE Minister of Foreign Affairs and Chairman of the Committee for following up the embargo on Iraq, sent a letter to the UAE Undersecretary of the Department of Ports which stated:

"We have been informed by the armed forces command that one of their navy patrols seized the following ships:

- *"GREEK FIGHTER" laden with oil cargo of 5,000 tons approximately;*
- *"GULF PRINCE" laden with oil cargo of 3,000 tons;*
- *"JULIA II" laden with oil cargo of 450 tons.*

Because of their violation of the international embargo imposed on Iraq.

In accordance with the instructions given by HE Sheikh Hamdan bin Zayed Al Nahyan, the minister of state for foreign affairs – chairman of ministerial committee for the embargo on Iraq, please take the following procedures as regards the sale of cargoes:

1. *Sell the above cargoes through your department's applied methods subject to the sale being effected at sea. The successful bidder shall bear the costs of the tanker's hire and the other ensuing obligations;*
2. *Deduct all the expenses incurred by the vessels in favour of your department and the other concerned authorities and pay the crew's salaries and provide them with food from the sale proceeds;*
3. *It is required that the chartered tanker shall have best the specifications consistent with the weight of the load required to be discharged offshore ie. within the territorial waters – at the site deemed fit by your department;*
4. *The purchaser should give a written undertaking to export the cargo outside the UAE and not allow the chartered vessel to enter the UAE ports;*
5. *Berth the vessels at Abu Dhabi Free port after their cargoes were discharged and we will inform you subsequently what procedures should be taken in respect of them;*
6. *Provide us with detailed report on the condition of the ships and whether or not they are in seaworthy condition."*

100. On 23 December 2001 UAE Navy Tug, A50 Hafeet, went alongside the vessel and instructed it to take up its anchor in order that it might be towed to Abu Dhabi. When the master requested more time to prepare the boiler and raise stream the Chief Engineer from the tug began preparations for cutting the anchor chain. However, the tug later withdrew and the anchor chain was not cut.

101. On the same day Capt Velis wrote to Dr Zakaria giving the quantities of oil then on board the Greek Fighter. This consisted of some 45,062 mt of Iranian IFO, 2857 mt of Aden, 1412 mt of cutter stock. It noted that, at the beginning of December 2000, 13,040 mt had been received from Jaguar 1 and Jad Daniel and stored in No. 2C and Port and Starboard slop tanks. That quantity was then blended with 120 cst and exported. About 600 mt remained on board and that was then mixed with other products in No. 2C and Port and Starboard slop tanks. It was on this message that there was a manuscript annotation to the effect that the 13,040 mt had come from an auction at Abu Dhabi.

102. On 24 December 2001 the Navy tug went alongside once again and the Greek Fighter was boarded by two officers who enquired of the master's opinion as to whether it was safe to tow the vessel to Abu Dhabi using one tug only. The master told them it was unsafe and served them with a letter of protest to that effect.

103. On the same day Mr Edward Newitt of HTD wrote to Brigadier Juma Khalifa Abu Shabas, more conveniently known as Bu Shabs, the officer in charge of the Coastguard Headquarters in Abu Dhabi. He asked for written confirmation of the verbal orders to impound Greek Fighter and for her to be towed to Abu Dhabi, and by whom and on what basis that order had been given. He also asked for confirmation that analysis of the samples taken from the vessel did not show that the oil on board was from an illegal (Iraqi) origin. The letter warned that it was unsafe to tow such a large vessel laden with 50,000 tons of oil and that if an accident occurred while the vessel was in the care and custody of the UAE authorities, Owners would hold them liable for any loss or damage.

104. Also on 24 December 2001 Owners called on Fal to take the matter of the vessel's detention up with the UAE authorities to clear the matter. The message concluded with the peculiarly apposite malapropism "It is going without sailing that vessel remains always on hire".

105. The Navy tug A50 Hafeet withdrew on the afternoon of 25 December.

106. On the same day Fal commenced the first of several legal proceedings in the courts of the UAE. This was claim 2/2001 in the Khorfakkan Court of First Instance. This was in the nature of a friendly action against the Owners and master in which Fal claimed that because the continuation of suspension of operations by the Greek Fighter by order of the Coastguard would prevent Fal from conducting its business and would give rise to the risk of loss and damage to Fal, it applied for a summary order to suspend the removal or towage of the vessel from Khorfakkan and for an order for the appointment of an expert petroleum firm in order to inspect and analyse the oil in order to determine whether it was of Iraqi origin. It is to be observed that at paragraph 2 of the Statement of Claim it is pleaded that Fal received from Palatax (= Palatex) 15,744 mt of Iraqi fuel oil carried on the three vessels, Jaguar 1, Navstar and Jad Daniel (sic) "originally purchased by (Palatex International) for export from Zayed Port Authority at the public auction" held on 12 November 2001.

107. I refer to these proceedings as "Claim 2/2001".

108. There was an ex parte hearing that same day when the court refused the summary application on the grounds that because the Coastguard was an administrative department of the UAE and intended that the vessel be

towed to Abu Dhabi the court at Abu Dhabi, and not that at Khorfakkan had jurisdiction. The court issued a summons to Owners inviting them to attend at a hearing on 30 December to defend the case and submit any evidence.

109. On 26 December 2001 Fal wrote to the Coastguard warning them of the lack of safety in attempting to tow the vessel to Abu Dhabi and inviting them to reconsider towing and delay the vessel's movement for a week by which time she would be repaired and would be able to sail under her own power.

110. Further, also on 26 December 2001 the A50 Hafeet returned and the Coastguard officers boarded the Greek Fighter together with an officer from another tug Neftegaz 52. The master demanded the issue of a towage certificate after approval by the Salvage Association but the officer told him that they had orders from their head office to tow the vessel to Abu Dhabi. The master said his crew would heave up the anchor only if forced to do so and would not assist the preparation for towing. The master issued letters of protest which the Coastguard officer refused to sign. The crew of Neftegaz 52 prepared and attached the towing cables. The master entered in the log book "*commenced heaving anchor up under force*". The vessel was then towed to Abu Dhabi where it was anchored early on 29 December 2001.

111. In so far as it is material I find that from 14.10 on 26 December 2001 the Coastguard took over the physical control of the Greek Fighter in all material respects from the master and crew.

112. Meanwhile, on 26 December Fal started a new action, this time against the UAE Coastguard, Ministry of Defence, before the First Instance Court of Abu Dhabi (case 609/2001). Application was made for orders against the Coastguard as follows:

"To suspend the removal or towing of the oil tanker "GREEK FIGHTER" from its current berthing location off Khorfakkan Port.

To appoint expert petroleum firm in order to survey the oil quantities owned by the Applicant in order to determine whether or not they are of Iraqi origin. Meanwhile, the Applicant reserves its rights."

113. It is to be observed that in the claim document signed by Fal's lawyers there is express reference to the purchase by Fal of the Palatex cargo, to 15,744 mt of it having been discharged from the three vessels, Jaguar, Navstar and Jad Daniel into the Greek Fighter, to its having been purchased from the Ports Department, to the fact that it was delivered to Fal to be mixed and then exported and to its having been mixed on board with 37,443.470 mt of other types of oil. A total mixed cargo of 52,467.61 mt is then stated to have been transferred to the Mint Prosperity for shipment to Pakistan under a bill of lading dated 7 December 2001, leaving a total residue of 719.709 mt of mixed fuel oil remaining on board in tanks C1, 2, 3 and 4 and in the port and starboard slop tanks. It is further to be noted that the Palatex oil is not described as Iraqi.

114. On 27 December 2001 Owners sent to Fal a message calling upon them to take all necessary steps to avoid and/or minimise delays/expenses/damages for which Owners were not responsible and reminding Fal that the vessel was still on hire and that hire was overdue since 26 December 2001.

115. On 29 December 2001 the judge of the Abu Dhabi court issued an order attaching the oil on board the Greek Fighter and directed that no changes or temporary operations were to be allowed.

116. On 30 December 2001 there took place a meeting in Abu Dhabi between Advocate Sultan Rashid of Owners' lawyers and Brigadier Bu Shabs. The Brigadier informed Sultan Rashid of the following.

i) The Greek Fighter was used as a storage vessel but it and/or Fal failed to maintain a record of ingoing and outgoing cargoes.

ii) Fal failed to comply with "the required procedures" and failed to obtain "the necessary required permission to use the vessel as a storage vessel" – in addition to "various technical problems which Fal failed to maintain."

iii) A number of samples were taken from the vessel and analysed and the results showed that the cargo "is of an Iraqi origin", there being about 48,000 tons on board. The analysis report was produced and shown to Sultan Rashid.

iv) When Sultan Rashid explained Owners' position the Brigadier advised him to contact MOFA Consular Department.

v) A decision had been taken to confiscate the cargo and that it should be sold/auctioned. The Coastguard's understanding of such a decision was that it would also lead to the vessel itself being treated as confiscated.

117. Meanwhile the Coastguard refused a request from Fal's agents, Gulf Agency, for the vessel to receive bunkers.

118. On the same day the master was taken ashore from the vessel for questioning. He was asked to sign a transcript in Arabic which he did "without responsibility" because it was so written. The questions and answers were however quite innocuous.

119. Also on 30 December 2001 there took place a further hearing in Claim 2/2001 at the Khorfakkan Court, but Owners did not appear although they had been given notice on 26 December. At a further hearing on 6 January 2002, at which Owners again did not appear, the court decided that the defendant Owners had no standing, not being Owners of the cargo, and dismissed the claim in so far as it was against Owners.

120. On 31 December 2001 Capt Margetis of Owners asked Fal whether the 15,744 mt fuel oil originally purchased by Palatex and then loaded into the Greek Fighter was confiscated Iraqi oil. Fal paid the December hire instalment, without reservation.

121. On the same day ITS Caleb Brett sent to Akron at Fujairah a laboratory report of an analysis for density, viscosity, water and sulphur content of the three samples drawn by Caleb Brett from 2C and port and starboard slop tanks. This report does not indicate when the samples were taken, albeit it states that they were received on 31 December. It is unclear whether this report was forwarded to the Coastguard at that time, although it appears to have been forwarded on 2 July 2002 in connection with Case No. 21/2002, a claim by Fal against Dimitrios Bakhos, the owner of Akron.

122. On 2 January 2002 Mr Kyrimis of Fal responded to Capt Margetis's message of 31 December 2001 that Fal could not answer the question whether the Palatex cargo was of Iraqi origin "since the origin of the cargo is completely unknown to us".

123. The vessel's supply of diesel was running very low by this time and Owners through Mr Newitt of HTD were able to make indirect contact with Brigadier Bu Shabs who said that he was willing to permit additional supplies provided that proof of origin and details of the vessel were provided. Fal responded by supplying details of Fal II together with particulars of her cargo of gas oil cargo.

124. On 6 January 2002 further samples were taken from the Greek Fighter's fuel oil and diesel by a UAE naval officer who arrived by Coastguard boat.

125. On 7 January 2002 Dr Zakaria of Fal wrote to Mr Bakri of HTD and requested that Owners should instruct their lawyer to attend the next hearing of Case 2/2001 in Khorfakkan on 15 January 2002 in order to agree the appointment of a surveyor of the cargo.

126. By 8 January the Greek Fighter had virtually run out of gas oil. The UAE Coastguard was insisting on exercising complete control over the supply of any further quantity. The crew were not allowed to leave the vessel which was under guard.

127. By 9 January there was a meeting at MOFA with the manager of the Consular Department, Mr Jalil. It was attended by Mr Newitt of HTD, Sultan Rashid and Meena Matthews of GAC. They were informed that the Greek Fighter itself had been detained as it had been found to be carrying Iraqi oil. The Gulf Prince was mentioned as being involved. The detention was based on:

i) UN Resolution No. 661

ii) UN Resolution regarding sanctions on Iraq;

iii) The decision of the Ruler of Abu Dhabi (and the UAE).

128. Following detention of the vessel, analysis of the samples showed that the cargo was Iraqi origin. The next step was to discharge the cargo then on board and auction it together with the vessel. Until the sale of the vessel they would continue to supply the vessel with bunkers and other supplies. All vessels caught with Iraqi oil were now detained and sold automatically by order of the Ruler. The Manager declined to show those attending the order that had been made for the detention of the vessel.

129. The Manager expressed surprise that Mr Al Sari, the owner of Fal, had started proceedings against the Coastguard as he had been in discussions with the Undersecretary at MOFA and he had been promised that, before he started proceedings, the matter could be "solved" through Sheikh Hamdan. He further stated that this was not the first time that Mr Al Sari had traded in Iraqi oil, one of his vessels having been detained six months earlier for the same reason.

130. The Manager advised that the only course open to Owners was to file a Grievance with MOFA where the committee under Sheikh Hamden's chairmanship would decide whether to release the vessel.

131. On 10 January 2002 HTD wrote to Dr Zakaria stating that they awaited instructions from Owners about participation in the Khorfakkan proceedings but questioning whether the vessel was not now under Abu Dhabi jurisdiction. They called for a meeting with him. On the following day Capt Margetis wrote to Fal stating that Owners did not see the point of the Khorfakkan proceedings now that the vessel had been moved to Abu Dhabi, but if Fal wanted Owners to agree to the court's appointing a surveyor, Fal must undertake to indemnify Owners in respect of any liabilities under the Khorfakkan proceedings and to pay a local lawyer to represent Owners in those proceedings.

132. On 12 January 2002 Mr Newitt and Mr El Bakri of HTD, Sultan Rashid and Meena Matthews had a meeting with Brigadier Bu Shabs and other officers from the Coastguard. The Brigadier informed them that the samples taken by the Coastguard from the three tanks showed that the vessel was carrying Iraqi oil. Three different samples were taken and they all showed Iraqi origin.

133. He further stated that the Coastguard had been monitoring the vessel for three to four months and it was clear that the vessel was trading in Iraqi oil. When Mr Newitt informed him that Fal had purchased cargo from Palatex which was suspected to be of Iraqi origin sold at auction in Abu Dhabi, the Brigadier said that if it were of Iraqi origin it should have been shipped outside UAE and not sold within UAE.

134. He stated that the Coastguard had detained two other vessels – Gulf Prince and Julia II – which upon analysis of samples were found to be carrying Iraqi oil.

135. At that point the Brigadier produced a survey report numbered 14948/01 issued by ITS Caleb Brett on 12 December 2001. The document produced, having set out the analytical results, stated underneath:

"The samples No. 1, 2, 3, 5, 6, 7 and 8 are matching with Iraqi origin cargo specification. The sample No.4 is matching with Iranian origin due to high sulphur and low density viscosity."

136. Samples 1 to 3 were from the Greek Fighter 2C, Port and Starboard slop tanks respectively. Samples 5 and 6 were from the Gulf Prince and samples 7 and 8 were from Julia II. Sample 4 was from Fal XIV. Owners' team were not allowed to have a copy of this document.

137. The Brigadier also referred to the Greek Fighter's other technical defaults, listing failure to keep loading and discharging records, operating as a storage vessel without a licence and having no P&I pollution cover. The last one was denied. He said that repatriation of the crew could only be carried out with MOFA approval.

138. I find that the Caleb Brett analysis No. 14948/01 shown to Mr Newitt and Owners team was a copy of the document sent by fax by Caleb Brett to Akron on 11 December 2001 (see paragraph 81 above) which had been overprinted with the words quoted in paragraph 135 above. Those words were not on the report when Caleb Brett sent it to Akron. The words had been printed onto the original or a copy of it later either by Akron or by the Coastguard. On 12 May 2002 Mr John Notman-Watt, the General Manager of ITS Testing Services (UK) Ltd, Sharjah Branch, issued a statement in which he said that the additional words were not included in the original document as issued by his office. Those words were in a different typeface to that of the rest of the document and the statement contained in them could not be supported technically on the results of the analysis set out in the report. This statement was made as supporting evidence for criminal information brought by Fal against Demetros Bakhos, owner of Akron, directed to the District Attorney of Sharjah. I accept the statement of Mr Notman-Watt as true. Not only had the analysis report been overprinted: but the signature of Mr Notman-Watt on the original had been whited-out and the space used to accommodate the overprinting.

139. I interpose that this was not the only forged Caleb Brett analysis report. That which had been issued on 31 December 2001 (see paragraph 121 above) was also to reappear in a quite different form. Although it was not produced by Brigadier Bu Shabs to Owners' team on 12 January 2002, it was put in evidence by the Coastguard, together with Report No. 14948/01, on 9 April 2002 in the Abu Dhabi Action No. 609/2001. This other report numbered 15141 had been overprinted with the words:
"The above specifications are matching with the specifications of Iraqi cargo."

140. Mr Notman-Watt's signature had similarly been whited out from the original. I accept as true Mr Notman-Watt's statement dated 13 May 2002 that those words were not included in the original issued by Caleb Brett. I find that they were overprinted on to a copy of the original either by Akron or by the Coastguard.

141. I am bound to observe that the introduction of the additional reference to the samples having a specification matching that of oil of Iraqi origin must have been made to assist the Coastguard in justifying the identification of the cargo as contraband. That could lead only to the consequence that the cargo would be seized and sold. The proceeds of any such sale would on the evidence go into an account under the ultimate control of Sheikh Hamdan in his official capacity. A course of forgery directed to increasing the payments into that account by the confiscation of cargoes and vessels was most unlikely unless it were motivated by personal gain for those responsible for the forgeries and for anyone who controlled the proceeds of sale. In so far as it may be material to the circumstances of the seizure and disposal of the vessel I infer that these forgeries were created in furtherance of a corrupt design in which those who controlled the proceeds of the auction of the cargo were complicit. Whether this involved Sheikh Hamdan personally cannot be conclusively determined, but it is hard to see how either Akron or the Coastguard would have embarked on this course unless inducements emanating from the proceeds of sale were involved, and how, if such were the case, those in the Ministry of Foreign Affairs who controlled the proceeds of sale could not be aware of the inducements. I should make it clear that Fal by its counsel has not levelled this allegation at Sheikh Hamdan in the course of these proceedings.

142. At the adjourned hearing of Khorfakkan claim 2/2001 on 15 January 2002 the Court of First Instance dismissed Fal's claim on the grounds that it had no jurisdiction and also because Fal had joined an improper party (namely the defendant owners who had no interest in the oil). As to jurisdiction, Khorfakkan was not the correct court. That was the jurisdiction to which the vessel was about to be transferred.

143. Owners did not appear by a formally authorised advocate at that hearing because they were unable in the time which they had left themselves to obtain a power of attorney for the advocate from the master, who could not go ashore for this purpose because of the sea conditions. The unauthorised advocate asked for an adjournment, but the court dismissed Fal's claim.

144. On 15 January 2002 Fal faxed Owners as follows:
"Kindly be advised that after termination of first optional 3 months periods, charterers will continue keeping the vessel under charter and compensate owners as per agreed daily hire or USD 9,5000 PDPR, due to unforeseen turn of circumstances. However, this doesn't consist a statutory expansion of governing C/P and charterers will provide owners with redelivery notices of 7, 5, 4, 3, 2, 1 day once will be completed the investigative detention and vessel will be released by UAE coastguard."

