JUDGMENT : THE HONOURABLE MRS JUSTICE GLOSTER. QBD. Commercial Court 14th January 2005.

Background

1. This is the trial of certain preliminary issues ordered to be determined by Cresswell J at the Case Management Conference on 5th March 2004. The parties agreed that I should also determine certain additional preliminary issues.

2. Once these preliminary issues are determined, the parties intend to attempt mediation to resolve the balance of their dispute. The hope is that the answers to these preliminary issues will assist with the mediation.

3. The estimated length of trial was 3 days with half a day estimated reading time. In fact the trial lasted 4 days (12, 13, 14 and 15 July 2004). There were 2 live witnesses who gave evidence and 2 experts who also gave evidence. There were a number of files of documentary evidence and numerous authorities referred to. Opening skeleton arguments ran to over 30 pages on each side and there were extensive written closing submissions.

4. The claim is made by the Claimant, Thor Navigation Inc. ("Owners"), owner of the vessel "THOR II" ("the Vessel"), under two fleet policies of hull and machinery insurance insuring the Interglobal fleet. The first policy, dated 11 July 2002, was issued by the First Defendant, Ingosstrakh Insurance Company Ltd ("Ingosstrakh"), covering 40% of the risk; the second policy, dated 29 June 2002, was issued by the Second Defendant Schwarzmeer Und Ostsee Versicherungs-Aktiengesellschaft ("SOVAG"), covering 60% of the risk. I shall refer to the First and Second Defendants collectively as "Insurers".

5. Ingosstrakh is a Russian joint-stock company and has been a leader in the Russian insurance market for 55 years, including the marine hull insurance market. SOVAG is a German company owned by Ingosstrakh. Although SOVAG took 60% of the risk, this business was led at all times by Ingosstrakh. Mr Semenkov, a director of Ingosstrakh's marine hull ocean going department, was the individual responsible for agreeing the terms on which Insurers were prepared to offer and provide cover for Owners' vessels (including the Vessel).

6. Topmar Shipping Corp SA ("Topmar") acts, amongst other things, as a producing broker for Ingosstrakh in Greece. The agency relationship began in 1997. Topmar (acting primarily by Mr Krasnokutskiy and also by Mr Hallak) acted as brokers for Insurers in relation to the placement of this business, their role being that of a conduit between Insurers on the one hand and Owners and their brokers on the other.

7. Owners, a Liberian company, own the Vessel which operates as part of a fleet of vessels managed by Interglobal Marine Agencies ("Interglobal"). European Link SA ("Link") acted on behalf Interglobal and Owners in the placement of this business. The individual at Link who was concerned with the placement was Mr Myrianthopoulos.

8. Ingosstrakh writes business in a number of international markets, not just Russia. Most of its international business comes from London, Greece, Norway and Germany. About 50% of the hull and machinery policies written by Ingosstrakh are written on an unvalued (as opposed to valued) basis although the percentage figure varies from market to market. In the Russian market the figure is more than 90%, in the Greek market it is between 80-90%, whereas in the London and German markets it is approximately 5%. The majority of Ingosstrakh's international business incorporates Institute Time Clauses – Hulls, clause 280, 1/11/95 (which is expressed to be subject to English law and practice) and is subject to English jurisdiction.

9. The policies gave hull and machinery cover in materially identical terms for a period of 12 months from noon on 29 June 2002. They set out, in respect of each vessel insured, brief details of the vessel, its owners, the particular terms of cover applicable to that vessel, and a *"sum insured"* for each. In particular, the Vessel was listed with a *"sum insured"* of US$1.5m and was subject to "Institute jurisdiction clause 358 1/11/81." Cover for the Vessel was subject to the Institute Time Clauses – Hulls 1/11/95, as amended by various other terms including the following: *"For Thor II conditions are amended to be free from particular average unless caused by fire, grounding, collision, stranding, lightning, explosion including 4/4 RDC"*.

10. On 15 September 2002 the Vessel suffered a casualty: she broke her intermediate shaft, causing further damage to her main engine. The vessel was immobilised, and had to be towed to Piraeus. At Piraeus, the

vessel was inspected, and repair specifications were drawn up and sent to three repair yards. The repair yards' quotations indicated that the costs of repairs would exceed US$2m. Owners claimed for a constructive total loss and gave Notice of Abandonment (which was declined).

11. On 12 November 2002 the Insurers gave notice that they believed that the Vessel could be repaired for less than her sum insured (but gave no details). On 14 November 2002 Owners sold the vessel for scrap.

12. Insurers now claim that the policies were unvalued policies. Owners deny this; but assert that, if the policies are, on their true construction, unvalued policies, then Insurers are estopped from so contending, alternatively that the policies ought to be rectified.

Preliminary Issues

13. The Preliminary Issues for the Court's determination are as follows:
    (1) whether the hull policies the subject of the claim were as a matter of construction valued or unvalued policies;
    (2) whether Insurers are estopped from contending that they are unvalued;
    (3) whether the policies should be rectified;
    (4) on the assumption that the policies are unvalued, what the repaired value of the Vessel would have been (for the purpose of ascertaining whether she was a constructive total loss); (this has now been agreed by the expert valuers to be US $ 900,000, so no longer needs to be determined;)
    (5) a determination in principle, on the assumption that the policies are unvalued, of the measure of insurable value payable to Owners if the vessel is ascertained to be a constructive total loss.

Construction of the policies

14. Section 27(1) of the Marine Insurance Act, 1906 expressly provides that a (marine) policy may be "*valued or unvalued*". If the policy is valued, then the value fixed by the parties is conclusive of the insurable value of the subject matter insured (section 27(3)). Section 27(2) provides that: *"A valued policy is a policy which specifies the agreed value of the subject matter insured."*

15. So the burden rests on the parties to specify the agreed value in the policy if it is to be regarded as valued. Section 28 defines an unvalued policy as one which "*does not specify the value of the subject matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained*".

16. It was common ground before me that whether a policy is valued or unvalued is a matter of interpretation of the particular contract; see para 28-7 of ***The Law of Insurance Contracts*** *by Clarke* and para 1-15 of ***MacGillivray on Insurance Law*** (10th ed). It was also common ground that the parties' intentions are to be objectively assessed to determine whether they intended to (1) place an agreed value on the subject matter insured or (2) just limit the insurer's liability to a stated maximum and that the ordinary principles of construction, for establishing the intentions of the parties, objectively ascertained, applied. Thus, adopting the approach of Lord Hoffmann in ***ICS v West Bromwich BS*** [1998] 1 WLR 896 at 912-913, the Court must ascertain the meaning *"which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"*; that background knowledge includes *"anything which would have affected the way in which the language of the document would have been understood by a reasonable man."* In particular: *"the meaning of the document is what the parties* ***using those words against the relevant background*** *would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see* ***Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.*** *[1997] AC 749."* See per Lord Hoffmann in ***ICS v West Bromwich BS*** (*ibid*) at 912-913.

17. Accordingly, the critical issue of construction which I have to decide is whether, although the policy makes no express reference to "an agreed value", nonetheless the reference to a particular "SUM INSURED" for each vessel is, in the context of these particular policies, to be regarded as a specification of the agreed value of the vessels or whether, in the words of section 28, the policies, subject to the limit of the sum insured, leave the insurable value to be subsequently ascertained.

18. Normally, words such as "*valued at*", or "*so valued*", or something similar, are used. However, as Thomas J (as he then was) stated in ***Kyzuna Investments Ltd v. Ocean Marine Mutual Insurance Assoc (Europe)*** [2000] 1 Lloyd's 505, the words "agreed value" or "valued at" need not be used to create a valued policy, "*provided the intention of the parties is clear that there is a specified agreed value, proposed by the assured and accepted by the underwriter*" (p.508 rhc – principle (3)). In other words, and as required by section 27(2) of the Act, the parties have to make their intention clear that they are specifying an agreed value. By contrast, "*The use of the term "sum insured" will normally indicate the amount for which the subject matter is insured and not as specifying the agreed value*" (p.509lhc – principle (4)). At p.510lhc Thomas J reiterated the point by saying in relation to the words "sum insured" that "*far from meaning the value has been agreed, this ordinarily means the sum is the ceiling of recovery*".

19. The principles of law applicable to determining whether a policy of marine insurance is a valued policy, or an unvalued policy, are clearly summarised by Thomas J in ***Kyzuna*** as follows:

"The applicable principles of law were not in dispute and can be shortly summarised.

(1) Section 27(2) of the Marine Insurance Act 1906 defines a valued policy as: 'A valued policy is a policy which specifies the agreed value of the subject-matter insured.'

(2) At the time the common law was codified by the Act, the common form of marine policy (the SG Form set out in Sch 1 to the Act) contained the following provision on value:

> *"The said ship, etc, goods and merchandises etc.., by the Act, the concerns the assured by agreement between the assured and the assurers in this policy, are and shall be valued at…."*
>
> *The editors of Arnould on Marine Insurance (16th edn, 1981) commented that that clause was also usually contained in every form of marine policy in use in the UK.*
>
> *The current form of marine policy now in general use (MAR91) and which came into general use with the revision to the policy form and Institute Clauses in the early 1980s contains a schedule where the name of the insured, vessel and subject matter are to be set out; this also sets out a space for 'agreed value (if any)' and 'amount insured hereunder'.*

Thus the standard forms of marine policy allow for agreement as to value by making specific reference to the value as an agreed value in accordance with s 27(2) of the Marine Insurance Act.

(3) It is clear from a number of cases that the words 'agreed value' need not be used; for example, it appears to have been common to use the term 'valued at' on a slip. In ***Wilson v Nelson*** *(1864) 33 LJQB 220 a policy on the SG Form contained after the words 'are and shall be valued at' the words 'as under'. The policy then concluded with the words '1,300l. on freight'. The court held that it was not a valued policy; the sum of £1300 was no more than the sum insured. Blackburn J said (at 222):*

> *'… and in all the policies I have ever seen, I think I may say that the invariable practice is, when it is intended that the policy shall be "valued," after stating that the sum insured and the thing insured, to add "valued at the same," or at so much, adding the same or a greater sum.'*

It is not essential that the words 'valued at' are used, provided the intention of the parties is clear that there is a specified agreed value, proposed by the assured and accepted by the underwriter. I agree with the view expressed in a footnote to Arnould para 424 which states: 'Yet if the intention of the parties is clear the policy will be regarded as valued notwithstanding that the words "valued at" are not used.' The editors cite as authority for that proposition the decision of Wright J in ***Loders & Nucoline Ltd v The Bank of New Zealand*** *(1929) 33 Ll L Rep 70; but there is nothing, in my view, in that case which supports the proposition. However the proposition must, self-evidently, be right.*

(4) The use of the term 'sum insured' will normally indicate the amount for which the subject matter is insured and not as specifying the agreed value. There are a number of authorities that make this clear. The judgments in Wilson's case draw a careful distinction between the sum insured and what is required if there is to be a valued policy. In British Traders' Insurance Co Ltd v Monson (1964) 111 CLR 86 the High Court of Australia had to consider a policy which contained insuring words that stated (at 88):

> *'… the liability of the Company shall in no case exceed in respect of each item the sum expressed in the said Schedule to be insured thereon or in the whole the total sum insured hereby …*

SCHEDULE …

THE PROPERTY INSURED	*SUM INSURED*
As per schedule attached hereto and incorporated herein	*£5,318*
Total Sum insured	*£5,318'.*

The High Court stated that a somewhat faint attempt had been made to suggest the policy should be construed as a valued policy; they held it was not. In contrast in ***Elcock v Thomson****, [1949] 2 KB 755, the policy, after setting out the 'sum insured', went on specifically to provide that this sum was accepted by the underwriters and the assured as being the true value of the property insured. The current leading textbooks, to which I was referred, all refer to the use of the term 'sum insured' as being the maximum amount insured under the policy or the ceiling on recovery. For example in Dr Malcolm Clarke's* ***The Law of Insurance Contracts*** *(3rd edn, 1999) para 28-7 he refers to the 'sum insured' as being a ceiling on recovery which does not make the policy a valued policy. Professor Merkin in Colinvaux* ***Law of Insurance*** *(7th edn, 1997) para 1-15 refers to the sum insured as the amount at which the insurers' liability is limited. Professor Rhidian Thomas in his The Modern Law of Marine Insurance (1996) draws the distinction between the use of the term the 'sum insured' as a ceiling to the liability of underwriters and the agreement to a valued policy.*

I was also referred to the decisions in ***Blascheck v Bussell*** *(1916) 33 TLR 74 and Re Freesman and Royal Insurance Co of Canada (1986) 29 DLR (4th) 621 where the courts took the view that the sum stated in the policy was the sum insured and not an agreed value.*

(5) It is common for a policy of marine insurance to be a valued policy. There are at least two principal reasons why such policies are used. Agreement on valuation avoids disputes over valuation in the event of loss (see ***Barker v Janson*** *(1868) LR 3 CP 303 especially at 307 per Montague Smith J). Although under s 27(4), an agreed value is not conclusive for the purpose of determining whether there has been a constructive total loss, the Institute Clauses have provided for many years that the insured value is to be taken as the repaired value. In many cases, this has the effect of making it more difficult for there to be a constructive total loss. In* ***General Shipping and Forwarding Co v British General Insurance Co Ltd*** *(1923) 15 Ll L Rep 175, Bailhache J set out some considerations why marine underwriters preferred agreed over-valuations of the hull.*

(6) In policies where (as in this policy) the proposal is made the basis of the policy, any terms in the proposal which conflict with the policy are overridden by the conflicting term in the policy. The law was summarised by Lord Wright in ***Izzard v Universal Insurance Co Ltd*** *(1937) LL.L.Rep. 121 at p.125 col 1, [1937] AC 773 at 780:*

> *'No doubt the proposal conditions and the express conditions of the policy must be read together, and, as far as may be, reconciled, so that every part of the contract may receive effect, but, if there is a final and direct inconsistency, the positive and express terms of the policy must prevail.'*

(7) As the wording was put forward by the defendant underwriters, any ambiguity should be resolved against them."

20. In ***Quorum AS v. Schramm*** [2002] 1 Lloyd's 249 Thomas J made clear that his decision in ***Kyzuna*** applied generally to all cases of marine insurance, reiterating that he had well in mind that it was common for a marine policy to be valued (see p.260lhc), and he restated the "*well known distinction between an insured value and a sum insured*" (see p.260rhc).