145. On 19 January 2002 there took place a hearing before the First Instance Court of Abu Dhabi in Case 7/2002. The court ordered the appointment of an expert to examine the cargo to ascertain whether it was of Iraqi origin and there was to be a further hearing to consider the expert's report on 12 February 2002.

146. On 23 January 2002 the UAE Ministry of Finance and Industry advertised in the local press the sale for scrap of a total of 30 vessels including the Gulf Prince and Julia II. These had both been detained when alongside the vessel at Khorfakkan.

147. The vessel remained off Khorfakkan, the master in constant communication with the Mina Zayed Port Authority in an effort to keep the vessel's gas oil and fresh water supplies replenished. On 11 February 2002 Fal remitted the hire instalment due for the period 9 to 24 February 2002.

148. By the end of February 2002 Fal had commenced yet further proceedings against the Coastguard. This was Suit No.204/2002 in which Fal claimed damages of US$3.5 million for the illegal arrest of the vessel and cargo. It is to be observed that it was expressly pleaded that prior to the arrest Fal had imported fuel oil from Iran, Aden and Singapore on board the Sea Pride 2, the Mint Prosperity, the Gulf Discovery and the Fithon and had received from Palatex 15,744 mt of fuel oil carried on board the Jaguar 1, the Navstar and the Jad Daniel such oil having been purchased by Palatex from Mina Zayed Port Authority, Abu Dhabi at public auction on 12 November 2001 "in order to be exported abroad". The pleading further stated that such fuel oil had been delivered to Fal in order to be mixed on board and exported to Pakistan, the total mixed quantity, including the 15,744 mt received from Palatex, amounting to 53,187.47 mt of which 52,467.761 mt was exported to Pakistan on board the Mint Prosperity, leaving a balance stored in Tanks 1c, 2c, 3c and 4c and the starboard and port slop tanks. Fal claimed losses due to its having to pay charter hire during the arrest and to its servicing the value of the cargo together with its inability to perform its contractual obligations to third parties. It is to be observed that the defendant Coastguard was to inform the Ministry of Defence – to be notified through the Directorate of state cases at the Ministry of Justice, Abu Dhabi.

149. In the meantime Fal had continued to pay charter hire as and when it fell due but on 2 March 2002, in a message from Mr Kyrimis of Fal to Capt Margetis, Fal requested Owners to agree to a reduction in hire until the problem of the detention of the vessel was solved. On 15 March 2002 Owners proposed a reduction of hire to US$7000 per day until the detention was completed and the vessel released whereupon it would revert to the contractual rate of US$9,500 per day. On 17 March Owners agreed to a counter-proposal reducing hire to $6000 per day after three instalments at $7000.

150. On 9 April 2002 the Coastguard served a defence in Abu Dhabi Action No. 609/2001 in which, in support of the proposition that the vessel had Iraqi oil on board, it relied as genuine evidence on the forged analysis reports No. 14948/01 and 15141/01 from Caleb Brett. The defence invited the court to rule that it had no jurisdiction and to set aside the interim judgment appointing a technical expert.

151. On 28 April 2002 a representative of the Coastguard headquarters at Fujairah went on board the vessel and took samples from various tanks, including 2c and 1-5 wing.

152. On 30 April 2002 Fal approached Caleb Brett in order to see a copy of Caleb Brett's report 14948/01. Caleb Brett replied that they would have to obtain the authority of their principals, Akron. Caleb Brett then contacted Mr Bakhos of Akron but the latter refused consent on the grounds that Akron was acting for the Coastguard from whom permission must be obtained. Caleb Brett informed Fal that there was nothing they could do. However, Fal had ascertained from Caleb Brett that the two reports had not in their original form contained the notations referring to matching with Iraqi oil.

153. On that basis, on 4 May 2002, Fal made a criminal complaint to the District Attorney of Sharjah to the effect that Mr Bakhos, Partner and Director of Akron had added the notations to the reports and thereby forged them. On 12 and 13 May 2002 Mr Notman Watt gave a statement and declarations to the Sharjah Police certifying that the reports issued by Caleb Brett had not contained the notation and stating in relation to report 14948.

"Furthermore, the statement added to our report cannot be supported technically on the results of the analysis set out in the report."

154. On 16 May 2002 Mr Abdullah Juma Al Sari, owner of Fal, wrote to the Undersecretary at the Ministry of Foreign Affairs, alleging that the vessel had been detained on the evidence of forged laboratory reports presented by the Coastguard and that the detention was therefore illegal and the vessel should be released immediately.

155. In the meantime, the Sharjah Police interviewed Mr Bakhos of Akron. He explained that the Coastguard customarily employed Akron to receive and dispatch oil samples to the STE laboratory and to send the results of the analysis to the party requesting the analysis and to the Coastguard. Further, on 2 July 2002 the Sharjah Police called on the Coastguard to produce the reports which had been received from Akron. On 8 July 2002 the Coastguard replied enclosing copies of the original form of the reports received from Caleb Brett not including the forged annotation.

156. Early in June 2002 at a conference in Bahrain, Vice Admiral Keating, Commander in Chief of the US 5th Fleet and his United States Navy Maritime Liaison Office disclosed the names of several UAE companies said to be involved in smuggling Iraqi oil, including Fal. It was said that the US Navy was preparing a report to the United Nations to have those companies stopped from operating. Fal at once issued a press released denying any involvement in smuggling.

157. On 14 June HTD wrote to Fal pressing for payment of outstanding charter hire (US$360,000) and advancing an indemnity claim in respect of Owners' additional losses due to the detention of the vessel.

158. On 16 June 2002 Mr Al Sari, on behalf of Fal, wrote to Sheikh Hamdan, the UAE Foreign Minister, explaining how by means of the forged Caleb Brett certificates the Coastguard had detained the vessel causing heavy losses to Fal. He requested that the vessel and her cargo should be released. No reply to this letter was ever received.

159. On 3 July 2002 there was issued UAE Federal Decree 41 of 202. It provided for the setting up of a ministerial committee to review breaches by vessels of the UN Security Council embargo on Iraqi oil. The ministerial Committee was headed by Sheikh Hamdan and included the Minister of Justice.

160. Article 2 provided:

"The ministerial committee shall be responsible for the following duties:

1. Supervise and coordinate with the competent authorities in the country to execute the resolutions of the Security Council related to breach of the international siege implemented on Iraq.

2. Supervise the confiscation of vessels and shipments of petrol or any other goods and refer the proceeds to the UN Secretary in order to deposit the same in special account of the UN. And the proceed of selling the vessels to be deposited in favour of the state treasure.

3. Assess the charges of vessel existing in the port and the charges of guardianship and any other administrative charges.

4. Study the possibility of issuing new punishment jurisdictions or regulations against Owners of the vessels."

161. Article 6 provided:

"The minister of foreign affairs and the concerned parties shall execute this decree and shall be published in the gazette and to be implemented from the date of issue."

162. On 13 July 2002 Saif Saaed bin Saed, the Under-Secretary at the Ministry of Foreign Affairs and Chairman of the Committee for Following up the Embargo on Iraq, wrote to the Attorney of the Marine Ports Department referring to the Greek Fighter confiscated on 17 December 2001 due to breach of the Iraqi embargo and continuing:

"We would like to inform you that according to the directions of H E Sheikh Hamdan Bin Zayed Al Nahyan, Minister of State for Foreign Affairs, Chairman of the ministerial committee of siege against Iraq, kindly take necessary action to sell the shipment of the said vessel according to the implemented procedures and deposit the amount in the account of the chairman with First Gulf Bank after deduct the amounts due to your department and other parties."

163. On 16 July 2002 Caleb Brett took ullage readings in the presence of the Coastguard and the latter took more samples.

164. On 20 July 2002 the UAE Ministry of Finance placed on advertisement in the local press for the sale at public auction of all the cargo on board the vessel. The following day the Chief Judge of Abu Dhabi Federal Court of First Instance, by which the interim orders had been issued on 26 December 2001in Suit 609/2001, wrote to the Director of the Coastguard referring to the advertisement of the sale and ordering the Coastguard to stop the auction.

165. On 22 July 2002 Mr Kyrimis of Fal wrote to Mr Margetis of Owners stating that Fal was seeking Owners' assistance to prevent the auction by Owners' lawyers registering a complaint against the Ministry of Foreign Affairs and the Coastguard for ignoring the Court's decision. Mr Margetis acknowledged that letter but drew attention to the outstanding hire of US$630,000. Fal again pressed Owners to assist the Charterers in securing release of the vessel and said that they were working towards a solution to the outstanding hire.

166. In the course of a meeting on 24 July 2002 between Mr Elbakri, Owners' lawyer, and representatives of the Ministry of Foreign Affairs and the Coastguard it emerged that the Port Authority had informed both the Ministry and Sheikh Hamdan personally of the Court's order and that the auction of the cargo would only go ahead if permitted by Sheikh Hamdan. He had apparently raised queries about the applicable procedure. In the meantime, the auction had been postponed.

167. On the same day, Owners having sent a testy letter to Fal reminding them that it was up to Fal to find a solution to the detention of the vessel, Fal put forward an offer to pay the $630,000 outstanding hire over the next 20 days in three equal instalments but on the basis of Owners assistance in dealing with the authorities. Owners accepted this proposal but said they were doing all they reasonably could towards release of the vessel and invited Fal to contact their Dubai solicitors (HTD) to consider further action.

168. On 28 July 2002 Fal returned to court with an application under Suit 609/2001 and 7/2002 for the Ministry of Justice to respond urgently to the court's order of 19 January 2002 for the appointment of an expert to inspect the samples. The Chief Justice duly requested the Ministry to make this appointment.

169. On 29 July and 5 August 2002 Fal paid the first two instalments of outstanding hire of $210,000 each.

170. On 12 August 2002 there took place a meeting with the United States Navy in Bahrain. It was attended by Mr Osman of Fal, Mr Nicholas Angell of the New York law firm, Afridi and Angell, who was retained by Fal to prepare Fal's response to the allegations of smuggling made against Fal by Vice Admiral Keating on 5 June, a representative from the United States Embassy in Bahrain and from the UAE Embassy in Bahrain. The US Navy alleged at that meeting that four vessels – Fal XII, Fal VI and FVII and Habebal otherwise known as Fal XV - XVI – were involved with Iraqi oil movements at various times from 1998 to 2002. All were said to be controlled by

Fal or Mr Al Sari at the relevant time. The Fal representatives asked for an opportunity of presenting evidence to show that Fal did not own or control those vessels at the time when their involvement with Iraqi oil was alleged. The US Navy representatives agreed to this request.

171. On 24 August 2002 Fal paid the third and last instalment of outstanding charter hire under the Second Line Agreement.

172. On 24 August, at the request of Mina Zayed Port Authority, Surveyors from GeoChem Middle East went aboard the vessel and measured the ullages and cargo volumes, as well as taking samples from Tanks 3C and 1C.

173. On 28 August 2002 there took place a meeting between Mr Newitt on behalf of Owners and Dr Zakaria on behalf of Fal convened in response to Fal's request to Owners to assist Fal by bringing their own proceedings for release of the vessel. Mr Newitt made it clear that Owners would only be prepared to take further steps if Fal brought its charter hire payments up to date and fully approved and supported the steps taken by Owners as well as indemnifying Owners in respect of such steps and the costs incurred. Dr Zakaria, however, did not want Owners to rely on the criminal complaint evidence as against the Coastguard lest it caused the Coastguard to lose face and thus create further problems for Fal.

174. In a letter dated 22 September 2002 Mr Newitt informed Dr Zakaria as follows:

"Having reviewed the matter with Owners, and subject to receiving the confirmations above, Owners' proposal is to write a letter to the UAE Coastguard and UAE Ministry of Foreign Affairs in Abu Dhabi. In relation to the delivery of the latter we shall try to procure the support of the Greek Ambassador.

Owners do not consider that commencing further proceedings against the Coastguard would achieve anything at this time, without having first tried to obtain responses/intervention from the Ministry/Coastguard.

The intention is for Owners to set out their current predicament in the letter, stressing that the detention is unlawful. Owners wish to refer expressly to the evidence used in the criminal complaint against Akron and state that the documents relied upon by the UAE Ministry of Foreign Affairs/Coastguard in ordering the detention of the vessel are fraudulent. The statement of Mr Nottman Watt of ITS Caleb Brett Sharjah is fundamental to this submission."

175. Mr Newitt therefore requested Fal to release the evidence in relation to the criminal complaint.

176. Dr Zakaria replied on 28 September 2002 expressing surprise at Mr Newitt's attitude, stating that Owners had "*no reason to get involved in the criminal proceeding*" and pressing them to take action as they had an obligation under the charterparty and could not "*stand passive and sometimes negative as happened earlier in the Khorfakkan case.*"

177. I interpose that this message suggests a complete misapprehension of the respective obligations of Owners and Time Charterer. The detention of the vessel was wholly attributable to the allegation that Fal had misused the vessel by permitting the loading of Iraqi oil. There was no suggestion by Fal that Owners had anything to do with the origin of the cargo. As long as the time charter was running the sole responsibility for the employment of the vessel and therefore for procuring its release so that it could again be used for cargo operations rested with the charterers. Their inability to use the vessel for normal operations after its detention by the Coastguard was caused by the combined effect of the detention by the Coastguard, the attachment order in Action 609/2001 and 7/2002 and by the failure of the Ministry of Justice to nominate an expert in accordance with the Court's order. In these circumstances, Owners were entitled under the Time Charter to take no active steps to procure the end of the detention so as to facilitate the restoration of charterers' ability to conduct cargo operations.

178. On 24 September 2002 the Coastguard filed an application in Abu Dhabi Suits 609/2001 and 7/2002 that the vessel's cargo be sold at auction. It relied in support on a letter dated 21 September 2002 from the chairman of the Marine Ports Authority to Ministry of Justice in which it was stated that the vessel's continued presence off Abu Dhabi created great risks to the marine environment.

179. On the following day the Chief Justice of the Abu Dhabi First Instance Court wrote to the Ministry of Justice informing it of a decision of a judge of that court that samples should be taken from the cargo on board by a neutral committee pending the selection of the court appointed expert, that the remaining cargo should be sold at public auction and the proceeds of sale deposited in the United Nations Iraqi Sanctions Fund pending the outcome of Fal's proceedings, that if no sale by auction took place within 15 days, the cargo was to be stored in the custody of the Armed Forces, its type, quantity and market price at discharge having been recorded and that, following such discharge of the cargo, the vessel should be placed under the control of the Armed Forces and should be shifted to a safe position, the Armed Forces to insure its safety and protect it from perils that might result in pollution.

180. On 28 September 2002 Dr Zakaria, on behalf of Fal, again requested Mr Newitt, on behalf of Owners, to press Owners' claim for release of the vessel.

181. On 30 September 2002 the Undersecretary at the Ministry of Justice wrote to the Chief Justice reporting that in accordance with his letter of 25 September a neutral committee had been formed to take samples.

182. On 2 October 2002 the Port Authority again placed a press announcement that the cargo was to be sold by sealed offers to be received by 8 October. The sampling was carried out on 2 October. According to a Saybolt report, the samples were duly sealed and numbered.

183. On 6 October 2002 Fal filed petition 213/2002 in the Abu Dhabi First Instance Court by which Fal challenged the order of 25 September that the cargo be sold as inconsistent with the earlier orders in the same case and procedurally impermissible and contrary to the Constitution and its articles protecting property against seizure without reasons and further that payment of the proceeds of the auction to the UN Fund could not be justifiable in the absence of a determination that the oil was Iraqi contraband.

184. On the same day Sheikh Hamdan, the Foreign Minister, wrote to the Minister of Justice as follows:
"Please note that some of Owners of the ships attached at the ports of the UAE – due to importation of smuggled Iraqi oil which constitutes violation of the UN Resolutions regarding the embargo against Iraq – most often file cases at the UAE courts requesting that the attachment be lifted and the cargo and the vessel not be sold.
In accordance with the directives of HH the President of the UAE and pursuant to Federal Decree No.41 of 2002 on forming ministerial committee competent to look into the vessels' violations of the UN Resolutions regarding the embargo against Iraq;
Taking into account that this committee is the sole body competent to look into these matters;
This matter is connected to the UAE's obligations to the International Community with regard to the implementation of the UN Resolutions on the embargo against Iraq.
Therefore, the courts should be instructed not to accept and register any cases regarding the above subject as they fall outside their jurisdiction and to refer them to the above committee to consider them and take the appropriate decisions."

185. On 7 October Petition 213/2002 was heard in the Abu Dhabi Court of First Instance.

186. In its judgment, given on the following day, the court rejected the arguments as to procedural objections to the order. It also rejected the constitutional objections because the sale of the cargo had been ordered on the grounds that the cargo presented an imminent danger to the marine environment and the cargo owner was fully protected because the provisional attachment ordered on 29 December 2001 continued to apply to the proceeds of sale. The order for the proceeds of sale to be paid to the UN Fund was an administrative matter within the exclusive powers of the judge.

187. On 8 October 2002 the UAE Minister sent on to the Heads of the Judiciary a copy of Sheikh Hamdan's letter of 6 October, adding
"Therefore we hereby instruct that the contents of the above letter be implemented immediately."

188. On 9 October 2002 Afidi & Angell sent Fal's presentation to the US Navy. The letter deals separately with each of the vessels said to have been involved with contraband oil cargoes. It included the following:
"This list evidences the fact asserted by Fal that, apart from FAL XVIII and GREEK FIGHTER, the salient facts of which I believe are known to you, no boarding of a Fal-owned vessel by the US Navy or the UAE Coast Guard during the period 1999 to date has resulted in an arrest or detention or claim of violation of the Iraq Sanctions."

189. Although Fal's presentation to the US Navy is not shown to have had any direct causal effect with regard to the ultimate loss of the vessel, it is relied on by Owners as evidence of Fal's previous involvement in smuggling Iraqi oil which led to the US Navy closely monitoring Fal vessels and to the initial detention of the vessel. Owners further rely on the falsity of Fal's evidence as evidence of a propensity to deal in embargoed oil.

190. On 6 January 2003, Capt Johnson of the US Navy, Legal Advisor to the Co-ordinator of the Multinational Interception Force, wrote to Fal and Mr Ansell that a review of the presentation left them convinced that the 5 June statements by Vice Admiral Keating were accurate and they therefore disagreed with the conclusion that there was no basis for the determination that Fal had been in violation of Iraqi sanctions.

191. According to the evidence of Mr Osman of Fal all the contents of the documents accompanying Fal's presentation were true. That evidence was challenged in cross-examination only in relation to the Fal XII and the Fal XVI. There is thus no evidence which establishes that Fal owned or controlled the Fal VI or the Fal VII on the dates when in April 2000, January 2002 and September 1998 respectively these vessels were diverted by the naval pilots.