Owners' submissions

21. Counsel for Owners (Mr Stephen Kenny) submitted that, in the particular circumstances of this case, the approach of Thomas J in ***Kyzuna*** should be distinguished, because (he said) the policy in the present case is significantly different. First, he submitted, this case concerns a commercial trading vessel, whereas ***Kyzuna*** involved a pleasure yacht; the former vessels are, under English marine insurance practice, invariably insured under valued policies, whereas there is no such invariable practice in relation to yachts. Second, he submitted, that, in the policies with which this case is concerned, there are no general insuring clauses or special equipment clauses, of the type that influenced Thomas J in the ***Kyzuna*** case and that the policies contain very little by way of policy-specific wording. Third, he submitted, that, on the contrary, the scope of insurance in this case is defined, almost entirely, by reference to the Institute Time Clauses – Hulls 1/11/95, amended in the case of the Vessel by the rubric:

"free from particular average unless caused by fire, grounding collision, stranding lightning, explosion including 4/4 RDC" and that these Clauses contain numerous references to the vessel's insured value.

22. In summary he submits, that, on their true construction, the relevant policies are valued policies for the following reasons:

(1) The policies, which are short, one- or two-page policies, incorporate (by reference) the Institute Time Clauses – Hulls 1/11/95 ("the ITCH"), and the Institute English Jurisdiction Clause 358 1/11/91.The ITCH (in common with all the modern Institute Clauses) specify as follows:
"This insurance is subject to English law and practice" (At trial it was not in dispute that this is a reference to English marine insurance practice.)

(2) The plain intent of the provision is to specify that any insurance on ITCH terms should be interpreted consistently with the practices and understandings of the English marine insurance market; see Arnould on Marine Insurance Volume 3 paras 9, 10, 14; O'May on **Marine Insurance** pp. 24-26; Rhidian Thomas, **The Modern Law of Marine Insurance** p. 53. The provision is designed to ensure consistency with English norms, even where these do not form part of English law, strictly speaking. Thus, the effect of the provision is that English practices, understandings and usages can be relied upon when seeking to construe the ITCH, and policies incorporating them. Further, these practices, understandings and usages are a key part of the factual matrix against which the policies have to be construed.

(3) In this case there is unanimous evidence that, at least in the English marine insurance market, there is an invariable custom or usage that trading vessels are insured on agreed values.

(4) The policies should not be construed as being inconsistent with that custom because the ITCH clauses specifically state that *"This insurance is subject to English law and practice"*.

(5) Moreover *"If there is an invariable, certain, and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts … upon a matter on which such usage or custom has reference a promise for the benefit of the other party in conformity with such custom or usage; provided there is no inconsistency between the usage and the terms of the contract"*: Chitty on Contracts (29th ed. 2004) p. 783 para 13-018. There is no inconsistency between the express words of the policies and that custom.

(6) The underlying assumption of the ITCH is that the insurance to which they attach is on valued terms. Thus, he submitted,

(i) Clause 19.1, *"constructive total loss", provides that "In ascertaining whether the Vessel is a constructive total loss, the* ***insured value*** *shall be taken as the repaired value…" . Clause 19.2 then goes on to provide: "No claim for constructive total loss based on the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed* ***the insured value****…".*

(ii) Even more clearly, Clause 11 of the ITCH – "*duty of assured (sue and labour)"* – assumes a valued policy. Clause 11.4 provides:
"When expenses are incurred pursuant to this Clause 11 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to ***the value of the vessel as stated herein****, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure* ***if the sound value exceeds that value****."*

(iii) Clause 11.5 provides: "*…* ***if the Vessel be insured*** *for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under-insurance" and clause 11.6 provides: "*The sum recoverable under this Clause 11 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed ***the amount insured under this insurance in respect of the Vessel***."

(iv) There are other references to the vessel's *"insured value"* in the ITCH: see Clause 1.5, 18.3, 22.1.1, 22.1.2. All of these are inconsistent with an unvalued policy.

(v) In the ***Kyzuna*** case, Thomas J felt able to disregard equivalent clauses in the Institute Yacht Clauses (clauses 16.3 and 17.2 of the Institute Yacht Clauses 1/11/85) *as "standard clauses applicable only if there is an agreed value"* (see p. 510 lhc). Where there is other language pointing clearly

against the policy being valued, such an approach to construction is plainly necessary. However, here:

(a) The insurance is on a trading hull, and the ITCH contain the substance of the insuring clauses of the policy;

(b) The underlying assumption that the insurance is valued is more pervasive in the ITCH than in the Institute Yacht Clauses;

(c) There is no other language pointing clearly against the policy being valued.

(vi) In these circumstances the "cogent submission" that the definition of Constructive Total Loss in Clause 19 of the ITCH, and the other references to "insured value" in those clauses, points towards a valued policy is much less easy to reject than it was in *Kyzuna.* On the contrary, once the invariable usage of the market is taken into account, it is clear from the incorporation of the ITCH that they were intended to be valued.

(7) Additionally, *"a policy is more likely to be construed as a valued policy in cases in which a valued policy is most useful…";* see Clarke's **The Law of Insurance Contracts** (1999 edition) par. 28-7, adopted by Thomas J in **Quorum v Schramm** [2002] 1 Lloyd's Rep. 249 at 260. In the case of a marine policy on hull, a valued policy is most useful, not only for the reasons set out in the *Kyzuna* above, but also because banks, and others who finance trading vessels, generally favour valued policies, because they ensure that, in the event of total loss, the recovery will be sufficient to discharge any mortgage debt. Underwriters also favour valued policies, not only because they make a constructive total loss less likely; but also because the underwriters commonly "rate" the premium charged at a percentage of the agreed value: the higher the agreed value, the higher the premium. In addition, the market valuation of a particular trading vessel is readily ascertainable by underwriters by reference to published material (e.g. Lloyds' Index). But the market valuation may not represent the true value of the vessel as a continuing source of income to her owner. By agreeing in advance the sum payable on a total loss, the owner can secure some compensation for the loss of his continuing source of income. Likewise, he submitted, difficulties of valuation arise when such a policy is unvalued.

The expert evidence

23. Before I deal with Mr Kenny's submissions on the construction issue, I should refer to the expert evidence which I heard in relation to the issue as to whether the policies were valued or unvalued. This consisted of reports and oral evidence from two experienced and distinguished Lloyd's Marine Underwriters, Richard Outhwaite, on behalf of the Claimant Owners, and Bernard Devereese, on behalf of Insurers. They agreed that it was the invariable practice in the English marine insurance market for hulls and machinery to be insured on a valued basis, that is to say on policy wordings that included words such as "so valued" or "valued at" adjacent to the description of the subject matter being insured. Mr Devereese said that a competent underwriter or Lloyd's broker would not consider a policy merely using the term "sum insured" as describing a valued policy. Both agreed (albeit Mr Outhwaite with some reluctance) that the term "sum insured" was universally recognised as denoting the maximum amount of insurers' liability under the policy being issued and that, in each case, the true meaning of the policy must depend on the words actually used.

Conclusion on the construction issue

24. Largely for the reasons advanced by Mr Davies, on behalf of Insurers, I reject Owners' submissions that, on their true construction, the policies here are valued policies. My reasons may be summarised as follows.

25. For the policy to be a valued policy, section 27 requires there to be a specification of the agreed value of the subject matter insured. The mere specification of a sum insured, without more, cannot amount to a specification of the agreed value of the subject matter insured. The definition of an unvalued policy in section 28 emphasises the recognised meaning of the words "sum insured" as being merely an expression of the limit of insurers' liability, as distinct from the "*insurable value*" which is the amount that the insurer will have to pay if there is a total loss (which would be the "agreed value" in a valued policy). The relevant words are expressly used in that context in the Statute. In other words, mere use of the words "sum insured" without any reference to words of valuation denotes an unvalued policy. That is

the clear guidance that one receives from the Act. It is not enough that the policy remains silent. The parties are required to specify the agreed value.

26. In so far as it is relevant, Owners do not dispute that it is usually the case that the recognised meaning of the words "sum insured" as being merely an expression of the limit of insurers' liability and are not words of valuation. Even Mr Outhwaite appeared to accept this. Being a contract of indemnity, in the event of a loss the assured is required to prove the amount of his loss and is entitled to recover up to the limit set by the "sum insured". The "sum insured" has two purposes. It fixes a figure (1) by which the premium can be calculated and (2) for the upper limit of recovery. It does not provide a basis for calculating the "*insurable value*" or the claim; see ***The Captain Panagos DP*** [1985] 1 Lloyd's 625 at p.630 rhc per Mustill J. In that case the words "insured amount" were used which are synonymous with the words "*sum insured*". Mustill J held that use of those words was not enough to constitute a valued policy.

27. The fact that the mere specification of a sum insured, without more, cannot amount to a specification of the agreed value of the subject matter insured, is confirmed by Thomas J's decision in *Kyzuna*. Although that case concerned a yacht, Thomas J laid down the principles applicable to determining whether a policy was valued or unvalued in all cases of marine insurance, not just those relating to yachts: see p.508rhc to p.509rhc. In setting out the applicable principles of law, Thomas J had well in mind the fact that it is common for a policy of marine insurance to be a valued policy. This fact actually featured as one of his principles of law (see his principle (5)). I reject the suggestion that different principles apply depending upon the nature of the vessel insured. Thomas J's principles were clearly intended to be of general application as subsequently emphasised by him in *Quorum v Schramm (supra).*

28. The critical points decided by Thomas J were first (as I have already mentioned above) that the words "*agreed value*" or "*valued a*t" need not be used to create a valued policy, "*provided the intention of the parties is clear that there is a specified agreed value, proposed by the assured and accepted by the underwriter*" (p.508 rhc – principle (3)). Owners are happy to accept this proposition.

29. Second, Thomas J held that, in contrast, "*The use of the term "sum insured" will normally indicate the amount for which the subject matter is insured and not as specifying the agreed value*" (p.509lhc – principle (4)). At p.510lhc Thomas J reiterated the point by saying in relation to the words "sum insured" that "*far from meaning the value has been agreed, this ordinarily means the sum is the ceiling of recovery*". I accept Mr Davies' submission that it follows from this, that Thomas J was deciding that the words "sum insured", when used on their own, do indicate, or equate to, an unvalued policy. Because, if they are not regarded as specifying the agreed value and only equate to the ceiling on recovery, this necessarily means that they do not satisfy the requirements of section 27(2) and thus the policy must be unvalued. Owners do not accept this proposition. They seek to distinguish ***Kyzuna.*** In my judgment there is no basis for the distinctions they seek to make. The concession made by insurers in that case (p.510lhc) that the term would, in accordance with the authorities, normally point to an unvalued policy was clearly correctly made. It is also quite apparent that Thomas J was of the view that this concession was correct because he held that the use of the words "sum insured" without more meant that the policy in that case was unvalued. Nor is there any distinction to be made based on the fact that in *Kyzuna* the vessel was a different type of vessel, namely a yacht. Thomas J had well in mind that it is common for a policy of marine insurance to be a valued policy, since he was clearly looking at the broader context as well. Indeed this fact actually featured as one of his principles of law (see his principle (5)). The fact that this case concerns a "Hull" rather than a low value "yacht" (which, according to Mr Outhwaite would usually be written on an unvalued basis) does not detract from the recognised meaning of the words used in the policies here. The "practice" upon which Owners rely has already been taken into account in coming to the conclusion.

30. Nor is any assistance, whether by reference to factual matrix, or as a matter of pure construction of the words used, to be derived from the point that the incorporated ITCH clauses specifically state that *"This insurance is subject to English law and practice*". As Mr Kenny conceded in argument, the words actually used in the policies have to be the controlling influence on the result. (Even Mr Outhwaite (when giving his evidence on the market practice of hull policies being contracted on a valued basis) was constrained to admit that whether a policy was valued or unvalued depended on the words used.) I reject Owners'

argument that the words "sum insured" in these policies should not be given their ordinary meaning because of the existence of the agreed practice. I accept Mr Davies' submissions that:

i. The Policies are expressly subject to English law (by virtue of the ITCH). English law provides that evidence of custom/usage (quite apart from mere practice) is inadmissible where it seeks to vary or contradict the express terms of the contract. If the terms of the contract/policy are plain, evidence of custom and/or usage and/or practice is inadmissible.

ii. The fact that the ITCH purport to make the Policies subject to "English … practice" is irrelevant if English law provides that evidence of such practice is inadmissible.

iii. In any event, the agreed practice in this case; viz. that invariably, in the English marine insurance market, hull and machinery are insured on policy terms that provide for an agreed valued basis, does not help Owners in this case. Owners, in their Re-Amended Points of Claim and in Mr Kenny's opening, and Mr Outhwaite in cross-examination, recognised that whether a policy is valued or not, must depend upon the actual words used. There was no evidence adduced before me of a custom and practice to the effect that use of the words "sum insured" means that the policy is to be treated as a valued policy, even in the absence of any words in the policy that could be regarded as a specification of an agreed value. Whilst it may be the practice, indeed the invariable practice, of English marine underwriters to provide cover on a valued basis (a fact recognised by Thomas J in reaching his decision in ***Kyzuna***), the reality is that they achieve this by using clear words to that effect in accordance with the requirements of section 27(2) of the Act.

31. I also reject Mr Kenny's argument that one should construe the words "the sum insured" as equating to the specification of an agreed value of the Vessel, because the underlying assumption of the ITCH is that the insurance to which they attach is on valued terms. He submits that this is more pervasive in the case of ITCH (compared to the Institute Yacht Clauses under consideration in ***Kyzuna***) and that, accordingly, this is another reason for distinguishing that case. Thomas J was not persuaded by the assured's reliance on the provisions of the Institute Yacht Clauses (which mirror to an extent the ITCH). Thomas J's approach is obviously correct. The ITCH are subject to English law and drafted in the knowledge of the terms of the Act, which expressly caters for both valued and unvalued policies. Further, it is expressly stated in the heading of the ITCH that they are "FOR USE ONLY WITH THE CURRENT MAR POLICY FORM". The current MAR Form was not used in this case, but its standard terms, both the Lloyd's and the ILU Form, expressly refer to and draw a distinction between: (1) "Agreed Value (if any)" and (2) "Amount Insured Hereunder", the latter equating to the phrase "sum insured" (as per ***The Captain Panagos DP***). Accordingly, Owners' contention that the underlying assumption of ITCH is that the insurance to which they attach is necessarily on valued terms is wrong. The MAR Form expressly contemplates and caters for unvalued policies. The fact that the words "insured value" appear more frequently in ITCH is not a valid argument for distinguishing ***Kyzuna*** on this point. No assumption is made in the Clauses to support the notion that they assume a valued policy. The fact that Insurers might be prejudiced by having only an unvalued policy, because they could not rely on some of the provisions in ITCH (for example, clause 11.4), does not persuade me that one must construe the words "sum insured" as ascribing an agreed value to the vessels, or to any individual vessel. Nor do some of the suggested difficulties in valuation put forward by Mr Kenny (which I deal with below) predicate that the words "sum insured" equates to agreed value. Likewise I cannot see that his submissions derive any support from the fact that there are two Insurers and two Policies in this case, rather than one.