192. As to the Fal XII, Owners submit that the evidence that at the time in April 2001 and January 2002 when that vessel was loading oil in Iraq that vessel was not owned by Fal was false and that the presentation included false documents, in particular the crew statements. The substance of Mr Raphael's 35 pages of cross-examination of Mr Osman in relation to this vessel was that the vessel, having been de-registered from the Panamanian Registry as owned by Fal, was then re-registered in the same ownership to the effect that it was owned by Fal at the time when it was arrested. Further the Crew Statements falsely stated that the crew members had no contact with Fal.

193. For reasons which are set out in paragraphs 272 to 273 below I find that Fal were not owners of that vessel on either occasion of its arrest.

194. As to Fal XVI, also called Habebal and Doaa, Owners contend that at the times when it was arrested in September 2001 and July 2002 it was owned or operated by Fal. Owners relied on a number of substantial discrepancies between the MOA said by Fal to evidence the sale of the Fal XVI on 4 October 1999 and the bill of sale, May 2001. There were differences in the name of the buyer and the sale price. An addendum apparently agreeing to a change in the buyer's name was attacked as fabricated. It was further submitted that the evidence of the dates for payment in amounts actually paid to Fal under the MOA differed substantially from

the terms as to deposit and completion payments in the MOA and further the payments were not made by the apparent purchaser.

195. For reasons set out in paragraphs 274 to 276 below I find that by the time of the arrests the vessel had been sold by Fal on 4 October 1999 to Al-Reya Shipping Co with International Navigation Ltd being subsequently substituted as purchaser.

196. I therefore conclude that there was no substance in any of the allegations made against Fal by Vice Admiral Keating. His staff connected the five vessels with Fal at the time of their arrest by reason of their deficient investigatory techniques.

197. Fal's presentation to the US Navy is therefore not evidence which establishes a propensity to act in breach of the UN oil embargo against Iraq.

198. On 7 October 2002 Mr Newitt sent to Dr Zakaria the draft of a letter to be sent by Owners to the Coastguard and Ministry of Foreign Affairs.

199. On about 9 October 2002 the Coastguard and Armed Forces applied in Abu Dhabi Suit 609/2001 for an order that samples of the cargo should be taken by a "neutral committee of both parties, that the cargo should be sold at public auction, that the proceeds should be deposited until the case had been decided, that the samples should be preserved for inspection by the court expert when appointed and that the vessel, when unloaded, should be placed under the detention of the Armed Forces.

200. On about 11 October 2002 – Fal applied in 7/2002 for the cargo to be discharged and stored in the custody of the Armed Forces and that the action be stayed. On 13 October 2002 Fal applied for permission from the Court in 7/2002 for permission to purchase the cargo rather than that it be sold at auction. On the same day it appealed against the decision in Petition 213/2002 and it made an interim application to the Abu Dhabi Court of Appeal to stay the auction of the cargo. This was rejected by the Court of Appeal.

201. On 15 October 2002 Fal applied again for a stay of the auction, this time to the Abu Dhabi Court of First Instance. This was rejected on 20 October.

202. On 16 October 2002 Mr Kyrimis of Fal informed Mr Newitt that the cargo had already been sold by auction. It apparently took place on 14 October.

203. On 24 October 2002 the Port Authority informed the master of the Vessel that the cargo had been sold at public auction in accordance with the instructions of the court and the master was requested to start discharging at the time (0600 on 25 October) previously indicated by the master. On 25 October the vessel commenced discharge of the cargo into the Gulf Tiger, a vessel owned or operated by Fal but apparently chartered by Emirates Crown Lubricants.

204. Following discharge of the cargo Owners made contact with Brig Bu Shabs of the Coastguard who confirmed that the vessel was still under confiscation. Some indication was received from the Coastguard early in November 2002 that release of the vessel might be obtained by a payment being made to the Coastguard by Owners but the amount to be paid was never specified. Accordingly, Owners wrote to Sheikh Hamdan at the Ministry of Foreign Affairs requesting that the vessel be released. No reply was ever received to this letter even although it was personally delivered to the Under Secretary of State by Owners' local lawyer.

205. On 6 November 2002 the Coastguard and Armed Forces put in a defence to Fal's Petition 213/2002 before the Abu Dhabi Federal Court of Appeal in which it argued that by reason of Decree No.41 of 2002 and the Cabinet Resolution No.23 of 2001 the court had no jurisdiction to review the case and further that Fal had no interest in the appeal because the cargo had already been discharged and sold and samples taken!

206. On 14 November 2002 Dr Zakaria of Fal wrote to Mr Newitt stating that Owners could have procured the release of the vessel in October by providing the Coastguard with a written undertaking to be responsible for the expenses incurred during the vessel's detention including bunkers and fresh water supplies. Fal were therefore not responsible for the delay in Owners writing to the UAE authorities and thereby procuring the vessel's release. The letter added:

"In the meantime I would like to draw your attention that the Master of MT "Greek Fighter" had informed the shipowners and P&I Representative with all cargoes discharge operations in the same time, for which we believe the ship became out of Charterers' concern. Hence you have full option to defend the ship and to resist the detention of the ship before the competent court and/or authority."

207. In Mr Newitt's reply he pointed out that in relation to that last remark no notice of redelivery had been given – or any other notification in accordance with the terms of the charter. He warned Fal that if it continued to withhold information about the pending proceedings in UAE courts, Owners would hold Fal liable for all Owners losses.

208. On 25 November 2002 the Federal Court of Appeal gave judgment dismissing Fal's appeal in Petition 213/2002 with regard to the order of 25 September 2002. The basis for the decision was that by Federal Decree No. 41 of 2002 the ministerial committee was the authority competent to review breaches of the UN embargo on Iraqi oil and that in accordance with Sheikh Hamdan's letter to the Minister of Justice dated 6 October 2002 the courts had no jurisdiction.

209. On the same date Dr Zakaria wrote on behalf of Fal to Mr Newitt claiming that from the time when the vessel had first been detained by the Coastguard on 17 December 2001 liability of Fal to pay charter hire ceased and since Owners had therefore received more hire than was due to them Fal was preparing to debit Owners with the balance. Further, Owners were under a duty to mitigate their losses by starting proceedings to procure release of the vessel.

210. On 4 December 2002 Mr Newitt was advised by Owners' local lawyer that the ministerial Committee set up under Decree 41 of 2002 had issued an order that the vessel was to be confiscated and to be taken over from the Coastguard by the Armed Forces. No such order was produced to Owners, a matter raised by the Vessel's master in a note of protest issued to the Port Authority on 12 December 2002.

211. On 15 December 2002 Mr Newitt had a meeting with Brig Bu Shabs at the Coastguard headquarters in Abu Dhabi. The Coastguard did not want the vessel in their custody but they wanted to ensure that it was not returned to Fal and used by them for illegal operations. It was of the view that Fal had produced the Palatex cargo through a middleman for further blending and resale by themselves. He further made it clear that progress towards release of the vessel could only be made via the Ministry of Foreign Affairs. According to Mr Newitt's statement, which I accept as accurate in this respect, he raised the matter of the forged analysis certificates. The statement is as follows:
"The Brigadier advised that he was aware of the specific references to "Iraqi cargo" added to the test certificates after they had been issued by ITS Caleb Brett. His understanding was that Akron had added these annotations and that in his view this was normal. I pointed out to him that if Akron had added these notes on the certificates, they should have made clear that the comments were from them and not ITS Caleb Brett. The Brigadier advised that he had always received the certificates with such typewritten comments and the annotations did not always confirm that the cargo was of Iraqi origin. As an example her referred to the test certificate of 12 December 2001, which referred to the analysis of a sample taken from the "FAL XIV", which indicated that the cargo was of Iranian origin rather than Iraqi. He said that if anyone were acting in bad faith trying to implicate Fal they would simply have referred to this vessel as having had Iraqi cargo since it was owned/operated by Fal. He advised that samples taken by the Coastguard were delivered to international testing companies through middlemen so that the testing companies would not know that they were testing for Iraqi cargo on behalf of the Coastguard."

212. I interpose that for reasons which I have already given (see paragraph 66 to 73 above) there can be no doubt that the certificates were concocted in such a way as to make it seem that the notations were originally included by Caleb Brett. As such they could only have been created for the purpose of manufacturing false evidence. In as much as Brig Bu Shabs admitted his awareness that the annotations had been added later and claimed that they had already been made by Akron when received by the Coastguard, I find that his statements to Mr Newitt were untruthfully misleading and that it is to be inferred that he was personally complicit in the manufacture of the certificates either by Akron or the Coastguard.

213. On 16 December 2002 the master notified the Port Authority that if the vessel had indeed been confiscated by the Armed Forces, the officers and crew were to be repatriated. He requested the Coastguard to advise him of the date of confiscation and to confirm that the UAE would be responsible for paying the wages of the officers and crew until repatriation.

214. On the following day the vessel was required by the Coastguard to shift from her position 13 miles offshore to the Inner Anchorage at Abu Dhabi under the escort of a UAE Navy tug.

215. On 18 December 2002 the master sent a message to the Coastguard copied to the Port Authority, Mr Newitt and the Greek Embassy in UAE in which he repeated his two previous requests for information in writing as to whether the Vessel had been confiscated by the UAE Coastguard or Armed Forces and the reasons for such confiscation. If the vessel had been confiscated the master and all crew wished to be repatriated as soon as possible.

216. Following a request from Fal, on 20 December 2002 the General Manager of Saybolt, UAE, reported briefly as to the question whether the Caleb Brett laboratory analysis in reports 15141/01 and 14948/01 showed that the cargo sampled was Iraqi origin or blended with Iraqi cargo. The report stated:
"It is impossible with the limited data on the above mentioned reports to make any accurate conclusions that the cargo is of Iraqi origin or is blended with Iraqi cargo."

217. On 23 December 2002, in response to a similar request from Fal, as to the two Caleb Brett reports Mr M D Das, General Manager of Oil Lab & Marine Surveyors Co Ltd, UAE, reported that "the limited tests which were carried out on samples, were not sufficient to establish or indicate the sources of any Fuel (oil)".

218. At some time on about 3 January 2003 the master of the vessel spoke by telephone with one Capt Obain of the Coastguard who had indicated that the crew were free to leave the vessel at any time provided they were replaced. In a letter of that date to the Coastguard and Port Authority the master pointed out that if the vessel had been confiscated, Owners had ceased to be responsible for crewing or maintaining it and that would be a matter for the Coastguard/Navy. Further the authorities of the Flag State and the vessel's insurers would have to be notified. He therefore again formally asked for written instructions to the vessel and clarification regarding repatriation.

219. I interpose that, given that all the cargo except slops had been discharged from the vessel by 26 October 2002, even if there had been any basis in UAE law justifying the detention of the vessel, the failure of the UAE

authorities to respond to the master's repeated requests for confirmation as to whether the vessel was confiscated and as to the status of the crew was by international standards nothing short of deplorable. It is, however, clear that during this time the vessel was as subject to the physical control of the Coastguard as when the cargo was still on board. Had the master made for the open sea it can be inferred that armed force would have been used to prevent that operation.

220. On 3 January 2003 Owners solicitors, HTD, Piraeus, sent a letter before action to Fal claiming accrued hire of US$1,881,396.09 and hire continuing to accrue. The letter stated that HTD would revert in respect of Owners claims for loss of the vessel and increased expenses due to its detention. It is to be observed that this letter stated that the UAE authorities had "purported to confiscate" the vessel and that the vessel had been "officially confiscated". However, there is no evidence of any formal notification of such by the UAE authorities up to that time.

221. On 6 January 2003 Fal submitted a defence memorandum in Suit 204/2002 in which it alleged that Akron had forged the two analysis reports issued by Caleb Brett. On the same day Fal amended its pleading to reply on the allegation that Mr Bakhos of Akron was instructed by and colluded with Col Shaheen, Commander of the first squadron of the Coastguard and with Major Al Hamadi, the deputy commander of that first squadron in the forgery of the reports.

222. Also on that day the Coastguard filed a defence memorandum in which it placed substantial reliance on lack of jurisdiction to hear the claim on the grounds of Decree No. 41 of 2002.

223. On 21 January 2003 the Fujairah prosecutor conducted an interview of Coastguard office Darweesh. With reference to the forged Caleb Brett analysis certificates, Darweesh stated that Akron added the paragraphs referring to Iraqi origin on the instructions of Capt Hussain of the Coastguard. He had referred to a booklet of analyses of Iraqi oil issued by the Iraqi Ministry of Oil.

224. I interpose that when the Fujairah prosecutor subsequently called upon the Coastguard to produce the booklet of the Iraqi oil characteristics, the Coastguard replied that "the required booklet is not available". I am satisfied that if any such booklet had in reality existed and was normally used by the Coastguard to identify Iraqi oil, a copy would have been produced in response to the Prosecutor's report.

225. Further, as already indicated the Coastguard had previously admitted receiving the Caleb Brett certificates before the addition of the annotations. This is consistent with the Coastguard having added the annotations or procured Akron to do so.

226. On 28 January 2003 Mr Newitt wrote to Brig. Bu Shabs complaining as to the failure of the Coastguard to confirm whether the Vessel had been confiscated and giving notice that Owners wished to withdraw the crew on 31 January 2003. The letter asked for confirmation that, as previously indicated by the Ministry of Foreign Affairs, the crew could be withdrawn.

227. In the course of 30 January to 6 February 2003 Owners' representatives made repeated efforts to obtain the consent and cooperation of the Coastguard and the Port Authority for the withdrawal of the master and crew and their repatriation. Even after the extensive efforts of the master and HTD over many weeks no formal written confirmation had yet been given that the vessel had been confiscated. The Coastguard and the Port Authority each now claimed that permission to withdraw the crew was the responsibility of the other and neither would give consent. The master and crew therefore had to remain on the vessel where they were in substance imprisoned.

228. On 4 February 2003 the Abu Dhabi Court of First Instance gave judgment in relation to an application in Suit 7/2002 to the effect that it had no jurisdiction because of Decree 41/2002. Fal appealed this decision.

229. On the same day in the course of a discussion between Rula Dajani of HTD and Capt Obain of the Coastguard, the latter indicated that the Coastguard would agree to some of the crew being withdrawn provided that the master and engineers remained on board for the purposes of the safety of the vessel. A decision of the Ministry of Foreign Affairs on the fate of the vessel was said to be imminent. Capt Obain threatened to take action against the master personally unless he stopped sending messages and warnings of the kind hitherto received. Owners decided that it would be unsafe to leave the master and the engineers on board without the other crew members.

230. On 9 February 2003 the Greek Ambassador had a meeting with the Ministry of Foreign Affairs and was informed that a decision on ship and crew would be taken after the Eid holiday (15 February).

231. On 23 February 2003 the Greek Ambassador sent to the Ministry of Foreign Affairs yet a third note verbale about the vessel and her crew, the previous two having been ignored, contrary to the normal practice of diplomacy. The third note verbale was also ignored.

232. On 3 March 2003 Owners' Local Advocate was advised orally by the Ministry of Foreign Affairs that the vessel was to be sold at public auction. The auction was advertised in the Khaleej Times on 4 and 5 March. It took place on 12 March. Owners' representatives attended, with authority to bid up to a certain level, but the vessel was purchased for scrap at a higher price (US$3.7 million). The crew were eventually repatriated on 18/19 March 2003. The vessel had thus been held by the UAE for 15 months and was finally disposed of without any court order to that effect and indeed without any procedure for making good legal justification.

Was any of the Cargo on board of Iraqi origin?

233. It is convenient to consider first the various analyses conducted on the vessel's cargo in the order in which the sampling operations were conducted. These are:
(i) the ITS/Caleb Brett analyses set out in the forged reports issued on about 12 December 2001 (14948) and 31 December 2001 (15141);
(ii) the so-called Aquarius samples taken by Mr Leach Smith on 13 December 2001;
(iii) the Saybolt samples of the cargoes then on board taken on 2 October 2002 and analysed by SGS in its report to the UAE Ministry of Justice of 22 March 2003.

234. As to the ITS/Caleb Brett analyses, as already noted, it was the opinion of Mr Notman Watt that the statements added to these reports "could not be supported technically on the results of the analysis." The statements in question were that seven out of the eight samples the subject of report 14948 were matching with Iraqi origin cargo specification. No similar statement from Mr Notman-Watt is in evidence relating to the analysis evidenced by report 15141, but, having regard to the close correspondence of the results to those recorded in 14948, I infer that Mr Notman-Watt would have expressed the same view as to those results. It is to be observed that ITS/Caleb Brett, of which Mr Notman-Watt was General Manager, was based in Sharjah. Some experience of the comparative analysis of Gulf oil products may therefore be inferred.

235. The tests for the three characteristics – density, viscosity at 50°C and sulphur content – carried out by Caleb Brett would only cover basic physical properties required for trading purposes rather than for the purposes of identifying the origin of the oil. Iraqi Ministry of Oil specifications indicate density at 15°C; 0.9464, Sulphur: 3.5 and kinematic – Viscosity @ 50°C: 70-110. Comparison with the results shown in reports 14948 and 15141 for the samples from the Greek Fighter indicate similarity with those specifications in sulphur content alone. There is wide divergence in density and viscosity. Accordingly, as indicated by Mr Notman-Watt in his statement to the police, these analysis results if derived from a homogeneous cargo are not consistent with the normal Iraqi oil specifications issued by the Iraqi Ministry of Oil. However, if the samples were taken from a cargo only part of which was of Iraqi origin, there might, as I understand it, be no necessary inconsistency with there being a constituent of Iraqi origin.

236. The Aquarius samples have an unsatisfactory history. They were taken at the request of Mr Kevin Leach Smith employed as a marine consultant by Aquarius International Consultants (Dubai Branch) Ltd acting on behalf of the vessel's P&I Club. According to his evidence, they were taken as running samples during a period of about two and a half hours on the evening of 13 December 2001. They were taken by the pump man or the bosun. In the course of his cross-examination it emerged that, although in his contemporaneous report he had described the HFO service tank as empty, there was a sample bottle containing oil marked "HFO Service" (tank). Mr Leach Smith was obliged to accept that there must have been a mistake but was unable to explain how it had occurred. No duplicate samples were issued to the Vessel.

237. The samples were not immediately analysed. They were at first stored in Aquarius's offices for some six months and then put in a separate storage warehouse not segregated from other sample bottles. Mr Leach Smith next had recourse to these samples in mid-2003 on being told that they might be needed. He then found that some plastic bottles had split vertically and were leaking. He placed those bottles on their side in a plastic container. There was thus incomplete segregation between the contents of some of the bottles. It was possible that oil from one sample might leak into another. I find that the risk of this having happened was relatively small.

238. The Aquarius samples were eventually sent for analysis to Alcontrol Geochem in Chester in April/early May 2005. Alcontrol carried out so-called "fingerprinting" analysis by a process using biomarkers and isolope analysis. In a report dated 26 May 2005 Alcontrol stated that three of the samples – those from the 2 centre tank, the port slop tank and the 3 starboard tanks gave "good correlation coefficients confirming the sources of these oils to be of Iraqi origin." Confidence level was placed at 95 per cent. The report further stated that samples from the starboard slop tank, 3 port, 4 port and 4 starboard tanks gave "reasonable quality matches to the Iraqi oil" but with a lower confidence level than 95 per cent. It was suspected that an input from a second source had affected the biomarker ratios. The samples from another eight tanks did not correspond with Iraqi oil reference samples. Three other tanks showed poor correlation with Iraqi oil.

239. The 20 samples analysed by Alcontrol were sent to SGS at Ellesmere Port for analysis by conventional methods, not involving biomarkers, for various constituents and properties, including density, sulphur and kinematic viscosity. The results for density viscosity and sulphur content for the port and starboard slop tanks show close similarity to those recorded by ITS/Caleb Brett in their reports of 11 and 15 December 2001. The results for the 2 centre tank show very close correspondence as to density and sulphur content but very wide divergence as to viscosity. Dr Edwards, the Owners' expert, was of the view which I accept, that this must be an analytical error. The very close correspondence of these samples with the ITS/Caleb Brett results is strong evidence that the Aquarius samples had not become significantly contaminated during the period between their being drawn and analysed. Further, the correspondence in results lead inexorably to the conclusion that if, as suggested by Mr Gopal, Fal's expert, there was anything wrong in the manner in which the Aquarius samples were drawn, the same error must have been made when the ITS/Caleb Brett samples were drawn. In each case these were running samples and the contents of these tanks were probably reasonably homogeneous. It thus seems unlikely that the samples tendered for analysis were not reasonably representative of the whole contents of each tank.

240. There are two aspects to the conclusions of Alcontrol that the contents of the sampled tanks were of Iraqi origin:

(i) the provenance of the reference material;

(ii) the reliability of the analytical methodology.

241. As to (i) according to the Alcontrol report, two distinct reference samples of oil of Iraqi origin were used – Kharal Zubair marine fuel oil, ie. Basra Light Crude and Kirkule. A Yemen sample was also used.

242. There is no reason to doubt the origins of these reference samples. The Khoral al Zubair sample was supplied by Intertek/Geochem. Mr Gopal's company, but it was identified as of Iraqi origin on the basis of its properties on analysis and not on such hard evidence as a certificate of origin, so it is not conclusively shown to be Iraqi.

243. As to (ii), the evaluation of the reliability of this analytical exercise has been rendered more difficult by the fact that no witness was called from Alcontrol to explain the process described in the three certificates of analysis dated 17, 18 and 26 May 2005. The analysis was carried out only 3 weeks before the start of the trial in compliance with an order of Mrs Justice Gloster dated 11 February 2005. The very substantial report, which was directed not merely to conveying the bare analytical results but also to expressing an opinion as to whether those results established whether any of the samples were of oil of Iraqi origin, responded to questions put to Alcontrol by both parties and was not a requirement of the order of this court. It was therefore open to the respective expert witnesses to adopt or attack it. It was belatedly relied on by Owners' expert, Dr Edwards, in support of his initial conclusion, reached on independent grounds, that at the time when the vessel's cargo was first sampled during December 11-15 it was carrying significant quantities of Iraqi oil. However, Alcontrol's methodology proceeded in four stages or levels as to which they had issued their three certificates of analysis and one brief email. Dr Edwards was only completely experienced in the case of Alcontrol's first level and was only partially familiar with the second level having been involved only in about six cases at that level, but he was without any experience of Alcontrol's third and fourth levels. Alcontrol was, as he put it, "at the leading edge" of modern analytical techniques so he was unable to express any qualitative evaluation of their third and fourth level work.

244. What Alcontrol appear from their documents to have done by way of analysis was as follows.

245. At the first level by the use of gas chromatography they divided the 20 samples into three groups A, B and C, respectively marine oils with no visible cross contamination, marine oils with light subjected to evaporation losses and light oils with marine oil. The next stage in the first level was to identify the pristine/phytane ratios of the 20 samples and to compare those with that of the Basra light crude reference sample. Then by thin layer chromatography of the 20 samples the percentages of other constituents – aliphatics, aromatics, NSO polar resins and asphaltene – were ascertained. The grouping of the samples derived from the gas chromatography was then revised to take account of this further data with the result that samples 4, 9, 18, 19 and 20 were classed into Group A as heavy fuel oil with no visible cross contamination. These were drawn from the port slop tank, the 2 centre tank, the 5 port tank, the 5 starboard tank and the starboard slop tank.

246. At the second level gas spectrometry was used to identify particular compounds such as naphthalene, phemanthrene, dibenzothiophene and their isomers and to group the results. The process then moved on to biomarker analysis. Biomarkers are a group of compounds, primarily hydrocarbons, found in oils, rock extracts, recent sediment extracts and soil extracts. Chemical analysis of the biomarkers characteristic of a particular source of, for example, oil can be used as "a fingerprint" of a given oil from which the source of a spilled oil can be identified and the biomarker characteristics are not destroyed by age, weathering or cross-contamination. Comparison of the results, obtained by processes of no little complexity from the reference sample and an authenticated Basra light crude oil with a grouping of the samples 4, 9 and 14 in Group A and 7, 18 and 19 in Group B. Samples from the Port slop, No.2 centre and No.3 starboard tanks were therefore placed in Group A and No.1 port, No.5 port and No.5 starboard tank were in Group B.

247. At the third level Alcontrol first compared the biomarkers of the reference sample apparently from Khor al Zubair which they had used at levels one and two with authentic Basra light crude oil. They found good correlation by reference to biomarkers, although not by other analytical methods. The 20 samples were also sent to SGS for physical tests for such properties as density sulphur and kinematic viscosity. Comparison of the density and carbon residue results pointed to grouping similar to that in level 2. The grouping for sulphur content and viscosity was also similar. On the basis of biomarkers that were stated to have been better defined than those derived at the second level as well as other constituents and properties and further by comparison with three reference samples – a Kirkuk oil having been added – it was then possible to re-evaluate the groups of samples with regard to their biomarkers and to the reference samples. This process again grouped together as Group A the port slop tank, 2 centre and 3 starboard as the samples showing the biomarker characteristics most similar to the reference samples. It also grouped together four other tanks – 3 port, 4 port, 4 starboard and the starboard slop tank – as giving a reasonable quality match with the reference samples, but with less certainty than the Group A samples. Eight other samples did not match the reference samples. These were No.1 port, No.5 port and No.5 starboard, the HFO settling tank, the starboard main bunker tank, No.2 port and No.2 starboard and the No.4 centre tanks.

248. On the basis of these three levels of investigation, Alcontrol's conclusion was that the Group A samples – port slop, 2 centre and 3 starboard – showed "a high probability of containing Iraqi oil", whereas the Group B samples demonstrated a lower probability due to possible cross-contamination. It required further investigation to be more specific about that.

249. Following the release by Alcontrol of its report based on the three investigative levels, it was requested to conduct further tests using isotopic analysis and factor analysis for the purpose of confirming the biomarker-based

results. In an email issued on the first day of the trial Alcontrol reported that this further work confirmed the positive identification of the samples in Group A as Iraqi oil and further indicated that there was "strong evidence" to suggest that links to Iraqi oil could also be found in nine other samples. No detailed methodological description has been issued in relation to these latest tests.

250. Dr Edwards, Owners' expert, very fairly said in evidence that he was unable to express any view on the percentage level of confidence (95%) expressed by Alcontrol with regard to some of the samples being of Iraqi origin, since he had not witnessed the exercise. I would add that Alcontrol's 95% confidence in their conclusions was derived only after completion of the second and third levels – an aspect of Alcontrol's methodology upon which Dr Edwards was not adequately experienced as an expert.

251. There were sharp disagreements between Dr Edwards, Owners' expert, and Mr Gopal, Fal's expert, as to the reliability of Alcontrol's analysis. However, both were agreed that Alcontrol's interpretation of their analytical results was dependent on the analysis procedure followed.

252. In this connection, however, Mr Gopal has attacked the whole basis of Alcontrol's methodology by his evidence that

i) Iraq did not produce fuel oil with a viscosity in excess of 180 cst whereas Iran and Kuwait fuel oil had a viscosity of 280 and 380 cst and the applicable refining processes give rise to differences in bulk properties between Iraq and those other areas;

ii) Oil produced in southern Iraq comes from the same geological formation as that produced in southern Iran and Kuwait and it is therefore extremely difficult to distinguish it in its unrefined crude condition from crude produced in those areas, whether one refers to physical properties, bulk elements, pristine/phythane biomarkers or isotope analysis.

iii) It follows that if the bulk properties of samples of unknown origin do not match reference samples from southern Iraq, biomarker analysis cannot attach the unknown origin sample to southern Iraq.

iv) Unless therefore the unknown origin sample's bulk property and biomarker analysis is demonstrated both to match reference samples from southern Iraq and not to match that of reference samples from Kuwait or southern Iran, those two areas could equally be the source of the sample of unknown origin. Alcontrol's use of a sample of oil from the Yemen with different properties and biomarkers could not be relied upon as excluding southern Iran and Kuwait.

253. Mr Gopal further drew attention to the considerable differences in the bulk properties identified in the analyses conducted by Geochem in August 2002 and by SGS in March 2003 compared with those identified in the ITS/Caleb Brett and the Aquarius analyses. Mr Gopal attributed this to differences in sampling procedures, possibly in particular the fact that Geochem and SGS made up volumetric composite samples.

254. On the basis of this evidence Mr Gopal stated that, given that the contents of the port slop tank were a 280 cst grade oil and of No.2 centre a 380 cst oil, these oils could not have come from Iraq. Their bulk properties did not match the reference sample. Further, as to No.3 starboard tank sample, that was drawn from a ballast tank with but 30 cm of liquid which would give rise to difficulties in drawing an effective sample free of seawater. If seawater had been present, it would effect the biomarking and isolope analysis. Mr Gopal also drew attention to the striking discrepancy between the results of the isotope analysis shown in the 4th level email report by Alcontrol and the conclusions drawn from the level 3 investigation. Thus, in the latter, three of the samples were found to have no link with Iraq, whereas at the 4th level these same three were found to be limited to Iraq. Further two of those 9 samples were at level 3 found to have a poor link with Iraq and 4 others as having only a reasonable match with Iraq. Moreover, seven out of the nine samples were 280 cst fuel oils not produced in Iraq.

255. Mr Gopal further drew attention to the fact that, whereas Alcontrol indicated in their report that they were proceeding to adopt a tiered approach to interpretation based upon a three level investigation illustrated in the report and stated to be derived from a paper entitled "Improved and standardised methodology for oil spill fingerprinting" by P S Daling and others, Alcontrol did not follow this conventional methodology which is structured on a process of eliminating non-matching samples at each stage. Instead of such process of elimination Alcontrol adopted the grouping procedure described above, thereby in effect recycling non-matching samples back into the comparative process. Thus they continued to treat the samples as possible Iraqi contenders at level 1 even when the reference samples – viz Basra light and Iranian heavy crude – were outliers. The same approach was followed at level 2 where the results of the Hopanes Biomarker identified both the Khar al Zubair and Basra light crude reference samples as outliers. Further, as appears from sample 5 of Daling and from the paper referred to by Dr Edwards, by Obermajer, Osadetz and Pasadakis, whereas a positive correlation between biomarker results does not provide definitive proof of a genetic relationship, a negative correlation (providing that pristine Biomarker compositions are recognised) is usually a conclusive indicator of a lack of a genetic affinity. Hence in Daling where a diagnostic ratio has less than a 98 per cent correlation, there is a non-match. So, at level one, since there was a substantial mis-match derived from Alcontrol's ratios between alkanes and acyclic isopenoids which are generally accepted to be highly material comparators, the comparative exercise should have stopped. Mr Gopal further criticised Alcontrol's analysis for such ratios because they had used an in-house method of analysis instead of the internationally accepted IP 318 method.

256. I interpose that IP 318 chromatography was first brought into use in 1975 and although it is still an internationally accepted method, it presents problems to the user because it is only applicable to heavy fuel oils if they are

distilled for analysis and because it requires manual measurement which may produce problems of accuracy. Mr Gopal had no experience of the use of biomarker analysis but he was well acquainted with the use of the IP 318 method.

257. Having considered Dr Edwards's evidence and Mr Gopal's answers in cross-examination I am not persuaded that Alcontrol's methodology has given rise to reliable conclusions as to the likely origin of any of the oil on board the vessel. In particular, Alcontrol adopted a method which retained as possibly of Iraqi origin through all the four stages of their investigation samples which upon being found to mismatch the reference samples in one or more respects ought by application of the Daling method, to have been eliminated at earlier stages. Secondly, there is significant divergence between some of the marketing specifications identified in the Iraqi Ministry of Oil document, which I find to be genuine, and the bulk properties of the relevant samples. Thirdly, consistency between the samples biomarker values and those of the ship's samples is not in itself evidence of the origin of the ship's samples in the absence of any reference samples from oil fields in southern Iran or Kuwait. Whereas I accept that if there were the blending operation on board the vessel on 14 December 2001 which is referred to in documents produced by Fal relating to blending results, including the two centre tank and the slop tanks, that would be likely to give rise to differences between the analyses of the ITS/Caleb Brett and the Aquarius samples on the one hand and the samples taken by SGS in 2002 on the other hand, and that accordingly Mr Gopal's reliance on those differences to attack the validity of Alcontrol's reasoning might be misplaced, I find that, for the reasons set out above, Alcontrol's conclusions as to the origin of the oil in any of the samples are not reliable evidence that they were of Iraqi origin. The highest it can be put is that the biomarker analysis of the samples from No. 2 centre tank, the port slop tank and the No.3 starboard tank indicates that such oil has characteristics consistent with oil of Iraqi origin. As I have said, that does not prove that it was Iraqi oil.

258. As to the Saybolt samples taken on 2 October 2002, it is important to note that, unlike the samples drawn at the instance of the Coastguard and ITS/Caleb Brett in December 2001, which were drawn by the crew, these samples were drawn by Saybolt surveyors and therefore are more likely to be representative and formally sealed. The samples were composited volumetrically in accordance with the volumes indicated in the vessel's ullage report. Samples, drawn presumably from those volumetric composites, were then sent to SGS at Ellesmere Port for fingerprint analysis by the IP318 method of high resolution gas chromatography. This was the analysis for pristine and phytane ratios already described in relation to the Alcontrol report. Composite samples included the port and starboard slop tanks together with other spaces and the two centre tank with four centre and two port and starboard. The physical properties analysis results for the slop tank sample matched with samples of 280 cst fuel oil from Bandar Mahshahr, Iran. The analysis for the organic chloride content was to the same effect. The physical properties analysis results for the No.2C sample, which included components from 4c and 2 port and starboard matched with the sample of 380 cst fuel oil from Bandar Abbas, Iran. The IP318 gas chromatography analysis produced widely divergent mismatches between the pristine and phytane ratios of the slop tanks composite sample and the No.2C composite sample on the one hand and those of a sample of Basra light crude on the other hand. Indeed the IP318 analysis results of none of the composite samples matched those of the Basra light crude. Further the IP 318 analysis of the No.2c composite sample matched the IP 318 analysis of a Bandar Abbas sample.

259. Dr Edwards, Owners' expert, has drawn attention to the fact that the physical properties analysis conducted by SGS in 2003 demonstrates that when the sample of the 2C tank was taken in 2002 that tank must have contained a completely different oil from that present when the Aquarius samples were drawn in December 2001. He further makes the point that SGS were analysing composite samples and not individual tank samples and doing so long after December 2001. The results were therefore not as reliable or indicative as those derived from the Aquarius samples. Further, the IP318 gas chromatography method of fingerprinting was relatively primitive and difficult to use with perfect accuracy.

260. In my judgment, those analytical results do not establish that the vessel had any significant quantity of Iraqi oil on board when the UAE Coastguard detained her in December 2001. In arriving at this conclusion I attach weight to ITS/Caleb Brett's opinion as to their samples, to the evidence as to normal Iraqi viscosity levels and to the physical properties of the December 2001 samples, and further, notwithstanding that following the drawing of the Aquarius samples there does appear to have been some onboard cargo tank transfer and possibly blending operations, to the divergence of the SG IP 318 analysis results for all the samples from the results for Basra light crude. I have already referred to the apparent shortcomings of Alcontrol's methodology and the conclusions in their report. On balance, it is, in my judgment, possible to go further and conclude that having regard only to the analytical evidence it is not established that there was any significant quantity of Iraqi oil on board.

261. This, however, does not dispose of the issue whether at the time of its detention by the Coastguard the vessel had at least some Iraqi oil on board. Owners rely on the fact that at the same time as the Coastguard detained the vessel the Coastguard also detained the Gulf Prince and Julia II which were alongside the Greek Fighter at the relevant time. Owners say that oil of Iraqi origin was loaded from the Gulf Prince into the Greek Fighter on Fal's instructions. It is common ground that Julia II probably did not transfer any oil to the Greek Fighter. There is some evidence that her pumps were defective. Nothing is known about the origin of such cargo as she had on board. Both the Gulf Prince and the Julia II were confiscated by the Coastguard and sold at public auction on 23 January 2002. The rapidity of that sale suggests that Owners of those vessels may well not have attempted to challenge the confiscation and therefore that they regarded that course as futile.

262. In support of the case advanced by Owners as to the Gulf Prince cargo is the evidence contained in the statements of the Coastguard witnesses to the Court-appointed expert in Abu Dhabi Action 204/2002 in which Fal claimed damages against the Coastguard for the arrest of the Greek Fighter and its cargo, as well as the evidence of Capt Doukas, master of the Greek Fighter when it was detained. In summary the Coastguard witnesses stated that when they arrested the Gulf Prince it was carrying no papers applicable to the oil on board. The master and crew were said by the master to be all Iraqis. It is said that the master explained the lack of papers by saying that it was because of the UN sanctions against Iraq and that they wanted to make a living. When asked why the Gulf Prince was in UAE territorial waters he said that he received instructions from one Fawzi Al Lami, an Iraqi, residing in Dubai, to go to the Greek Fighter "upon agreement with Fal" and to supervise the transfer operation to that vessel.

263. According to the statement of Capt Doukas of the Greek Fighter the cargo transfer from the Gulf Prince was in accordance with instructions received from Fal, in the same manner as other cargo transfers, namely by Fal making a telephone call to their representative on board about 20 minutes before the arrival of a transfer vessel. The Fal representative would then speak to the Chief Officer passing on such instructions, identifying the quantities of oil to be transferred and the tanks to be used and whether a blending operation was to be carried out. The Chief Officer would then consider whether the instructions could be carried out having regard to stress and stability considerations. Capt Doukas rejected the suggestion by Fal that he had been contacted independently by or on behalf of the Gulf Prince and had agreed to take the cargo on board as "false". Fal's representative on board had ordered the loading of cargo from the Gulf Prince. I interpose that Capt Doukas said in evidence that Fal's representative, Mr Alim, was on board throughout the period from 2 December 2001 until the Gulf Prince transfer operation on 11 December and it was through Alim that the instructions to load from the Gulf Prince were received and he participated in the decision as to the tank into which the Gulf Prince cargo was to be transferred.