32. Nor, in my judgment, is there anything in the factual background that supports an argument that the words "sum insured" must be read as "agreed value", because, approaching the matter on any sensible commercial basis, that is what, objectively speaking, a reasonable insured under the policies would have thought was the position; see *Mannai Ltd v Eagle Star (supra)*. In so far as it might be admissible to refer to them as factual matrix material (which must, in my judgment, be doubtful), every quote sent on behalf of Insurers and every policy and endorsement issued by them expressly used the words "SUM INSURED" (in capital letters). No reference was made to any "value" being recognised or agreed to by Insurers. Although the request may have been for a quote on a valued basis, that is not what Insurers were prepared to offer and they made their intention plain by just using the words "SUM INSURED"

without any words referable to value (in all quotes communicated to Owners and policies/addenda sent through).

33. For similar reasons, I also reject the submission that one can imply a term into the Policies to the effect that they are to be regarded as valued policies. To do so would contradict the express wording of the Policies which is not allowed: see *Chitty* (29th ed) at para 13-023. As I have already stated above, in any event, there is no relevant custom in this case. As Owners accept, each case depends upon the words used. There is no custom pleaded or proved to the effect that, by using the words "sum insured" in a policy of marine insurance, it is recognised that the policy is a valued policy. It cannot be said that there exists a custom to that effect that is so well established and has become so universal "*that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business*": *Chitty* at para 13-021; see also ***Cunliffe-Owen v. Teather & Greenwood*** [1967] 1 WLR 1421 at p.1438B-C & G per Ungoed-Thomas J.

34. Accordingly, like Thomas J in *Kyzuna,* I conclude that there is nothing in the policies here to displace the ordinary meaning of the words "sum insured".

Facts relevant to the claims of estoppel and for rectification

35. Before dealing with the evidence given by the respective parties as to their subjective intentions at the time, I first summarise the chronological correspondence and other documentary material relevant to the consideration of these claims.

36. First contact was made on 30 January 2001, when Link sought quotations from Topmar, and various others, for hull cover for the Interglobal fleet on the basis of stated vessel values. All the other insurers/ agents approached appeared to have understood this as a request for valued cover. At that time the Interglobal fleet was insured in the United States, through HBI International Ltd, on a valued basis, with expiry at the end of February 2001. However, by early 2001 it was clear that Interglobal would face difficulties in obtaining cover for its fleet on rates that it was prepared (or able) to pay. Mr Myriantholpoulos says that these difficulties caused him to approach Topmar (as Insurers' representative) to quote for the business. On 30 January 2001 Mr Myrianthopoulos sent a fax on behalf of Link to Topmar seeking a quotation in respect of four vessels (including the Vessel). The information supplied in the fax included a "value" for each of the vessels. A figure of some sort was essential for any prospective insurer. Without some form of valuation figure it would have been impossible for an insurer to work out a rate of premium whether the policy was to be valued or unvalued. Mr Semenkov received a copy of Link's fax dated 30 January 2001 from Topmar and he sent a quote back to Topmar the same day by email. Mr Semenkov and Mr Krasnokutskiy discussed the terms of the proposed quote before anything was sent to Link. Mr Semenkov said that, although his email did not specifically mention whether the quote was being made on a valued or unvalued basis, he would have expected Mr Krasnokutskiy to make it clear that the quote was being made on an unvalued basis when the same was sent to Link. On 31 January 2001 Mr Krasnokutskiy sent a quote on behalf of Insurers to Link (Mr Myrianthopoulos). In addition to setting out the proposed premium, the quote expressly stated a "SUM INSURED" in respect of each of the vessels. Although those sums were the same as the "values" set out in Link's fax of 30 January, the quote did <u>not</u> accept those values as agreed values nor did the quote refer to the words "insured value" or "valued". On 21 February 2001 Mr Krasnokutskiy chased Mr Myrianthopoulos for a response to Topmar's fax of 31 January. Link failed to respond to this chaser.

37. On 2 March 2001 HBI International Ltd ("HBI") confirmed that the present US insurers (of the Interglobal fleet) were prepared to extend cover to the end of March 2001. Those insurers were plainly unhappy about renewing the Interglobal cover on the terms as expiring and thus there was an interim extension of just one month. Somewhat out of the blue (2 months later), on 21 March 2001 Mr Myrianthopoulos sent a further fax to Mr Krasnokutskiy thanking him for the 31 January quote and asked for a revised quotation bearing in mind, amongst other things, (1) the addition to the fleet of ALDEBAR with a value expressed as $1.5m and (2) the fact that the "insured value" of MARIA DIA I was $1.5m, not $2.5m as previously stated.

38. This fax was forwarded to Mr Semenkov by Mr Krasnokutskiy and Mr Semenkov provided a revised quote. Mr Krasnokutskiy sent Insurers' revised quote to Link (per Mr Myrianthopoulos) by fax on 22

March 2001. That quote again stated that Insurers' quote for ALDEBAR was being offered on the basis of a "SUM INSURED", and that the terms for the other vessels were as per Topmar's quote in the fax of 31 January (subject to certain irrelevant amendments), i.e. on an unvalued basis. It did not accept that the values stated by Link were agreed by Insurers for the purpose of the proposed insurance.

39. On 29 March 2001 HBI sent a fax to Link confirming the US insurers' agreement to renew the Interglobal fleet insurance for a further 12 months on expiring terms, save that this cover was to terminate automatically if all the vessels were not re-classed by 30 June 2001. On 30 March 2001 Link informed Topmar that Interglobal's existing cover had been extended for a further 3 months (not 12 months) and asked that Insurers keep their quotations open for further discussion in 2 months' time. On 25 June 2001 Mr Myrianthopoulos sent a further fax to Mr Krasnokutskiy referring to the previous correspondence (and recent discussions with Mr Hallak) and confirming that Link had authority to place the proposed cover "*with you*". Mr Myrianthopoulos stated that "*values, terms, conditions and security*" were to be as per previous correspondence and asked for confirmation of cover accordingly. On the same day, Mr Hallak responded by email stating that Topmar would revert after "*relaying with underwriters*".

40. On 26 June 2001 Topmar (by Mr Hallak) sent an email to Mr Semenkov advising that confirmation to place cover for the Interglobal fleet had been received. The email then summarised the basic terms that had been proposed in the quotes previously sent on behalf of Insurers. Those terms included a "SUM INSURED" (but no insured or agreed value) in respect of each of the vessels, including the Vessel. Consistently with Insurers' quotes, there was no suggestion that any values had been agreed by or on behalf of Insurers.

41. On 28 June 2001: (1) SOVAG confirmed its 60% participation for 12 months with effect from 29 June 2001 with Ingosstrakh as claims leader and (2) Ingosstrakh sent a fax to Topmar enclosing a copy of the policy it had prepared (No.036750) and an invoice for premium due, thereby communicating the terms upon which it was prepared to provide insurance cover. The interest was expressed to be in respect of "Hull and Machinery" and in respect of each of the vessels a "SUM INSURED" (in capital letters) was expressly stated. No mention was made of any alleged agreed or insured values. Topmar forwarded a copy of the Ingosstrakh policy to Link on the same day.

42. Later on 28 June 2001 Link responded in relation to the Ingosstrakh policy, stating that, at first reading of the Ingosstrakh policy, there were four points which needed to be "*refined/amended*". These points were relatively minor. No objection was made to the use of the words "SUM INSURED" nor was any mention made of the fact that no reference was contained in the policy to any agreed values for the vessels. Link's/Owners' comments were passed on to Mr Semenkov late on 28 June and Mr Semenkov amended the policy accordingly (save as regards the fourth point raised, which related to Ingosstrakh following SOVAG, to which he was not prepared to agree).