264. Fal's evidence as to the Gulf Prince cargo differed fundamentally from that set out above. It expressly denied that it or its representatives had anything to do with the Gulf Prince or its cargo. With regard to the cargo itself, Fal refers to a letter dated 13 December 2001 from Mashal Shipping Agency, the agents or managers of the Gulf Prince, to the Commander of the Coastguard. In summary, it was there stated that while in Iranian waters the Gulf Prince had gone to the assistance of another vessel on which a fire had broken out in response to a request to salvage that other vessel and its cargo. The Gulf Prince was then bound for Dubai Dry Dock for routine maintenance. It loaded petroleum slops from the salvaged vessel but it had to get rid of them before going into dry dock. Accordingly, rather than polluting the sea in breach of the UAE environmental regulations by jettisoning that cargo, the master of the Gulf Prince negotiated an agreement with the master of a vessel at Khorfakkan (the Greek Fighter) for it to receive transfer of the slops. At 1000 on 11 December 2001, while transfer to the Greek Fighter was in progress, the master of the latter refused to receive delivery of anymore cargo, and transfer stopped at which point the Coastguard arrived. Further, in a statement by the master of the Gulf Prince he said that he was forced by the port authority at Bandar Immam, (Bandar Imam Khomeini) Iran, to accept the oil cargo from the damaged vessel and that he was ordered to discharge it in Iranian waters. However, he did not so discharge it but headed towards Dubai for repairs. When he was approximately seven nautical miles off Khorfakkan he contacted a Dubai agent – Fawzi Al Lammi to arrange for discharge of the cargo before arrival at Dubai. Al Lammi directed him to discharge it into the Greek Fighter. The Coastguard detained the vessel while it was transferring the cargo. About 300 – 350 mt of cargo was received from the damaged vessel.

265. Further, Fal relies on the evidence of its representative, Mr Alim, who was said by Capt Doukas to have passed on Fal's request to receive the Gulf Prince cargo. According to his evidence, on the day when the Gulf Prince arrived, he was ashore, having fallen ill and was consulting his doctor who advised him to take three days rest. He did not return to the vessel until the evening of 13 December 2001. He denied having any conversation with Mr Leach Smith, the Surveyor who at that time was taking samples from each tank on the Greek Fighter. I interpose that Mr Leach Smith's evidence was that while on board on 13 December he had several conversations with Mr Alim, who was present on deck at intermittent intervals during his presence on board. A doctor's certificate dated 11 December 2001 indicates that he was consulted by Mr Alim who was in pain, that the diagnosis was severe UTI, that medication was prescribed together with a statement that Alim was unfit for duty for three days.

266. By way of corroboration Fal also relies on a letter dated 10 December 2001 from Fal Energy Company to the Chief of Khorfakkan Port Immigration office asking for permission for Mr Alim to go ashore to see a doctor. Reliance is also placed on Alim's evidence that on 12 December 2001, while he was ashore, he visited the Khorfakkan immigration office with Fal's personnel officers so that the office could verify that the photograph in his passport matched his true appearance and that having done so, the official stamped his passport with the date. Fal also rely on Mr Osman's evidence that if Fal had traded the oil from the Gulf Prince, he would have known about it and that he knew nothing of it. Fal submit that the explanation for the Gulf Prince transfer of cargo was not an instruction from Fal through Alim but a private arrangement made by the master in Alim's absence. It is thus submitted that, if the cargo transferred was of Iraqi origin, the master brought this problem on himself and his owners.

267. Fal invite a finding that the evidence of Capt Doukas and Capt Mastrodimas, his predecessor, as to cargo documentation and as to their knowledge of the cargo should be rejected. In particular, the vessel was in breach of its obligation under clause 16 of the Shelltime Form in failing to keep a cargo log. It was Capt Mastrodimas's evidence that daily records of the contents of each tank were destroyed for there was no purpose in retaining them. Mr Remoundos of the vessel's managers gave evidence that the managers would receive weekly reports

from the vessel on cargo weights with regard to trim, stability and stress. Fal submit that this evidence as to record keeping is unsatisfactory and unreliable and that it was Owners' responsibility as carriers and bailees to keep records as to the oil on board so as to be able to account for all cargo movements.

268. The conflicts in the evidence relating to the Gulf Prince cargo are not easy to resolve. However, having heard the witnesses and, in particular Capt Doukas, Mr Osman and Mr Alim, I have reached the following conclusions.

i) Mr Alim was not on board when the Gulf Prince arrived, having gone ashore to consult a doctor.

ii) I accept the evidence of Capt Doukas that he made no private arrangement to receive that cargo. Having heard him closely cross-examined, I found him to be a credible witness in the sense that he was trying to give truthful evidence, although his recollection was mistaken as to the presence on board of Alim on 11 December.

iii) I accept the evidence of Mr Alim that he received a telephone call from Capt Doukas on his mobile while he was at home on the evening of 11 December and that Capt Doukas requested Fal's help in dealing with the intervention by the Coastguard. Had Capt Doukas and not Fal been responsible for transhipment of cargo from the Gulf Prince, it is inconceivable that the master would have turned to Fal's representative for help.

iv) The loading of the Gulf Prince cargo on board the Greek Fighter was authorised by someone in Fal by some means other than communication through Mr Alim.

v) The several references in the log book to the Gulf Prince discharging into the Greek Fighter would never have been put there had the operation been intended by Capt Doukas to be kept secret from Fal. Moreover, even if no Fal representative were on board to replace Mr Alim, one might have appeared unannounced at any time in the course of the transhipment operation.

vi) The account of the origin of the Gulf Prince cargo given by its master and by Mashal Agency appears to me to be intrinsically improbable, not least the master's evidence that it was only when he was but seven nautical miles from Khorfakkan, well south east of the Strait of Hormuz, (and therefore proceeding on a course away from Dubai) that he contacted the Dubai agent, Fauzi Al Lammi, and received instructions to transfer the cargo to the Greek Fighter.

vii) The Fal memo indicating that the Gulf Prince had discharged 2257 mt to the Greek Fighter – with the total declared stated to be 4000 mt – which I have held to be in the handwriting of Capt Velis, indicates that the Gulf Prince was to transfer more than the 300-350 tons of so-called slops referred to by the master and further suggests knowledge of its cargo and its intended transfer by Fal. Moreover, there are various inconsistencies between the account of the Gulf Prince's cargo origins given by the master and that given by Mashal, which at least call in question the reliability of the evidence of both of them.

viii) Whether the oil transferred from the Gulf Prince was of Iraqi origin is a matter of some difficulty. The evidence of the Coastguard officers given in May 2004, to which I have already referred, strongly suggests that the Gulf Prince and its master and crew were Iraqi and that the latter were attempting to ship contraband oil out of Iraq. The crucial question is whether, given the interest of the Coastguard in defending Fal's claim and having regard to the Coastguard's dishonest complicity in the creation of false certificates of analysis in respect of the cargo on board the Greek Fighter, any weight should be attached to their evidence as to what was said by those on board Gulf Prince. There is, however, in addition to those matters referred to in sub-paragraphs (vi) and (vii) above, the evidence that the Gulf Prince was not reported as an incoming vessel to the Khorfakkan Port Authority and the fact that vessel, master and crew, as well as the Dubai agent, Mr Al Lammi, were Iraqi.

ix) There is evidence as to only one set of samples having been taken from the Gulf Prince and subsequently analysed. Those were samples A and B listed in the Caleb Brett analysis report of 12 December 2001, No. FUJ/14948/01, which bore the added forged statement as to Iraqi origin with reference not only to the three samples from the Greek Fighter, but also to the two samples from the Gulf Prince and in relation to which Mr Notman-Watt of Caleb Brett stated that the statement could not be "supported technically on the results of the analysis". However, neither this statement nor any expert evidence points to a conclusion that the Gulf Prince samples were necessarily not of Iraqi origin. The highest it can be put is that Mr Notman-Watt's view was that the analyses did not amount to conclusive evidence of Iraqi origin.

x) In all the circumstances I have come to the conclusion that the Gulf Prince did transfer to the Greek Fighter oil (probably fuel oil) of Iraqi origin and that, but for the intervention of the Coastguard, it would have transferred more of such cargo. It is to be inferred that such cargo was contraband and not legally exported from Iraq.

xi) Although I find that Fal through Mr Velis believed that the Gulf Prince cargo to be transferred consisted of a significant quantity of what was described as fuel oil or slops or residues, I do not consider that on the balance of probabilities it is conclusively established that Fal knew that such cargo originated in Iraq. Whether Mr Velis or anyone else in Fal suspected that it did, I am unable to conclude from the evidence before me. Although, as I have held, Fal engendered into the UAE proceedings concocted documents, namely the ITRs apparently signed by Mr Datinguinoo, I am not persuaded that it is more probable than not that this was for the purpose of hiding complicity in supplying Iraqi oil rather than for the purpose of generally improving Fal's position in the litigation.

xii) Owners and their master were not aware that the Gulf Prince cargo was of Iraqi origin.

xiii) There is no evidence that the Julia II had on board oil of Iraqi origin or that Fal knew that origin. However, I infer that Fal knew that it was about to transfer oil to the Greek Fighter.

xiv) Neither Owners of the Greek Fighter nor their master knew that the oil which Julia II was about to transfer was of Iraqi origin.

269. It follows that there are two possible explanations for the presence on board of at least some Iraqi oil at the time when the vessel was first detained:-

i) retained quantities of the Palatex cargo, if that were of Iraqi origin, namely some 719.709 mt of mixed fuel oil in tanks C1, 2, 3 and 4 and in the port and starboard slop tanks, being that which remained on board after the Palatex cargo had been blended and transferred on to the Mint Prosperity; and

ii) a quantity of so-called slops or residues or fuel oil amounting to about 130 mt transferred from the Gulf Prince.

US Navy and UAE Coastguard's Attitude to Fal

270. Owners have advanced a secondary case that Fal had a history of smuggling Iraqi oil and was generally seen by the US Navy and the UAE Coastguard as a potential offender. There is evidence that the Coastguard had been keeping Fal's operations under surveillance for several months before the detention of the Greek Fighter. That surveillance involved three vessels: Fal XVIII, which was detained by the US Navy in April 2000; Fal XII, which was alleged by the US Navy to have loaded oil in Iraq in April 2001 and January 2002 and the Fal XVI, which was alleged to have loaded Iraqi oil in September 2001 and January 2002. There is no evidence that any other vessels formed the basis of these suspicions.

271. As to the Fal XVIII, the evidence is, and I find, as explained at paragraph 49 above, that at the time of its detention the vessel was laden with a cargo of fuel oil shipped at Lavan Island, Iran, for carriage to Khorfakkan and that no Iraqi oil was on board. In the face of it clearly genuine documents supporting that origin of the cargo and of sample analysis reports by Saybolt and ABS that the oil on board was not of Iraqi origin or was consistent with the documentary origin on 16 May 2000 Fal obtained an order for release from the Abu Dhabi Court of First Instance.

272. As to Fal XII, Fal's case is that the vessel was sold to one Abdul Samad Alwan on 8 January 2001 and a bill of sale executed on 20 January 2001, the Panamanian Registry being requested to delete the vessel on 22 January 2001. This was confirmed on 3 May 2001 with effect from 25 April 2001. On 24 September 2002 the Consul General of Panama in Dubai confirmed that the vessel had not been re-registered through the Consulate, having been deleted in April 2001. A document issued by the Directorate General of Merchant Marine at Panama, dated 2 October 2002 is further evidence of deletion from the Registry in April 2001 because, although it refers to an official receipt for all duties paid issued by the Panamanian Consul in Dubai dated 25 April 2002, that document referred to is clearly the same receipt as that dated 25 April 2001 which bears the reference number 70189 quoted in the 2 October 2002 certificate. A reference in Lloyd's Register to Fal XII is still registered by Fal in Panama in 2001-2002 was an error. The allegation put forward by Owners that, on the basis of the continuation of the employment contracts in respect of some crew members as at 20 January 2001 with Fal as employer, Fal must have continued to own or operate the Fal XII, was ill-founded. It arose from administrative failures on the part of Travex, Fal's managing agent, who, as they eventually accepted in their letter of 18 September 2002, had ignored the fact of which they had been informed at the time that the vessel was under new ownership when they issued new contracts to some of the crew in January 2001.

273. I accept the evidence of Mr Osman, who was very thoroughly cross-examined by Mr Raphael, that the Fal XII was no longer owned or operated by Fal either in April 2001 or in January 2002. In doing so, I am quite satisfied that none of the documents relied upon by Fal to support that evidence were concocted or false.

274. As to the Fal XVI, Fal's case is that it had been sold for US$500,000 to Al Raya Shipping Co under a Memorandum of Agreement dated 4 October 1999, long before it was detained in September 2001 and July 2002. It is said that there was an addendum to the MOA dated 15 October 1999 under which the buyer's name was amended to International Navigation Ltd. The bill of sale executed on 29 May 2001 showing International Navigation Ltd as buyer contained an error by its reference to a price of DHS 500,000. It should have been stated as US$500,000. The vessel was deleted from the UAE Register on 29 May 2001. However, payment was not made in accordance with the MOA (deposit of US$200,000 with a further US$300,000 on delivery) but the outstanding price was secured and eventually paid in DHS amounting to the equivalent of US$500,000.

275. Lloyd's records are to some extent consistent with this case. Thus a vessel by the name of Doaa was reported to have been sold in October 1999 and to have been removed from the UAE Register in May 2001. Under the name Habibah it was then resold in January 2002. Under the name Doaa ex Fal XVI the vessel is shown to have been broken up on 14 December 2002. Lloyd's Register shows the vessel still to have been owned by Fal in 2002-2003 but this was an error. Al Raya Shipping Company of Sharjah provided a letter confirming that Fal XVI had been sold to it and then re-named Doaa, that it had paid the price by means of a cheque for US$300,000 with the balance of US$200,000 paid later. The vessel was subsequently arrested by the UAE Coastguard and sold by the UAE Government.

276. Having heard Mr Osman cross-examined in some detail on the documents by Mr Raphael, I am satisfied that their vessel had indeed been sold by Fal to Al Raya/International Navigation before September 2001 when it was first detained by the UAE Coastguard and that it was then no longer under Fal's control.

277. I therefore conclude that Fal had not been involved in smuggling Iraqi oil on board the Fal XVIII, Fal XII or Fal XVI up to the time when the Greek Fighter was detained and that its evidence to the US Navy in respect of those vessels was in substance true.

Were Fal's Cargo Operations in connection with the Greek Fighter in breach of UAE Law?

278. Having regard to the findings of fact already made in this judgment, it is necessary to answer this question by reference to

i) the Palatex cargo and

ii) the cargo discharged from the Gulf Prince.

279. As to the Palatex cargo, it was blended with other oil on board the vessel and, except for a total of 719.709 mt ROB, the composite blend was then transhipped to the Mint Prosperity for shipment to Pakistan. I infer that the amount of blended oil remaining after transhipment was still on board when the Greek Fighter was first detained. Thus the relevant questions are

i) if, which is probable, the Palatex cargo consisted of Iraqi oil which had been seized by the Coastguard, the blending operation was contrary to UAE law;

ii) whether the retention on board of 719.709 mt of blended cargo incorporating Iraqi origin oil purchased at auction was contrary to UAE law.

280. As to the residues taken on board from the Gulf Prince, which I have found probably to have been of Iraqi origin, the relevant question is whether in all the circumstances it was unlawful to transfer such oil to the Greek Fighter, even if, as I have found, it is not established that its origin was known to Fal.

281. Finally, the question arises whether, if Fal acted unlawfully in transferring any such oil to the Greek Fighter it was lawful for the Coastguard to detain and sell the vessel regardless of whether Owners or their master knew the origin of the oil.

282. In relation to these questions I hold as follows, having regard to the evidence of Mr Edge (Owners) and Dr Al Owais (Fal);

i) The United Nations oil embargo against Iraq and the obligation to observe it became incorporated into UAE law to the effect that enforcement of that embargo was a matter of the regime of UAE administrative law and not of criminal law.

ii) Under UAE law enforcement of the embargo was to be effected by the Coastguard. If the Coastguard had evidence that a particular cargo was carried on a vessel in breach of the embargo, the cargo and the vessel could be seized by the Coastguard and both could be sold at auction, the proceeds of sale being paid to the UAE Ministry of Finance and then remitted to an account operated by Sheikh Hamdan. The decision whether any particular vessel or its cargo were to be seized and sold at auction was in practice taken by Sheikh Hamdan until July 2002 and thereafter by the Ministerial Committee set up by Federal Decree 41/2002, under Sheikh Hamdan's chairmanship. That Decree was treated by all concerned as if it were validly part of the law of the UAE. In truth it is unlikely that it had ever formally become part of UAE law because it had at all relevant times not been published in the Official Gazette as it should have been under Chapter III of the UAE Constitution.

iii) Oil sold at auction after it had been seized as contraband was sold on terms that the successful bidder would procure a seaworthy vessel complying with international standards and would lift the quantities purchased within three days from the date of the sale, otherwise the initial instalment of the price (20 per cent) would be forfeited. The Port Authority was to have the right to determine the place of delivery, whether offshore or at any of the Authority's seaports. Further, it was provided that:

"The winner bidder shall export the consignment out of the UAE and shall not be allowed to put the same up for sale within the local market."

The terms of sale thus required that the purchaser should take delivery by transfer into a seaworthy vessel within three days and would export the oil without reselling it within the local market. There is neither an express nor implied prohibition against blending the oil so purchased nor a condition that the oil should leave UAE waters within three days. The key provision is against resale within UAE.

iv) Once cargo had been purchased at auction it would cease to be contraband and dealing with it inconsistently with the terms of the auction sale would be a breach of contract as between the purchaser and the Port Authority in respect of which, once delivery had been taken by the buyer, neither the oil nor any vessel into which it has been loaded would be seized and confiscated.

v) The participation of Fal in the reception of the Palatex cargo on board the Greek Fighter, the blending of that cargo with other cargo on board, the subsequent discharge into the Mint Prosperity of the blended cargo and the retention on board of 719 mt of residues of the blended cargo did not amount to breach of the Iraqi oil embargo and provided no basis in Iraqi law for the confiscation of the vessel or the cargo. I interpose that at no time did the Coastguard rely on the operations with the Palatex cargo as justifying the detention of the vessel or cargo.

vi) Assuming that the "residues" remaining on board the Greek Fighter and transhipped from the Gulf Prince were, as I have held, of Iraqi origin, any dealing with that cargo would be a breach of the embargo. If Fal knowingly received such cargo on the Greek Fighter, it would be open to the Coastguard to confiscate the cargo and the vessel. There is no evidence as to whether the ignorance of the origin of such cargo on the part of Fal or Owners would make confiscation impermissible. However, I infer that it would not. It seemed to be implicitly accepted by the experts that discovery of contraband on board a vessel would justify confiscation even if the shipowners were unaware of its origin. It seems likely that the UAE authorities would apply a

similar approach to a charterer such as Fal who unknowingly accepted on board a cargo of contraband oil and to the owner of the vessel to which the oil was transferred.

Rights and Obligations under the Time Charter

Was Fal liable for breach of clause 4 of the Time Charter?

283. To load on board the vessel contraband oil would be to load "unlawful merchandise" contrary to clause 4 and would therefore amount to a breach of the Time Charter. I have found that Fal was responsible for the transhipment of about 130 mt of oil of Iraqi origin from the Gulf Prince and intended that further oil should be transferred from that vessel, albeit Fal is not shown to have known the origin of that oil. Certainly Owners did not. The sense of clause 4 is that the charterer is taken to warrant the lawfulness of the cargo and not merely that an undertaking is given that the cargo is lawful to the best of his belief. That the provision is to be so understood arises from its obvious purpose. The shipowner requires to be put into the position where he can rely on the charterer, who, it can be anticipated, has access to all relevant information, to ensure that the cargo which the vessel is required to load will not expose the shipowners to loss due to the vessel being detained or fined or otherwise delayed on account of a breach of the local law. In other words, this is an absolute warranty.

284. Accordingly, if the transhipment by Fal of contraband cargo of Iraqi origin caused the Greek Fighter to be detained, confiscated and sold, Fal would be liable for the loss, regardless of whether it knew the origin of the **oil.**

Clause 28 of the Time Charter

285. Clause 4 of the Shelltime 4 form of time charter was expressed to be "subject always to Clause 28". Having in its first sentence expressly prohibited the loading of acids, explosives or cargoes injurious to the vessel", clause 28 went on to provide …

"No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments."

286. This provision reinforces and expands the protection given by the lawful merchandise warranty. Thus, even though the cargo may lawfully be loaded at the port of loading, it must not be such that presents a risk that the vessel will be captured or seized by rulers or governments anywhere following loading. Here again the obligation of the charterer is, in my judgment, absolute: it is nothing to the point that the charterer may have been ignorant of that characteristic of the cargo which gave rise to the risk of capture or seizure and this for the same reason as I have indicated in relation to the effect of clause 4.

287. Similarly, in order for Owners to make good a claim for damages for breach of this provision it is necessary for them to establish that the loss was caused by the loading of cargo having the characteristic of exposing the vessel to capture or seizure.

288. Whether a cargo does have that characteristic involves an objective test to be applied by investigation as to whether, having regard to features of the cargo itself, in the broader sense, including not only its physical attributes and documentation but its place of origin and its destination viewed with regard to the intended voyage.

289. However, submissions on behalf of Owners to the effect that there would be a breach of clause 28 if the cargo were shipped by charterers who themselves were the subject of suspicion on the part of the Coastguard and where, even if the cargo were lawful, the vessel was thereby exposed to the risk of capture or seizure, in my judgment, give too wide a meaning to clause 28. Although that provision is obviously designed to protect owners against the identified risk eventuating, the exposure to that risk is expressly defined by reference to characteristics of the cargo itself, as distinct from characteristics of the charterers. It is thus to the physical and other characteristics of the cargo to which I have referred that it is necessary to look to see whether there has been non-compliance with clause 28. However, had it been necessary to consider whether a voyage had been undertaken, as contemplated in the second sentence, it would be open to Owners to rely on any circumstances relating to the voyage and the charterers themselves which foreseeably exposed the vessel to the relevant risk. That, however, does not arise on the facts of this case, for to that extent, the second sentence is inapplicable to a "warehousing" contract such as this.

Clause 4 and Clause 28: Causation

290. The detention of the vessel and its subsequent confiscation have been justified by the Coastguard only on the grounds that the vessel had on board in tanks 2C and port and starboard slops oil of Iraqi origin which was contraband. Up to the time of confiscation this justification was based on the ITS/Caleb Brett analysis of the 12 December 2001 samples. These, as I have found, do not amount to evidence that the vessel had on board Iraqi oil or contraband Iraqi oil and the analysis reports used by the Coastguard to justify the detention of the vessel were concocted in as much as they assigned to the samples an Iraqi origin untenable by reference to the analysis results. However, the exercise of detaining the vessel and subsequently confiscating it was initiated on the grounds of suspicion as to the contents of the vessel and in particular as to the oil being transferred from the Gulf Prince when the Coastguard arrived. That vessel was also detained at the time and subsequently confiscated, it is to be inferred, on the basis that it too had Iraqi oil on board, and that its discharging operation into the Greek Fighter gave rise to suspicion.

291. I have held that the cargo on board the Gulf Prince was contraband Iraqi oil and that such oil was in the process of being transferred to the Greek Fighter. Accordingly, if one asks whether the detention of the vessel was

initially caused by the loading of unlawful cargo or by the loading of cargo which gave rise to the risk of the capture or seizure of the vessel, the answer is that it was caused by the Coastguard's justified suspicion that the cargo being transferred was Iraqi and by the cargo transferred having originated from a vessel, the Gulf Prince, which was suspected (rightly as I have held) of carrying contraband. The fact that the Coastguard then embarked upon a course of falsification of evidence in conjunction with Akron is beside the point: for that which triggered the chain of events leading to the confiscation of the vessel was the association of the Greek Fighter with the Gulf Prince and the transfer of a relatively small quantity of contraband Iraqi oil from that vessel.

292. Furthermore, clause 27(a) of the Time Charter – the mutual exception clause excluding the liability of either for loss, damage, delay or failure in performance arising or resulting from arrest or restraint of princes, rulers or people – does not assist Fal with regard to liability for breach of clauses 4 or 28. Clause 27(a) has to be construed to the effect that the arrest or restraint to which it refers are not attributable to the shipment of unlawful cargo (clause 4) or cargo which prospectively presents a risk of capture or seizure.

293. Accordingly, subject to the issue of mitigation, which I consider later in this judgment, Fal is liable to indemnify the Owners in damages for breach of clauses 4 and 28 of the Time Charter.

Clause 13(a) of the Time Charter and the Implied Indemnity

294. In case my conclusions with regard to the application of clauses 4 and 28 of the Time Charter cannot stand, it is necessary to consider the Owners' claim to be indemnified under clause 13(a) and/or the implied indemnity. I restate the relevant wording as a matter of convenience:

"Charterers hereby indemnify Owners against all consequences or liabilities that may arise (i) … (except as provided in clause 13(b) from the master complying with Charterers' or their agents' orders ….".

295. The word "otherwise" refers to the master signing bills of lading in accordance with the directions of the charterers or their agents to the extent that such bills fail to conform to the requirements of the time charter.

296. Further, it is common ground that the Time Charter was subject to the usual implied indemnity against the consequences of complying with the charterers' orders.

297. Owners' case on their entitlement to an indemnity is as follows:

i) The charterers ordered Owners to load oil of Iraqi origin, the particular cargo from the Gulf Prince and/or the Palatex cargo. The Iraqi origin of the cargo aroused suspicion, even if the loading was not in breach of the embargo, as did the originating vessel for the Gulf Prince cargo.

ii) Alternatively Fal's loading operations overall, including those before December 2001 aroused the Coastguard's suspicions that Fal was breaching the embargo.

iii) Fal ordered the loading of cargoes whose origin and legitimacy it could not effectively prove because it lacked accurate and coherent documentation.

iv) Alternatively, if the Coastguard set out to victimise Fal without justification, it was the giving of the orders to load the cargo in question which caused the arrest and confiscation of the vessel.

298. Fal submit the express and implied indemnities are subject to the mutual exceptions in clause 27(a). Accordingly, the indemnity does not operate to displace the exclusion in charterers' favour of arrest or restraint of princes, rulers or people, to the effect that if the charterers gave an order to load lawful cargo but the UAE authorities wrongly claimed that the cargo was unlawful, the cause of the detention and subsequent confiscation and sale of the vessel would be in the intervention of the authorities and not the order of Fal to load the unlawful cargo. In such a case the loss would not have been directly or proximately caused by the order and the indemnity would not be engaged or the liability of Fal would be excluded by the clause 27(a) mutual exceptions.

299. Fal further emphasise that the indemnity will only be triggered if the loss of the vessel was caused by the charterers' orders given pursuant to their powers under the charter. Further, the mere fact that the vessel would never have been detained if Fal had never ordered it to load any cargo is not enough to establish entitlement to an indemnity on the grounds that the vessel was detained by reason of loading unlawful cargo, because, for example, the Coastguard entertained suspicions as to Fal's conduct. In such a case the charterers' order would not have caused the loss of the vessel. The indemnities are not against the consequences of the mere fact of entering into the Time Charter but against the consequences of compliance with the charterers' orders.

300. Considerable discussion took place in the course of submissions as to the nature of the causal link required to make good a claim against charterers for an indemnity. The focus of the issue was whether the indemnity was, as submitted by Mr Davey on behalf of Fal, confined to the "direct" consequences of the charterers' orders or, as submitted by Mr Raphael on behalf of Owners, merely caused by the charterers' orders in the sense of being a causal consequence, direct or otherwise.

301. I approach this analysis on the factual basis that (i) contrary to my judgment, the cargo on board the Gulf Prince and the Julia II was lawful, that consequently the cargo transferred to the Greek Fighter from the Gulf Prince was lawful, that, as I have held, the Palatex cargo was not unlawful and that consequently at the time of detention of the Greek Fighter there was no unlawful cargo on board and (ii) the detention and confiscation of the vessel was brought about by the Coastguard's unjustifiable suspicions as to the cargo on board and its belief that Fal's reputation was such as to suggest that it was using the Greek Fighter to carry out unlawful cargo operations.

302. As to the issue whether the consequence of charterers' orders to be the subject of the indemnity should be "direct" consequences as distinct from mere consequences, the authorities demonstrate that the problem is more apparent

than real and is largely a matter of semantics. The exercise essentially involved is the identification of the scope of the indemnity obligation and is thus fundamentally a question of construction. In identifying that scope, certain considerations are relevant. In particular, the parties are unlikely to have contracted for the protection of the Owner against losses which are remote as a matter of causation from the charterer's order. That is because it is in a commercial setting improbable that a charterer would be prepared to assume the risk of eventualities causally remote from his own orders. This concept of the exclusion from the scope of a contractual indemnity of remote eventualities has been illuminatingly and comprehensively explored by Rix J. in ***The Eurus*** [1996] 2 Lloyd's Rep 408 at pages 424 to 432. Much less would a charterer be likely to assume the risk of eventualities causally contributed to by negligence or other fault on the part of Owners notwithstanding that charterers' order may have initiated the train of events leading to Owners' loss. For these reasons it is improbable that a charterer would ever willingly enter into an indemnity which protected Owners from losses not predominantly or proximately caused by the charterers' orders under the charter. In this connection, the judgment of Lord Justice Mustill in ***The Nogar Marin*** [1988] 1 Lloyd's Rep 412 at pages 421 – 422 is particularly relevant. Visibly defective cargo was loaded on board but not recorded as such by the master on the mate's receipt. In consequence, when the charterers presented clean bills of lading to Owners' agents for signature, the agents signed them. Owners then became liable to receivers on the clean bills and looked to the charterers for an indemnity. The arbitrators had held that the intervening negligence of the master broke the chain of causation between the charterers' act of presenting inaccurate bills and the receivers' claim on owners. The award was appealed and upheld, Lord Justice Mustill observing:

"Finally, on this part of the case, we believe that, although the arbitrators may perhaps have … compressed the position as regards causation, the analysis [is] essentially correct. True, the master did not sign the bill. But if it was his mistake concerning the receipt which permitted [the agents] to sign the bills without qualification, and if his act was not strictly 'intervening', it can justly be regarded as predominant, on the arbitrators' findings, over whatever breach the charterers may have committed by presenting for signature bills of lading which conformed with the receipt which the master had previously signed."

303. It is to be observed that the negligent act of the master was not positioned in a temporal chain of causation between the charterers' tendering of the clean bills of lading for signature and the eventuality of the receivers' claim. Indeed, the master's act preceded the beginning of that chain. What mattered was therefore not whether the loss was a direct consequence of the charterers' presentation of clean bills in the temporal sense but whether that presentation or the anterior act of the master was the proximate or predominant cause of Owners' loss. The reasoning of Evans LJ. in *The Island Archon* [1994] 2 Lloyd's Report, 227 at pages 224-226 is, upon analysis, entirely consistent with this approach.

304. I therefore proceed on the basis that unless it can be said that Fal's orders as to the employment of the vessel were the proximate or predominant cause of the loss, neither the express nor implied indemnities are triggered. However, in identifying the proximate cause of the loss it is necessary to take into account the contractual setting of the indemnity having in mind the distribution of risk of loss between the parties which the indemnity could be expected to reflect.

305. There is no cogent evidence that, at the date when the time charter was entered into, it was commonly or mutually known that Fal was suspected by the UAE authorities at Khorfakkan or generally of dealing unlawfully with Iraqi oil or that those authorities had a propensity to pounce on innocent charterers or Fal in particular operating vessels at Khorfakkan or elsewhere on specious grounds or without any real evidence and indeed on the basis of bogus evidence, detain the cargo and vessels and then confiscate them. It could not therefore be said that the risk of that happening had been implicitly mutually accepted when the Time Charter was entered into. It was thus an eventuality which was essentially remote in the sense that it was loss of a kind which was beyond the horizon of that which the parties could be taken to have contemplated as possibly caused by the orders of the charterers at the time when they entered into the charter.

306. The unforeseeability of the kind of loss is, however, not conclusive on this question. It is simply that in approaching the broader question whether it is established that the proximate or predominant cause of the loss was the order of the charterer the relative weight to be attached to the acts of the UAE authorities must be informed by the unforeseeability of such acts.

307. Would the orders of the charterers be the proximate or predominant cause of the loss?

308. The circumstances in which the vessel came to be detained and subsequently confiscated on the basis of no more than a bogus analysis report and unsubstantiated suspicions present themselves to me as so causally significant that they and not the charterers' orders have to be characterised as the predominant cause of the loss. I find that documentation relating to the Gulf Prince cargo would have had no more impact on the chain of events than documentation in relation to the Palatex cargo had. Production of such documentation would have been futile in the face of the combined focus of the US Navy and the UAE authorities.

309. I conclude that neither the express nor the implied indemnity would have been triggered on the hypothesis in question.

Breach of the Safe Port Warranty?

310. Owners submit that, on the hypothesis that the actions of the UAE Coastguard were illegal under UAE law, Fal were in breach of the safe port warranty. That hypothesis is contrary to my findings to the extent that, if it were

proved that at the time when it was detained, the vessel was engaged in loading contraband Iraqi oil, the UAE authorities would be entitled to detain and confiscate it, albeit not more than 130 to 300 tons had been loaded by the time when the Coastguard intervened. It follows that this issue can arise only if my finding as to the probable origin of the Gulf Prince cargo is wrong.

311. The issue first involves the question whether there was a safe port warranty. Owners argue that the words in the fax concluding the contract – *"trading always afloat within IWL via safe ports/anchorages Arabian Gulf/China Range excluding Iraq as long as sanctions in force ...."*, which were then amended by Addendum No.1 which provided "vessel only to perform storage operations in the Khorfakkan area" – had the effect of the charterers assuming an obligation for the safety of the port of Khorfakkan or at least the anchorage off it. On behalf of Fal Mr Davey submits that, whereas the Time Charter originally included an express safe port warranty, the effect of Addendum No.1 which provided that the only employment upon which the vessel was to be engaged was the performance of storage operations at Khorfakkan was to supercede that warranty. Fal had no entitlement to select ports or anchorages limited by reference to safety. The effect of the Addendum was therefore to pre-select the place of performance by mutual agreement thereby displacing the safe port warranty. Fal submits in the alternative that the effect of clause 4, second paragraph, quoted at paragraph 20 above, was to impose on Fal a qualified obligation to use due diligence to ensure that Khorfakkan was a safe port or anchorage where the vessel could safely lie always afloat.

312. In ***The Helen Miller*** [1980] 2 Lloyd's Rep 95 Mustill J. observed at page 101:

"The next argument runs as follows. Where the charterparty expressly stipulates the place at which the vessel shall load or discharge the shipowner is regarded as having consented to the risk that the place will prove to be unsafe. Equally, in the present instance the owners by giving the right to trade the vessel outside the limits impliedly agreed to take the risk that if the right was exercised the port would prove to be unsafe. I cannot accept this argument. I am sceptical about the analogy between a named port or range and an area as wide as that arrived at by paying an extra premium to open the Institute Warranty Limits. Moreover, whatever may be the law about implying a warranty of safety in the case of a named port, a matter not yet finally decided, I know of no authority to suggest that where the charter contains an express warranty it is in any way restricted by the naming of the port or range. The judgment of Sir Owen Dixon CJ. in ***Reardon Smith Line v. Australian Wheat Board,*** *[1954] 2 Lloyd's Rep 148 at p153, cannot be read as expressing a contrary view, since the learned Chief Justice went on to hold that the charterers were liable under the charter, albeit it named the port."*

313. This approach must be correct in principle because it gives effect to all the terms of the charter which are not inconsistent. The identification of a named port or anchorage, thereby limiting the charterers' choice as to the location of performance is not inconsistent with a warranty that it is safe, any more than the sale of goods by description would be inconsistent with an express term as to quality.

314. In the present case Addendum No.1 expressly provided that "all other terms conditions and exception to [charterparty] dated 23 January 2001 to be incorporated and to remain unaltered." Those terms included the express safe port warranty in the fixture fax. As a matter of construction there is, in my judgment, no basis for the implicit abandonment by Owners of such a warranty simply because, instead of being employed between unspecified ports, the vessel was to be employed at one specific port. In this connection, the vessel could, for all owners knew, have been ordered by Fal to any anchorage off Khorfakkan, at which port there is on the evidence a spacious anchorage area. There would thus appear to be no reason why Owners should be taken to have relinquished the safe port warranty in relation to each and every anchorage to which Fal might direct her, as well as to the port generally.

315. The introduction of Addendum No.1 did not therefore displace the safe port warranty. The qualified safe port obligation in Clause 4, second paragraph, being to the extent of the due diligence qualification, inconsistent with the express warranty in the fixture fax, must yield to it. The attributes of safety identified in clause 4 are thus subsumed in the express safe port warranty. However, they are not the attributes of safety to be considered in this case, for here the issue is whether Khorfakkan was unsafe because of the risk of irremediable confiscation of the vessel due to the endemic dishonesty of the UAE authorities, in particular the Coastguard, and the lack of any effective means of obtaining justice in cases where a vessel had been unjustifiably detained and confiscated.

316. Owners' case proceeds on the hypothesis that Fal had not sought to load contraband Iraqi oil and that the Coastguard was acting illegally in detaining the vessel and its cargo and there was no justification for the initial detention of the vessel or for the decision of the Committee set up by Sheikh Hamdan either to continue the detention or to the order the confiscation and sale of the vessel.