43. On 29 June 2001 a copy of the amended Ingosstrakh policy was sent through to Link. On or about 2 July 2001 a draft of the SOVAG policy was sent to Link. This draft again expressly stated a "SUM INSURED" in respect of each of the Vessels with no reference to any values being agreed. Link responded by fax to Topmar on 4 July with two proposed amendments, one of which was accepted and one of which was rejected. No complaint was made by Link about the fact that the policy expressly referred to a "SUM INSURED" for each vessel and made no reference to "agreed values".

44. On 19 September 2001 Link asked for a quote from Insurers in relation to the possibility of adding the POLYDEFKIS to the fleet cover. In its fax to Topmar (which was copied on to Mr Semenkov), a "value" of $2.5m was given for this vessel. Insurers were prepared to quote on the basis of "*conditions as per slip*" and, after some negotiation over the rate of premium, Insurers agreed to attach this additional vessel to the cover on the terms set out in the Addenda No.1 to the policies. Each Addendum provided for a "SUM INSURED" in respect of the vessel and no more. This was in accordance with the terms of the policies.

45. On 6 December 2001 Link sought a further quote from Insurers to add the mv GEORGIOS S to the fleet policy. However, on this occasion Link specifically included amongst the details requested for the quote an "insured value" of $2.5m. When the quotation came back from Mr Semenkov, via Topmar, it did not

refer to an insured value, but simply stated "*conditions as per fleet*". Further, the Addenda No.2 sent by Insurers (accepted and counter-signed without dispute on behalf of Owners) simply referred to the fact that the insurance was on the basis of a "SUM INSURED" of $2.5m and there was no reference to an agreed value. Mr Semenkov said that he noted this request for a quote for an "insured value" of $2.5m, but that he was not prepared to insure this vessel on any different terms from those already covered (including the Vessel). Hence, when he quoted he did so on "*conditions as per fleet*" terms.

46. On 7 June 2002 Link sent a fax to Topmar asking for Insurers' agreement to late payment of the last premium instalment (because of unforeseen heavy spending) and inviting Insurers' renewal proposal. As regards renewal, on 10 June 2002 Insurers proposed a 7.5% increase in premium for all vessels, this being copied to Link on 11 June 2002. Owners were clearly concerned to get the cheapest cover possible because quotes were then sought on various alternative bases of cover.

47. Although quotes were sought and obtained from numerous other sources around this time, Owners decided they should renew with Insurers on terms of the 11 June 2002 fax. This was communicated to Topmar by Link on 26 June 2002 Topmar responded on the same day confirming the renewal on agreed terms "*as per expiry*" with a 7.5% increase in rates. Accordingly, as stated in the policies, the cover was fixed on the basis of a "SUM INSURED" for each vessel, not on an agreed or insured value basis. No complaint was made by Link on behalf of Owners, in respect of either of the Policies, despite the fact that both stated in capital letters on their face that the amounts stipulated therein were "SUMS INSURED" as opposed to agreed values.

48. It will be noted from the above that the requests made by Link consistently sought quotations on the basis of "values" or "insured values", whereas the responses to Link from Topmar, on behalf of Insurers, whether by way of quote, policy, or endorsement or addendum, consistently offered or gave cover on the basis of "sums insured" and at no stage did Insurers respond to Link's requests for quotes/cover by offering terms on the basis of an agreed value. Mr Semenkov's evidence was to the effect that this was quite deliberate on the part of Insurers because they intended to contract on the basis of unvalued policies.

Rectification

49. Having concluded that the policies are, on a true construction, unvalued, I turn now to consider Owners' alternative submission that the written contracts should be rectified to reflect the Owners' subjective belief that they were valued policies. Two grounds of rectification have been alleged: (1) common mistake by Owners and Insurers, and (2) unilateral mistake by Owners alone.

50. In ***Agip SpA v. Navigatione Alta Italia SpA ("the Nai Genova")*** [1984] 1 Lloyd's Rep. 353 at 359 Slade L.J. explained the rationale of rectification as follows:

> *"In principle … rectification is … not for the purpose of altering the terms of an agreement … but for that of correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect their true agreement".*

51. In all cases of rectification the claimant bears the burden of proving that the written instrument does not reflect the true agreement of the parties. Although the standard of proof required is the usual civil standard of the balance of probabilities, convincing evidence of the parties' true intentions is needed in order to counteract the cogent evidence of the parties' intention contained in the written contract: see per Slade LJ in ***the Nai Genova*** at 359; and ***Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*** [1981] 1 W.L.R. 505 at 514 *per* Buckley L.J., 521 *per* Brightman L.J. I bear that standard in mind, particularly when I come to consider the allegation of common mistake by both Owners and Insurers.

52. Under the first ground of rectification - common mistake by Owners and Insurers - the burden lies on the Owners to establish a common intention to contract on a valued basis, with at least some outward expression of accord to that effect, which continued up to the time of the execution of the instrument (June 2002): the ***Nai Genova*** [1984] 1 Lloyd's Rep. 353 at 359 *per* Slade L.J.

53. I have no hesitation in finding that the Owners, through their brokers, Link, subjectively intended to contract on a valued basis. In his written evidence and in cross-examination, Mr Myrianthopoulos of Link repeatedly said that he assumed that the words "sum insured" and "agreed value" appearing in a

policy would have had the same meaning. I accept that he took it for granted in his own practice that all policies for commercial trading vessels were written on an agreed basis. The impression I formed was of an experienced broker, making a foray into an unfamiliar insurance market, who assumed that the policies for which he requested quotations would be written on the usual agreed value basis with which he was familiar. Moreover, after the close of evidence, Mr Davies, on behalf of Insurers, fairly accepted that Owners were operating under a mistaken assumption as to the terms of the Policies, because Mr Myrianthopoulos simply did not appreciate the importance or significance of the words "sum insured" when used without words of value or valuation. Insurers, however, contend that he ought to have understood the meaning of the words used.

54. Owners' primary case is that Insurers intended to provide cover on a valued basis and shared Mr Myrianthopoulos' mistake. They contend that Mr Semenkov only appreciated that the point could be run after the claim for constructive total loss of the Vessel had been made. Thus Mr Kenny, for the Owners, put it to Mr Semenkov that his belief that he was contracting on an unvalued basis was one that came to him only after the policies had been written and the insured event had occurred and that his belief at the time when the written contract was concluded had been to write the policies on an agreed value basis. His failure, for example, to take a market valuation of the vessel was consistent with that belief since obtaining such a valuation was the first thing he would have done if he had truly thought that he was contracting on an unvalued basis. Mr Kenny submitted that Mr Semenkov could not adequately explain why, in the email to his lawyers, the constructive total loss issue was put in terms of sum insured rather than market value; and he relied, for example, upon answers such as the following

> *"… my understanding was at all times and from conclusion of this contract of insurance that the policy was unvalued. But logically the question of unvalued policy it develops not immediately when the case occurred, but sometimes after."*

to suggest that Mr Semenkov was lying.