317. It is well-settled that, in the context of an express or implied safe port warranty, the attribute of safety includes political and similar risks having a bearing on the safety of the vessel: see ***The Evia No.2*** [1982] 2 Lloyd's Rep 307 and ***The Chemical Venture*** [1993] 1 Lloyd's Rep 50. Prospective risk of loss of a vessel due to confiscation without justification and absence of any effective means of preventing it under the justice system, and conduct by the state authorities would not fall within the mutual restraint of princes exception for the specific safe port warranty would supersede the general exception.

318. Owners submit that, given that the detention of the vessel was the result of capricious and unjustified conduct by the UAE Coastguard and by Sheikh Hamdan and that the UAE had no justice system capable of preventing the

confiscation of the vessel or obtaining redress the safe port warranty was engaged and Fal are liable for its breach even if Fal were at no time dealing in contraband oil.

319. It is argued on behalf of Fal that it is not established that at the time when the vessel was sent to Khorfakkan there was a prospective risk of unjustifiable detention. That detention only occurred when the vessel had already been at Khorfakkan for some nine months. The existence of the prospective risk has to be tested at the time when the vessel was first directed to that port, that is to say at the time of Addendum No.1 and not at the time of the detention. This submission is in principle correct, as Owners accept. The relevant question is whether the salient characteristics of Khorfakkan existed at the time of Addendum No.1 being entered into or whether, as Fal contend, the confiscation of the vessel arose in abnormal circumstances.

320. It is further argued on behalf of Fal that those characteristics were not confined to Khorfakkan but extended to the whole of the UAE. On the authority of the decision of the Court of Appeal in The APJ Priti [1987] 2 Lloyd's Rep 37 Fal submit that just as an safe berth obligation is not breached where there are general features of a port which are not confined to any particular berth, so by analogy a safe port obligation is not broken where all the ports in the country are affected by the same characteristics.

321. The voyage charter in question in **The APJ Priti**, supra, provided for the carriage of a cargo of urea from Damman to ½ safe berths at each of Bandar Abbas, Bandar Bunshire and Bandar Khomeini in charterer's option. There was no express safe port warranty. The vessel was hit by a missile on route for the port indicated by charterers, namely Bandar Khomeini but before charterers had directed it to any berth. The issue was whether, if the approach voyage was prospectively unsafe, there was breach of the express safe berth warranty. It was held that there was no such breach. There was no basis for implying a safe port warranty and, until the vessel arrived at the indicated port of discharge and a berth was nominated, the express safe berth warranty was not engaged. That warranty related to the characteristics of the nominated berth and not to the characteristics of the approach route to the port where the berth was located. At page 42R Bingham LJ, with whose judgment Sir Denys Buckley agreed, qualified the effect of the safe berth warranty in the following passage:

"The charterers' promise should, in my view, be understood as limited to a promise that the berth or berths nominated would be prospectively safe from risks not affecting the port as a whole or all the berths in it. To hold otherwise is to erode what I think is intended to be a meaningful distinction between berths and ports. I cannot help feeling that the promise is primarily directed to ensuring that the berth or berths nominated (including the passages there and back within the port) should be free of marine hazards foreseeably dangerous to the vessel. But the Courts have always refused to distinguish between physical and political unsafety, and certain forms of political unsafety may have obvious physical consequences. It is, moreover, possible to envisage cases in which some berths in a port might be politically unsafe and others not. Counsel suggested the helpful example of Beirut. I am, therefore, satisfied that the charterers' promise must be understood as applying to physical and political unsafety, but I accept the charterers' contention that the unsafety referred to must be particular to the berth or berths nominated is prospectively unsafe, if every berth or the port as a whole is same extent. Where all the berths or the port as a whole are prospectively unsafe, the owners should not have agreed the discharge port in the first place or the master should have taken advantage of the clauses entitling him to discontinue the voyage."

322. Mr Davey argues by analogy that if, as the Owner's case involved, the characteristics rendering Khorfakkan unsafe also affected Abu Dhabi and other UAE ports, it is not open to Owners to rely on those characteristics as a breach of the express safe port warranty under this Time Charter.

323. I am not able to accept Fal's submission. In the passage cited Bingham LJ. was concerned to delineate a clear distinction between a berth warranty and a port warranty in the context of a charter containing only the former. If the effect of the berth charter were to protect the Owners in a case where all the berths and therefore the whole port were unsafe, it would have a similar effect to a safe port warranty. In other words in such a case the safe berth warranty should bear a construction which confined the relevant characteristic of unsafety to the nominated berth, even if in theory that could cover political dangers. The present case does not involve an analogous contractual regime. No safe berth warranty is involved here. There is no process of selection of ports or berths by the charterers. Here there is but one location for all operations and that is subject to a safe port/anchorage warranty. There is no conceptual basis for confining the construction of that warranty to characteristics unique to Khorfakkan: the other ports in UAE which might have been the subject of an express choice of location are completely irrelevant. As to the last sentence of the passage quoted, it is obiter and, whereas, in a case where both charterers and owners are aware of the particular characteristics of unsafety of the berths at the agreed port at the time when the charter is entered into, the warranty may well have to be construed so as not to cover those characteristics, there can be no reason why, if the characteristic is known only to the charterers or it eventuates only the charter has been entered into and is extant when a berth is nominated, a safe berth warranty of this kind should not protect the Owners. In any event this observation has no application to a case such as the present in which there is evidence to suggest that Owners were aware in advance of the characteristics of unsafety relied upon.

324. It is next necessary to investigate whether Khorfakkan was rendered unsafe for the reasons relied upon by Owners. In order to make good that it was it must be established that an objective observer equipped with all the information relevant to safety could be expected to perceive the risk of confiscation of the vessel for no justifiable reason and without remedy or redress in the courts of the UAE.

325. I have no doubt that if such an objective observer had considered this question, either at the time when Addendum No.1 was entered into or at the time when the vessel arrived off Khorfakkan and was ordered by Fal to a particular anchorage, he would not have concluded that the vessel was exposed to the risk of arbitrary detention and confiscation at the hands of the Coastguard or the UAE Government. There is no evidence that even up to the moment when the vessel was detained there was any such risk. The detention by the US Navy of the Fal XVIII discussed in paragraph 49 above, albeit on no sustainable grounds, had been cured in May 2000 by order of the UAE Court of First Instance issuing an order for release of that vessel. What part, if any, was played by the UAE Coastguard is unclear. It is not shown that in any other case had a vessel been detained and confiscated in circumstances involving fabricated evidence and intervention in the justice system by the UAE Government. Indeed, Decree 41/2002 was only promulgated on 3 July 2002 and the letter of instruction by Sheikh Hamdan to the Minister of Justice was dated 6 October 2002 (see paragraph 21.iii) above).

326. In support of the proposition that what happened to the vessel was a consequence of established characteristics of the political and legal system of the UAE, the Owners rely on the evidence of Mr Ian Edge in support of the proposition that because of the immense personal influence of a member of the President's family such as Sheikh Hamdan, son of the President, Sheikh Zayed bin Khalifa, it would in practice be impossible to obtain judicial relief against acts of the Coastguard, such as the detention of the vessel which, as in the present case, had been personally approved by him or by his officials. The essence of Mr Edge's evidence is that the courts would not be likely to make orders against state organisations or ministers, the judges being largely non-UAE Arab lawyers appointed by the Ministry of Justice on fixed term contracts renewable for good behaviour. Decree 41/2002 which removed from the courts jurisdiction in all matters related to breach of UN sanctions reflected the traditional approach of the Government, leaving Fal with some recourse to the Ministerial Committee as the only available remedy.

327. Fal have argued that their experience with the various proceedings commenced by them against the Coastguard in the UAE courts suggests that issues as to whether the Coastguard had any justification for confiscation of the cargo and vessel would still be effectively dealt with by the UAE courts, at least until the Decree 41/2002 was promulgated.

328. The loss of the vessel by detention, confiscation and sale was caused by three aspects of the administrative and judicial regime. First there was reliance by the Coastguard on false evidence in the form of the concocted Caleb Brett analysis reports to justify initial detention. Second, there was the introduction of Decree 41/2002 removing jurisdiction from the courts. Third there was the refusal of the Ministerial Committee to respond to Fal's attempts to procure release.

329. Against this background and upon those findings of fact set out above, I am not persuaded that, prior to the introduction of the Decree, the judicial system was so ineffective and so open to ministerial influence that an objective observer would have concluded that, if the Coastguard had detained the vessel and cargo on the basis of false evidence, the courts would not have provided a remedy. The conduct of the Abu Dhabi Court of First Instance in Suit 609/2001, later referenced 7/2002, prior to October 2002 does not suggest that, had it not been for the Decree, a fair trial would not have been available.

330. Although Fal was permitted to adduce in evidence as late as June 2006 a judgment of the UAE Court of Cassation or Federal Supreme Court in Suit 7/2002 which earlier this year considered an argument sought to be raised whether the Decree was unconstitutional because it had never been published, I am not persuaded that anything in that judgment, properly understood, amounts to a conclusive determination of that issue or even a provisional view as to how it might have been determined had Fal been permitted to introduce it at that stage in the proceedings. The judgment therefore does not support arguments directed to establishing that the judiciary was capable of acting independently. Dr Al Owais certainly expressed the view that lack of publication rendered the Decree unconstitutional. However, the Abu Dhabi Court of Appeal gave effect to the decree when on 25 November 2002 it dismissed Fal's appeal in Suit 7/2002 against the order of the Abu Dhabi Court of First Instance that the cargo on board the Greek Fighter should be sold on environmental grounds. It is right to say that Fal did not then attempt to take the point that the Decree was unconstitutional. Had it been held by the Federal Supreme Court that the Decree was indeed unconstitutional due to lack of publication, I accept the evidence of Mr Edge that the probability is that the defect would have been cured by a confirming decree of retrospective effect.

331. The refusal of the Ministerial Committee to release the vessel following Owners' letter to Sheikh Hamdan of 6 November 2002 or even to reply to it and the Committee's ultimate decision in February/March 2003 that the vessel was to be confiscated and sold were administrative actions taken by the Committee apparently under the powers which Decree 41 of 2002 was assumed to provide and not in the face of any decision of the UAE courts. It is therefore wrong to infer from this ministerial conduct that even if, in the period prior to July 2002 when the Decree was promulgated the Courts had ordered the release of the vessel, there would have been ministerial refusal to give effect to such an order.

332. I conclude that if one poses the question whether Khorfakkan was an unsafe port for political reasons at the time when Addendum No.1 was entered into or when the vessel was first directed by Fal to its anchorage, the answer is that neither Khorfakkan nor the anchorage were unsafe.

Breach of the Redelivery Obligation?

333. Owners submit that Fal was in breach of the redelivery obligation. The Time Charter provided that:
"Charterers to give 10/5/3/2/1 days notice of (redelivery)
(Redelivery) 1 safe anchorage Khorfakkan free of cargo".

334. The date by which the vessel ought to have been redelivered was 30 January 2002. The vessel was then under detention and the cargo was still on board. Notice of redelivery was not given. Fal argues that the Time Charter had by then been frustrated by the intervention of the Coastguard which rendered it impossible for redelivery to be effected.

335. On the hypothesis that Fal was not in breach of the Time Charter by reason of loading a dangerous or unlawful cargo, it is submitted that it was protected by clause 27(a) – "restraint of princes, rulers or people."

336. In view of my finding that Fal was in breach of the Time Charter by reason of loading contraband Iraqi cargo, it is unnecessary to consider this issue in any detail. I can, however, summarise my conclusions as follows.

337. The Time Charter had not been frustrated by 30 January 2002. Effective redelivery at Khorfakkan could be accomplished only if the vessel were released from detention. Therefore, in order for that point to be made good, it would have to be established that on the state of facts that then existed, it was impossible of performance by redelivery within a non-frustrating period of time. Although a decision appears to have been taken by the UAE authorities to sell the cargo as early as 19 December 2001 (see paragraph 99 above), that did not prevent redelivery of the vessel and it was not until 14 months later that the Ministerial Committee set up under Decree 41 of 2002 decided to confiscate and sell the vessel itself. Although the evidence suggests that, if contraband Iraqi oil were found on board, the vessel as well as the cargo would be confiscated, the evidence does not establish that this was an inevitable consequence. Accordingly, if one asks whether by 30 January 2006 redelivery of the vessel by Fal would be impossible within a non-frustrating time, the answer must be that confiscation was not inevitable and that the UAE authorities might be persuaded to release the vessel, as distinct from Fal's cargo, at any time in the not too distant future.

338. It follows that, the redelivery obligation remained to be performed by Fal unless and until the Time Charter was frustrated. That would be at the point of time when for the first time there was no realistic prospect of the release of the vessel within a non-frustrating time. In considering the period of time during which the vessel was under detention after 30 January 2001 it is necessary to bear in mind that by Addendum No.1 it had been agreed that the charter period had been extended to 30 October 2001 with charterers given an option of seven three month extensions by means of which the period of the Time Charter could have been extended until the end of July 2003. The assessment of the period of time relevant to the question whether and, if so, when the charter was frustrated before the UAE authorities notified their decision to confiscate it must take into account the fact that both parties are taken to have had in contemplation from 17 February 2001 onwards the possibility of the continuance of the charter until the end of July 2003. In view of the complete state of uncertainty about the intentions of the UAE authorities as to the fate of the vessel which prevailed until February 2003, I am not persuaded that the Time Charter could have been terminated by frustration until the vessel was eventually confiscated.

339. There having been no redelivery of the vessel at the time because she was at all material time under detention at Abu Dhabi, Fal would be liable for breach by failure to redeliver unless protected by the mutual exceptions in clause 27(a) – restrain of princes. Having regard to the fact that performance of the charter was at least temporarily prevented while the vessel was under detention, I hold that on the hypothesis that Fal was not in breach of the oil embargo, Fal's omission to redeliver was caused by restraint of princes and, accordingly, did not amount to a breach of the Time Charter, giving rise to an independent right to damages.

Did Owners fail to mitigate their Loss?

340. Fal argue that Owners failed to mitigate their loss by failing to take any steps in the UAE Courts to obtain the release of the vessel from detention. It is said that they took an inexplicably passive stance and failed to co-operate with Fal in as much as they failed to share important information. Given that Mr Newitt of HTD was the solicitor who headed the team advising Owners, Fal criticise Owners because there has not been full disclosure of attendance notes containing advice to clients.

341. Fal strongly criticises Owners' conduct and that of Mr Newitt in particular for failing to claim release of the vessel from MOFA as distinct from the Coastguard if necessary by commencing independent proceedings in UAE.

342. It is to be observed that Fal's case on mitigation rests on the factual basis that Fal had not been involved in loading contraband Iraqi oil to the effect that, by their inactivity and failure to advance an independent claim for release of the vessel against the Ministry, Owners were allowing themselves to be dragged down with Fal as innocent victims of abuse of power. However, although I have found as a fact that the Coastguard and MOFA proceeded with their allegation on the basis of concocted evidence which did not prove their case, I have also found that Fal permitted the Gulf Prince to load oil of Iraqi origin into the vessel, as suspected by the Coastguard, albeit not effectively proved. Accordingly, the argument that Fal should not be liable in damages or for an indemnity because Owners had negligently and unreasonably failed to seek the release of the vessel on the grounds that it was <u>not</u> involved in the receipt of contraband oil is, in my judgment, virtually untenable. This is because, once it was demonstrated that such oil had been taken on board, there was at the lowest a substantial probability that the vessel, as well as the cargo would be confiscated. In such circumstances, although Owners might independently take proceedings to recover the vessel on the grounds that the Coastguard had no evidence

of unlawfulness by Fal, Owners would in practice have to assert that Fal was innocent, which as I have found, was contrary to the truth, even if Fal may not have appreciated that the Iraqi oil they were loading was contraband. That being so, the submission that Owners had brought about their own loss by their own unreasonable conduct could not displace Fal's loading of unlawful cargo as the predominant cause of Owners' loss.

343. Further, although as from 9 January 2002 when Mr Newitt and the Club representative had a meeting with Mr Jalil of the Ministry of Foreign Affairs (see paragraph 127 above) it was apparent to Owners that there was a high risk that the vessel would be confiscated and sold and that the detention had been and confiscation would be a decision of Sheikh Hamdan. Mr Newitt formed the view that in the political environment of the UAE the Owners' best course was likely to be to leave it to Fal to take the lead to obtaining the release of both cargo and vessel. This is understandable. Not only was Fal as charterer likely to be in possession of all the facts relevant to the origin of the cargo but from the time of the 9 January meeting Mr Newitt had been given to understand that Mr Al Sari, a local businessman who controlled Fal, had been in direct contact with the Ministry of Foreign Affairs. Fal was seen as a significant commercial force in UAE and was therefore thought to be more influential with the Ministry than Greek Owners.

344. Although Mr Newitt and the Owners became increasingly concerned as the summer of 2002 came and no progress towards release was being made. Their decision not to commence legal proceedings was a considered one, was informed by the lack of progress in the proceedings brought by Fal against the Coastguard and by the fear of antagonising the Coastguard with the risk that the provisioning of the vessel which remained fully crewed and the making of crew changes would be prejudiced. That remained the position throughout 2002. However, upon the introduction of Decree 41 of 2002 in July of that year Mr Newitt's view became more firmly that resort to the local courts would be futile and that the only available course was to try to negotiate first with the Coastguard and then in November 2002 with the Ministry (see paragraph 204 above).

345. In evaluating the reasonableness of the Owners' conduct it is, in my judgment, important not to lose sight of the fact that, according to Mr Newitt's evidence, the Coastguard representatives with whom he dealt, notably Brig. Bu Shabs, had appeared to be convinced that Fal had been dealing with contraband oil and to be determined to prove that. The Owners had no direct access to Fal's records and were in large measure driven to rely on Fal's word as to its innocence. Fal did not provide them with documentation relating to Fal's criminal proceedings against the Coastguard. I reject Dr Zakaria's evidence to the contrary.

346. Fal have submitted that Owners should have started their own proceedings for the release of the vessel and should have been prepared to challenge the validity of Decree 41 of 2002, not merely submitting that it had not been published but also that there was no provision in the Constitution on the basis of which Decree 41 could have been promulgated. Having heard the expert evidence of Mr Edge and Dr Al Owais on this issue, I am not persuaded that Decree 41 was a permissible vehicle for depriving the courts of jurisdiction over all issues relating to Iraqi oil. At its lowest the unconstitutionality point was arguable. However, it was at no time run by Fal in its own proceedings 2002-2003 and it was thus hardly surprising that Mr Newitt and those advising Owners might not have entertained it. However, when it was put to Dr Al Owais that, following promulgation of Decree 41, any attempt to get the cargo released or to stop what the UAE authorities were doing in respect of it, never had a chance he agreed that this was so in the summary case. I infer that the answer to a similar question with regard to proceedings for release of the vessel would have been the same.

347. I have considered whether there was a failure to mitigate by reason of Owners not having followed up a suggestion said to have emanated from the Coastguard that if the Coastguard was reimbursed the expenses of victualling and maintaining the vessel since it was first detained and Owners gave an undertaking to that effect, the vessel might be released. This point was not pleaded by Fal as a ground of failing to mitigate. However, had it been formally taken, it would not have succeeded. Mr Newitt stated in cross-examination that Owners did follow this up with the Coastguard in an effort to get further clarification and details of the amount involved, but he could get no details other than a request for a blanket undertaking. Further, as indicated in Mr Newitt's letter to Dr Zakaria of Fal of 14 November 2002, he took the view that Fal and not Owners should take this suggestion up with the Coastguard and Dr Zakaria had said that he would do so, although he was sceptical about the proposal. The matter was never taken further and no further response was received from Fal.

348. The course of conduct in relation to this proposal, in my judgment, falls far short of a failure by Owners to mitigate. As Fal were still nominally the charterers, Owners were not unreasonable in encouraging Fal to take the matter forward. It is distinctly improbable that the vessel would have been released by the Coastguard on that basis.

349. I conclude that from the time of initial detention of the vessel the Owners and those advising them found themselves in a highly delicate position in which at least up to July 2002 it was hard even for one experienced in the UAE administrative system to know what course might have the best chance of obtaining the vessel's release. In particular, a balance had to be struck between action which would be likely to have that effect and action which might imperil the provisioning of the vessel and the welfare of the crew by antagonising the authorities, an eventuality not easily avoided as was shown by the response of the Coastguard to the Master's repeated demands for a decision as to whether the vessel had been confiscated. In these circumstances, whereas, a solicitor in Mr Newitt's position might have taken a more robust course and advised the Owners to embark on their own proceedings, I have no doubt that the course adopted was in all the circumstances a tenable response to an extremely difficult situation which reflected competent professional advice. It was certainly not unreasonable.

350. I therefore reject Fal's submissions on failure to mitigate.

Owners' Claim for Non-payment of Hire

351. Owners claim not only damages for the eventual loss of the vessel but also in debt for non-payment of hire up to the date of confiscation of the vessel on 12 March 2003. Clause 20 of the Shelltime 4 forum provides: *"Should the vessel be lost, this charter shall terminate and hire shall cease on the day of her loss…."*

352. Clause 8 provides: *"Subject as herein provided, Charterers shall pay for the use and hire of the vessel at the rate of per day, and pro rata for any part of a day, from the time and date of her delivery (local time) until the time and date of her redelivery (local time) to Owners."*

353. It is submitted by Owners that hire continued to accrue under the Time Charter up to 9 April 2002 whereupon it accrued under the First Hire Agreement of 17 April 2002 until 23 July 2002 after which it became due under the Second Hire Agreement and continued to accrue until either 12 March 2003 or until 25 November 2002 if there were an informal redelivery on 25 November 2002 by Fal declaring the charterparty to be at an end on that date. If hire ceased to accrue on that date, Owners claim as damages for breach of the lawful cargo warranty or by way of indemnity an amount equivalent to the hire that would have accrued due from 25 November 2002 to 12 March 2003.

354. It is submitted on behalf of Fal that, since it was not in breach of the Time Charter.

i) the effect of the initial detention of the vessel and cargo was to terminate the Time Charter by frustration;

ii) the fax of 15 January 2002 (see paragraph 144 above) did not give rise to a binding agreement for it was merely a statement of intention and was never accepted;

iii) the Hire Agreements purported to be variations of a contract (the Time Charter) which had already been terminated by frustration at the time when they were entered into and they were therefore entered into under a fundamental mistake as to the existence of the underlying contract and were therefore void for mutual mistake and all "hire" payments are recoverable by way of restitution;

iv) the Hire Agreements were not compromises, as distinct from bare variations because no claims had been brought or intimated at the time when they were entered into;

v) if the Time Charter was not frustrated, its terms continued to have effect while the vessel was detained, including the off-hire Clause (clause 21), and the vessel was accordingly off-hire throughout the period of detention of the vessel to the effect that all hire paid during that period is repayable.

355. I have already held that Fal was in breach of the Time Charter and that, even if it were not, the Time Charter was not terminated by frustration at any material time. Clearly, if Fal were in breach, as I have held, it would not be open to it to rely on termination by frustration, even if the contract had been rendered impossible of performance by the detention at any relevant point of time. It follows that Fal's argument that the two Hire Agreements were void for mutual mistake cannot be sustained.

356. I hold that Fal's fax of 15 January 2002 did not give rise to a binding variation of the Time Charter. It was not replied to by Owners and their subsequent conduct was not unequivocally referable to acceptance of that fax as an offer. Continued acceptance of hire was not such conduct because the hire continued to accrue due regardless of the fax.

357. I further hold that the two Hire Agreements were binding variations of the Time Charter which had the effect of reducing the rate of hire during the period of detention.

358. Hire continued to accrue due, albeit as from 10 April 2002 at the reduced rate agreed in the First Hire Agreement and from 24 July 2002 in the Second Hire Agreement. The relevant principle is that laid down by the House of Lords in ***The London Explorer*** [1971] 1 Lloyd's Rep 523, per Lord Morris of Bath y Gest at pages 529-530: hire continues payable until actual redelivery notwithstanding failure of charterers to redeliver in time to comply with the redelivery date.

359. The letter from Dr Zakaria to Mr Newitt of HTD of 25 November 2002 included the following passage:
"Owners well aware that the ship MT "Greek Fighter" had been detained and seized by the Coastguard on 17 December 2001. From that date the ship became under the command and control of UAE Authorities and the Charterers became not concerned with the ship it means that the Charterers are not obliged to pay the hire from that date in accordance with the Terms and Conditions of the Charterparty. As the Owners had received hire more than what was due to them pursuant to Charterparty. The Charterers are preparing to debit the Owners for the difference."

360. Fal thereby asserted that the charter had terminated when the vessel was first detained to the effect that Fal had at that time ceased to be liable for hire. Fal were not thereby operating the redelivery procedures but were asserting that the contract had already ceased to bind them. This assertion was not tenable for two reasons:

i) if, as I have held, Fal was acting unlawfully in the shipment of Iraqi oil, the detention was self-induced and it was not open to Fal to rely on it as frustration discharging Fal from the obligation to perform;

ii) even if Fal had not acted unlawfully, the contract had not been discharged by frustration when the letter was sent in November 2002.

361. However, by that letter Fal had made it clear that it was treating itself as discharged at least from all further performance. Just as if it had tendered the vessel by way of redelivery in accordance with the Time Charter it was telling the Owners that it would no longer pay hire. However, the vessel was under detention and was at the

Abu Dhabi and not at the designated place for redelivery (Khorfakkan). The fact that the vessel was under detention by the Coastguard did not, in my judgment, involve that the vessel was not in the same good order and condition as when delivered under the Time Charter. That phrase relates to the physical order and condition of the vessel. Redelivery did not involve the charterers restoring possession to the Owners for under the Time Charter possession rested in the Owners throughout. The fact that the Coastguard had taken over from the Owners physical control of the vessel did not therefore call for the charterers to redeliver free of detention. As to the vessel being at the wrong place for redelivery, the charterer is not prevented from making redelivery, but must compensate the Owner in damages calculated by reference to the loss of time and therefore of hire in making a voyage by the shortest route possible from her actual place of redelivery to the contractual place of redelivery: see The Rijn [1981] 2 Lloyd's Rep 267.

362. I therefore hold that the effect of the letter from Fal of 25 November 2002 was to bring about a redelivery of the vessel to Owners with the consequence that hire could not accrue after that date. Having regard to my having held that Fal was in breach of the lawful cargo obligation and liable to indemnify the Owners under the indemnities in the Time Charter, Fal will be liable for damages or an indemnity in respect of such losses of hire and expenses as were incurred by reason of the vessel not being at the contractual place of redelivery.

363. The question then arises whether, as Fal asserts, the vessel was off-hire during the period from the commencement of detention in December 2001 up to redelivery in November 2002.

364. Clause 21 of the Shelltime 4 forum provides as far as material as set out in paragraph 40 above.

365. It is accepted on behalf of Fal that, if Fal was loading unlawful cargo, this provision of the off-hire clause could not be engaged because the detention would be "brought about by the act or neglect of charterers". Owners, however, argue that even without involvement in unlawful loading Fal could not rely on the off-hire clause because the detention would have been brought about by the act of Fal in loading the vessel and thereby raising the suspicions of the Coastguard.

366. It is submitted by the Owners that in any event this provision was not in truth engaged because, although time was lost "due to detention of the vessel by authorities ….. abroad", the detention was not "attributable to legal action against …. the vessel or its owners". The Owners argue that the detention was attributable to administrative and not legal action against Fal and not the Owners.

367. Further, Owners submit that even if Fal was not acting unlawfully it is not open to Fal to rely on the off-hire clause because the effect of Fal's 18 January 2002 fax was to give rise to an estoppel relied upon by the Owners, there being a representation that hire continued to be due. Further, the First and Second Hire Agreements were entered into in the course of the period of detention and must be taken to have displaced the relevant off-hire provisions in that clause.

368. My conclusions on these issues are as follows:

i) Because of Fal's involvement in the illegal transfer of Iraqi oil from the Gulf Prince to the Greek Fighter it cannot rely on the off-hire clause in respect of any of the period of detention up to the date of redelivery on 25 November 2002, the detention of the vessel having been "brought about by the act … of the charterer".

ii) If Fal were not acting unlawfully in causing Iraqi oil to be loaded on to the Greek Fighter, whether detention of the vessel could be said to be attributable to the act of the charterers merely because the Coastguard entertained suspicions as to Fal's conduct would, in my view, depend on the character of the act. If it was the kind of act that could in all the circumstances be expected to cause the authorities to intervene by detaining the vessel on predictable grounds, there is much to be said for the view that the off-hire clause is not engaged, whereas if, in all the circumstances, the intervention of the authorities by detention of the vessel was capricious and not to be anticipated, the proviso would not apply. If that construction is correct, the detention of the vessel in circumstances in which Fal was acting in all respects lawfully and, in particular was not causing unlawful cargo to be shipped, would be outside the proviso and the off-hire provisions would apply.

iii) To construe "legal action against … the vessel" as not covering detention of the vessel by the Coastguard without legal proceedings in consequence of suspicion of the receipt of contraband oil by the vessel, presents itself to me as far too narrow a construction in the contractual setting of the off-hire clause. In this connection, it is to be noted that clause 21(a)(iv) would put the vessel off-hire for loss of time "due to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers or crew". Application of that provision does not apparently depend upon the commencement of legal proceedings by the customs and it is therefore unrealistic to construe sub-clause (v) so narrowly as to require such proceedings when the substance of both sub-clauses is deprivation of availability of the vessel when it has been detained by the authorities in the course of procedures involving enforcement of local laws or regulations. The reference to "breach of regulations" in sub-clause (v) is similarly consistent with this wider purpose.

iv) In the absence of unlawful conduct by Fal in relation to the period following the 15 January 2002 letter and up to the First Hire Agreement, I hold that Fal is not estopped from asserting that the vessel was off-hire. In this connection, I accept Fal's submission that it has not been established that the representation went beyond Fal's present intention nor in any event that Owners relied to their detriment on any such representation. By refraining from treating the Time Charter as terminated the Owners were in a better position than if they had ended the charter there and then: they went on receiving hire.

v) As to the First and Second Hire Agreements, I have no doubt that they took effect as binding variations of the Time Charter designed to cater for the particular circumstances of the detention of the vessel. There were mutual benefits in as much as Fal thereby secured the continued availability of the vessel in case the detention should end without argument as to whether the full rate should apply during detention and the Owners avoided any arguments that during detention the vessel should be off-hire and thereby received income needed to maintain and providing for the vessel and crew. The First Hire Agreement worked retrospectively in as much as it covered hire going back to the period beginning 24 February 2002 and ending 11 March 2002 and introduced the lower rate of US$6000 per day starting on 10 April 2002. It must therefore be construed as applicable from the first period to which it referred. The effect was thus that Fal contracted out of the application of the off-hire clause to the detention of the vessel for the whole of the period commencing on 24 February 2002. The effect is to preclude Fal from asserting that the vessel was off-hire from that date.

vi) Accordingly, I hold that, if Fal were not acting unlawfully in causing Iraqi oil to be loaded on board the Greek Fighter,

a) the vessel would be off-hire throughout the period of detention up to the first period of hire covered by the First Hire Agreement, namely that commencing 24 February 2002, after which hire fell due in accordance with the Hire Agreements;

b) the vessel was effectively redelivered on 25 November 2002 at which point hire ceased to accrue;

c) the Owners would be entitled to be compensated in damages for breach of the redelivery clause;

d) hire paid in respect of the period from the commencement of the detention to 23 February 2002 would not be due because the vessel would be off-hire and would therefore be recoverable by Fal by way of restitution.

Damages/Indemnity

369. The Owners have made good their claims for breach of the lawful cargo warranty (clause 4) and of the injurious cargo clause (clause 28). They are also entitled to recover under the express indemnity under clause 13(a).

370. The losses recoverable as damages are:

i) the value of the vessel on 14 March 2003, it being common ground that the vessel should be given its scrap value on the basis that it would be delivered at Alang.

ii) Various expenses attributable to the detention, including the fees of HTD's Dubai and Piraeus offices: GAC's fees and disbursements and compensation paid to the crew upon termination of their employment upon the sale of the vessel.

371. I find on the basis of the evidence of Owner's expert, Mr Kingham, that the value of the vessel less deductions associated with its sale and delivery at Alang, but not deducting the cost of bunkers, to have been US$3,761,180. I infer that the vessel had sufficient bunkers on board to make a final voyage to Alang.

372. I further find sufficiently proved:

HTD Dubai office fees and expenses: AED674,183;

HTD Piraeus Office fees: US$5,000.

GAC fees and expenses: US$28,393.07;

Crew compensation: US$31,117.92

373. Owners further claim as damages the difference between the hire paid at the reduced rate under the First and Second Hire Agreements and the amount which would have been paid but for those Agreements at the Time Charter rate of US$9,500 pd on the basis that the First and Second Agreements were the consequence of the detention of the vessel which was caused by Fal's shipment of Iraqi oil. Fal submits that the First and Second Hire Agreements were variations of the Time Charter by way of compromise and that it is not open to Owners to claim as damages the additional hire which they would have earned but for those Agreements.

374. It is to be observed that Owners claim this loss of hire as damages and not in debt. There are thus two considerations:

i) did the express or implied terms of the Hire Agreements exclude Owners' right to claim reduction of hire as damages for Fal's breach or as due by way of indemnity?;

ii) if not, was the loss of part of the hire caused by Fal's breaches of contract or does it fall within the scope of the indemnity?

375. As to (i) there is no doubt that neither of the Hire Agreements expressly excluded Owners' rights to claim as damages the amount of the reduction of hire. Nor, in my judgment, is there any basis on which such a term could be implied. In relation to the First Hire Agreement Owners had made no communication in which it was suggested that they were abandoning the possibility of a future claim against Fal for breach of the Time Charter. There was neither a threat of such a claim nor the suggestion that one might be brought. However, it seems that the final terms of that Agreement were arrived at on the basis of Fal's 17 April 2002 fax in the course of a telephone conversation between Capt Kyrimis of Fal and Capt Margetis of Owners. The evidence of Capt Kyrimis does not suggest that anything was then said which amounted to an abandonment by Owners of their right to claim damages all losses caused by any breach by Fal which caused the detention of the vessel. When Fal had fallen behind in payment of hire under the First Hire Agreement, Owners sent a fax calling for immediate payment of arrears which referred to that Agreement as "*our without prejudice agreement*". HTD then wrote to Fal on 14 June

2002 giving formal notice of a claim for an indemnity in respect of losses sustained by Owners as a result of the detention of the vessel. This letter referred to the First Hire Agreement as "the conditional reduction of hire payment agreement reached without prejudice (emphasis added). The letter included the following:

"You will appreciate that that indemnity claim will be very substantial considering the value of the Ship, and the various other losses and expenses aside from the question of hire under the charter such as extra port and agents costs, extra crew costs etc. which have been incurred during the period of detention."

376. Fal at no time challenged the reference to the First Hire Agreement as a without prejudice agreement and entered into the Second Hire Agreement for the settlement of arrears of hire under the First Hire Agreement without introducing any term which barred Owners' damages claims.

377. Accordingly, having reviewed all the communications between the parties as to both these Hire Agreements I have no doubt that it remained open to Owners to claim as damages for breach or indemnity in respect of loss of hire by reason of the agreed reduction in the Hire Agreements.

378. As to (ii), causation of loss, the predominant cause of the loss of hire was, in my judgment the detention of the vessel. It was to deal with the special need to assist the charterers to maintain cash flow to Owners when it was difficult for them to do so due to their inability to use the vessel for storage that the Hire Agreements were entered into. They were a practical expedient to which the parties reasonably had recourse in response to the consequences of the detention. The reduction in hire was analogous to a cost of mitigation reasonably incurred.

379. I hold that Owners are entitled to include this loss in their recoverable damages. The amount is that shown in Schedule 1 of the Particulars of Claim for the period up to the date of redelivery, 25 November 2002. The precise amount to that date remains to be calculated.

380. Owners further claim as damages the loss of hire during the period between redelivery and 12 March 2003. There is an issue as to whether this loss is to be quantified by reference to the daily rate of hire under the Time Charter or some lower rate which reflected movement in the market rates, the vessel's increased age, deterioration under detention and the fact, alleged by Fal, that it was no longer economically fit for trading and would have to be scrapped immediately if it were released from detention.

381. Determination of the appropriate daily rate for a vessel of characteristics equivalent to the Greek Fighter at the relevant time is necessarily a somewhat in exact exercise. Owners relied on the expert evidence of Mr Simon Chattrabhiuti of the Research Department of Galbraiths, the well-known international brokers. His view was that, based on Galbraiths' records of fixture in 2001-2, the vessel could have commanded US$10,000 pd. However, as he admitted in cross-examination, this was based on very slender information as to broadly comparable fixtures.

382. Having reviewed his evidence and having also taken into account that (i) the market had been falling in 2002 and did not begin to rise until the autumn of that year and that the vessel would almost certainly be sold for scrap, I conclude that damages for the period after redelivery ought to be calculated at the rate of US$8,000 pd. The total should therefore be quantified on that basis.

383. The finalisation of this judgment has been much delayed, not only by the intervention of other judicial commitments but also by the ongoing litigation in UAE which has on two occasions given rise to further judgments in the local courts which Fal have sought to adduce in evidence in this trial notwithstanding the main hearing having concluded in September 2005. It has therefore been necessary to delay preparation of this judgment until applications in respect of those judgments could be heard.

Mr Thomas Raphael (instructed by Hill Taylor Dickinson) for the Claimant
Mr Michael Davey (instructed by Hextalls) for the Defendant