55. Having seen and heard Mr Semenkov give his evidence, I am not prepared to conclude that he was lying on this point. Mr Semenkov's evidence was quite clear and was consistent throughout – he always intended to contract on the basis of an unvalued policy. He was adamant, both in his witness statement and in cross-examination, in saying that he intended to issue policies on an unvalued basis and that in using the words "sum insured" he intended the policies to have that effect. He said that he had been familiar with several books on English marine insurance law which explained the effect of issuing policies for a "sum insured". He therefore understood that by writing his policies in those terms they would be unvalued. Although in some respects he was an unsatisfactory witness, because his answers tended to be very long and he had difficulty with expressing himself in English, I accept that he was basically an honest witness. He is plainly an intelligent man; he is a qualified commercial lawyer with experience of marine insurance law, as well as being an underwriter, who obviously has a comprehensive knowledge of marine insurance law, including from an English law perspective. His basic understanding was confirmed by what was said in Insurers' Russian Rules of Underwriting, which adopt the same approach to the words "sum insured". I also accept his evidence that, in his experience, historically, Russian insurers contract on an unvalued basis and that it was Insurers' preference to do so, because they are not keen on insuring vessels for values in excess of their true market value, and have real concerns over foreign vessels, because they do not know enough about their values. Moreover, each policy and addendum was clearly expressed to be in respect of "SUM INSURED" and no more. It would have been surprising, to my mind, that a man like Mr Semenkov would have adopted such wording when he accepted that he knew that Owners were seeking cover on a valued basis, if he had intended to insure on a valued basis. Moreover his fax to Insurers' solicitors, which was sent unprompted, supports Insurers' case. It does not appear to me to be written on the basis that Mr Semenkov has just come across the point. I accept that at this stage, Insurers were considering all possible options open to them. Up until this stage Insurers had been content to run with the notion that the "sum insured" was the correct figure against which to assess a constructive total loss. As Mr Semenkov pointed out in cross-examination, Insurers were entitled to go through a process of making their minds up as to what points to take – and, for that, they needed to be fully informed.

56. Other points were taken by Mr Kenny to support Owners' case that Insurers had the intention to contract on a valued basis. However, at the end of the day, bearing in mind the standard of "convincing evidence" required to displace the cogent indication of Insurers' intention to contract on an unvalued basis in the written policy, I conclude that Owners' mistake was not shared by Insurers.

57. I turn to now to the alternative basis for Owners' claim for rectification, namely unilateral mistake by the Owners. The test for establishing rectification for such a mistake has been considered by the Court of Appeal in ***Nai Genova*** *supra* and, more recently, in ***Commissioner for the New Towns v. Cooper (Great Britain) Ltd.*** [1995] Ch. 259. Both decisions accept that rectification can properly be granted for a unilateral mistake where the defendant had actual knowledge of the claimant's mistake when the contract is signed. Actual knowledge in this context has been interpreted to include the defendant's wilfully shutting his eyes to the obvious fact of the claimant's mistake or his decision wilfully and recklessly to make reasonable inquiries that might reveal the existence of the claimant's mistake (***Commissioner for the New Towns v. Cooper (Great Britain) Ltd.*** [1995] Ch. 259 at 282 *per* Stuart-Smith L.J; *Baden v.* ***Société Générale pour Favoriser le Développment du Commerce et de l'Industrie en France S.A.*** *(Note)* [1993] 1 W.L.R. 509 at 575-576 *per* Peter Gibson J.). The effect is therefore that the defendant's knowledge of the claimant's mistake can be stigmatised as dishonest. The implication is that his decision to proceed with the contract when he knew of the claimant's mistake is below generally accepted standards of commercial behaviour (see ***Royal Brunei Airlines Sdn Bhd v. Tan*** [1995] 2 A.C. 378 at 390).

58. Applying these tests to Insurers, I find that they did not know of Owners' mistake. Taking the test at its lowest threshold, I am not satisfied that Mr Semenkov was wilful or reckless in failing to make inquiries of Mr Myrianthopoulos which might have elicited Owners' mistaken view of the construction of the policy. My impression of Mr Semenkov is of an underwriter who regularly issued policies on an unvalued basis without giving much thought to whether the insureds for whom he provided cover might generally have preferred – or indeed intended – to transact on a different basis. Mr Kenny pointed out to Mr Semenkov the numerous quotations for valued cover that Mr Myrianthopoulos had made on behalf of Owners for the various vessels in their fleet. To all these requests Mr Semenkov replied with an offer of unvalued cover, which Mr Myrianthopoulos apparently accepted. He took the view that it was for the insured to question the cover which he offered if they did not want it on unvalued terms. I accept the point made by Mr Davies for Insurers that Mr Myrianthopoulos' inquiries about cover were made over a period of months and that they were one of many inquiries that Mr Semenkov would have fielded in the course of a typical day. It was not as if they were made in such quick succession that Mr Semenkov might have had reason to know that Mr Myrianthopoulos had mistaken the basis on which Insurers were providing cover.

59. Mr Outhwaite was adamant in his evidence that the correspondence between the parties showed that the Owners' brokers assumed that "Sum Insured" in the policy wording was synonymous with "Insured Value" and that, if Insurers did not point out to Owners specifically, and expressly, that Insurers were only prepared to contract on an unvalued basis, that this was tantamount to sharp practice. In my judgment, in so far as Mr Outhwaite's report, or his evidence, commented upon factual issues such as what the parties must have known and alleged sharp practice, his "evidence" goes far beyond the function of an expert and is inadmissible. If I am wrong in that view, then nonetheless I reject his evidence of "opinion", since it is not based on the entirety of the evidence which I have heard and considered.

60. This leaves the basis on which rectification can be ordered for unilateral mistake where the mistake is not known to the defendant. It is summarised in the judgment of Stuart-Smith L.J. in ***Commissioner for the New Towns v. Cooper (Great Britain) Ltd.*** [1995] Ch. 259 at 280:

> *"[W]here A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from the discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance with the strict letter of the contract".*

61. The test was upheld on the facts of that case. It was held that the defendants made implied misrepresentations with a view to creating a "smoke-screen" which would have distracted the claimants from the true meaning of the written agreement between them. In contrast, in the present case, even assuming that Mr Semenkov suspected Mr Myrianthopoulos' mistake – which seems unlikely – I find no such unconscionable conduct on the part of Insurers. Mr Semenkov's way of doing business might not have been a model of best practice, but I do not accept that his habit of regularly issuing unvalued policies in the face of requests for valued cover can be described as a misrepresentation about the nature of the cover which he provided. The facts are very different from those in ***Commissioner for the New Towns v. Cooper (Great Britain) Ltd.*** where the parties dealt closely with each other over a period of months in concluding a single deal. Mr Semenkov dealt only occasionally and remotely with Mr Myrianthopoulos. I accept the force of Mr Davies' submission that Mr Semenkov was entitled to assume that he was dealing with an experienced broker who understood the legal effect of the cover being provided. In the context of the arm's length relationship between the parties, I do not accept that Mr Semenkov should have been expected to check whether the brokers with whom he dealt properly understood the nature of the cover, or to correct any mistakes they might make about the proper construction of the policy documents.

62. The claim for rectification therefore fails on both grounds.

Estoppel

63. I turn now to Owners' case based on estoppel. Owners contend that it is clear from the correspondence which I have summarized above that, on any objective view, taking into account those background facts which a Court may consider to inform itself of how reasonable men in the position of the parties would understand the relevant exchanges, a reasonable owner in the position of the Claimant and/or a reasonable insurance broker in the position of the Claimant's broker (Mr Myrianthopoulos of Link) would undoubtedly have considered that Topmar and/or Insurers were using the term *"sum insured"* as meaning *"insured value"*; and were representing them to be the same. Reliance is placed upon the evidence of Mr Outhwaite and of Mr Myrianthopoulos, and in particular the latter's evidence that if he had not been "misled" in this way, there would have been *"a great deal of discussion and Owners would probably be reluctant to accept such type of cover"*. Reliance is also placed on the evidence of a Mr Sarris of (Interglobal): if it had been made clear that the cover offered was unvalued*"… we would have objected to it and most probably would not have agreed Hull and Machinery cover on the terms offered by Ingosstrakh/ Sovag"*.

64. Owners' case is that these facts give rise to an estoppel. Mr Kenny submitted that it was clear that a misleading impression was created in Owners/ Link by the manner of Topmar's responses to the requests for quotations and by the terms of the policies issued. The clear impression created was that the "sums insured" referred to were the values on the basis of which quotation was sought, and were agreed values for the purposes of the terms of cover. He submitted that whether it is properly to be characterized as an estoppel by representation or by convention is, in the present case, unimportant: it can be said equally that:

    (1) Insurers represented *as a fact* that *"sum insured"* in their quotations and policies meant, or was, or referred to the *"insured value"* proposed by Owners and expected by the ITCH; so that the policies were valued; and that the Owners have relied on that supposed fact to their detriment;

    (2) the parties here have acted on an assumption *"shared by both of them or acquiesced in by the other"* (see Chitty on Contracts (29th ed 2004) p. 281 para 3-107; citing ***The Indian Endurance (No. 2)*** [1998] AC 878, 913) - namely an assumption that the *"sum insured"* in the quotations and policies meant, or was, or referred to the *"insured value"* proposed by Owners and expected by the ITCH; so that the policies were valued; and it would now be unconscionable for Insurers to resile from that assumption.

    Either way, it is submitted, Insurers cannot now be heard to assert that the policies were unvalued.

65. For similar reasons to those which I have already expressed in relation to the claim for rectification, in my judgment, Owners' claim based upon estoppel fails.

66. Estoppel by convention arises where "*the mistaken assumption of the party claiming the benefit of the estoppel must … have been shared or acquiesced in by the party alleged to be estopped; and both parties must have*

conducted themselves on the basis of such shared assumption": see Chitty at para 3-109. Further, this estoppel would only apply if it would be unjust and unconscionable to allow reliance upon the strict terms of the Policies; see Chitty at para 3-107.

67. I have already decided that Insurers did not share Owners' mistaken assumption. Nor in my judgment can it be said (for similar reasons to those given in relation to the rectification claim based on unilateral mistake) that Insurers "acquiesced in" Owners' mistaken assumption. At no relevant stage did Insurers conduct themselves on the basis that the Policies were valued policies. On each occasion, each of the Policies and Addenda were issued with clear wording. There was no suggestion that they were being treated as valued or that there was any accord between the parties (other than that the Policies were to be unvalued). As Mr Davies submitted, the terms of these Policies/Addenda were unlike any English terms of cover previously granted to Owners. As was agreed by both experts, the words "sum insured" when used alone do not (ordinarily) constitute words of valuation. Each quote given was expressly stated to be on a "SUM INSURED" basis and no other, save for on two occasions when they were given on the basis of the existing "conditions" but then followed up with the Addenda in clear terms. The "conditions" included the fact that the policies were unvalued. Insurers/Owners are to be taken to have understood the meaning and effect of the words used. They have a recognised meaning in this market – whatever Mr Myrianthopoulos may have thought.

68. I turn next to Owners' case based upon estoppel by representation. In order to establish their case based upon estoppel by representation, Owners have to show that Insurers made a clear and unequivocal representation of fact to the effect that the words "sum insured" meant "insured" or "agreed value", notwithstanding that, as I have held, the words did not bear that construction. In my judgment it is impossible to find any such representation in the correspondence. I accept Mr Davies' submission that the fact that Mr Myrianthopoulos may have failed to appreciate the meaning of the words "SUM INSURED" (when used on their own) is irrelevant when set against their well recognised meaning in the market and the fact that nowhere else in the Policies (or any of the quotes) was any reference made to "values". There was no clear and unequivocal representation made by Insurers as contended for by Owners. Although valued cover may have been requested, Insurers stated on each occasion that that was not the type of cover they were prepared to offer and that they were only prepared to offer cover on an unvalued basis. Nor, in my judgment, can the fact that Insurers did not spell out to Owners the difference between the two types of terms be said to amount to the type of clear and unequivocal representation of fact required to support an estoppel.

69. Accordingly I reject Owners' claim based on estoppel.

Calculation of the insurable value

70. I turn finally to the issue of calculation of the insurable value of the Vessel.

71. Section 68 of the 1906 Act specifies as follows:

"68. Subject to the provisions of this Act and any express provision in the policy, where there is a total loss of the subject-matter insured, -

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured."

72. The insurable value of a vessel is defined by Section 16(1) – a section entitled "Measure of Insurable Value":

"Subject to any provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:

(1) In insurance on ship, the insurable value is the value at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seaman's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance on the whole:

The insurable value in the case of a steamship, includes also the machinery, boilers, coals and engine stores if owned by the assured, and, in the case of a special trade, the ordinary fittings requisite for that trade

(2) …."

73. Mr Kenny submits that the result therefore will be that the measure of indemnity in the case of a total loss will be judged at the commencement of the risk (here 29th June 2002) and will include, not just the vessel's market value, but also various other items of cost i.e. her outfit, provisions and stores for the officers and crew, money advanced for seaman's wages, other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, the charges of insurance on the whole, her bunkers and engine stores (if owned by the assured), the ordinary fittings requisite for any special trade,all to be valued at the date of the commencement of the risk.

74. Mr Davies, on the other hand, submitted that ss.16(1) and 68 of the Act do not apply in assessing the insurable value of the Vessel. He relied on the fact that section 16(1) of the Act makes it clear that the provisions of that sub-section only apply "*subject to any provision …in the policy*". He referred to the decision of Mustill J (as he then was) in *The Captain Panagos DP* (supra) at p.632rhc, where the judge held that section 16(1) is archaic and unsuited to modern conditions, and that the terms of the policy in that case were such as to exclude the operation of sections 16(1) and 68. He submitted that the same reasoning applies in this case because:
    i. The insurance provided in this case is expressly limited to "Hull and Machinery" (see the "Interest" section of the Policies). Further, cl.6 of the ITCH expressly provides that "*this insurance covers loss of or damage to the subject-matter insured …*".
    ii. That subject-matter is the Vessel's hull and machinery and what is covered, in the words of Mustill J, is the "*pecuniary consequences of physical loss or damage to the ship*".
    iii. No cover is provided in respect of any of the other matters set out in s.16(1) of the Act.

75. In those circumstances, and adopting Mustill J's approach in ***The Captain Panagos DP,*** he submitted that the appropriate measure of indemnity in this case (assuming liability and a constructive total loss were to be established) would be the market value of the Vessel at the time and place of her loss. In this case, that is agreed as $800,000.

76. In my judgment Mr Davies' submissions on this point are correct and the approach of Mustill J's in ***The Captain Panagos DP*** falls to be adopted. Accordingly, I hold that the insurable value of the Vessel is the agreed figure of $800,000, namely the market value of the Vessel at the time and place of her loss.

77. Finally, I should like to express my appreciation to both counsel for the efficient way in which this case was argued in front of me and their helpful written submissions.

Mr Stephen Kenny (instructed by Holman Fenwick and Willan) for the Claimant
Mr Huw Davies (instructed by Hill Taylor Dickinson) for the 1st and 2nd Defendants