The MV Salem: But this time no witch hunt

Lord Denning MR stated tersely and as well as anyone could at the beginning of his judgement in *Shell Petroleum Ltd v Gibbs*, "*A gigantic ship was used for a gigantic fraud. She was the Salem, a super-tanker.*" [1] Underpinning this remark were the theft of millions of dollars worth of oil, the deceitful scuttling of the super tanker herself, double-crossing and an international group of conspirators. Immediately the assumptions and images that spring to mind are of probably insurance fraud, maybe massive theft, of course greed, probably larger than life characters and international machinations – and in this case the facts show all of these were present.

This essay true to Montaigne makes only two real points.[2] First, when abandoning a sinking ship in the apparent haste of an emergency it may well not be a good idea to first make sandwiches to take on your lifeboat – the general point being in life as well as in law, the devil lies in the detail and hence in the facts. Second, on courage, that as counsel you must be courageous enough to argue that a previous published decision by the same judge (clearly also a fact) was wrong, and as to the judge – it makes you none the worse for bravely admitting the error.

The facts as recounted in the *Salem* case I set out in (very) heavily borrowed fashion from the above judgment itself, but with special acknowledgement to the concise and Hemmingwayesque style of the former Master of the Rolls. I borrow so in this essay because it is relevant to the points made and, simply, since I like this judgment's style.

As perhaps anticipated at the outset, many of the 'facts' as they were recounted by Lord Denning in his judgement are not the facts as I found them in my research. This is not to indirectly criticize his judgment – Lord Denning relied on the facts as they were then believed to be and as were presented to the Court by the parties' counsel.[3] I also state, but not always, in parenthesis other versions or allegations as to some facts, most often from AJ Klinghoffer's very enjoyable book on the *Salem* fraud, *Fraud of the Century*, [4] and I add other facts which I believe to be interesting.

The wicked minds (Lord Denning's words) behind the plot were those of a group of cosmopolitan crooks. (Klinghoffer suggests that Lord Denning might have borrowed this phrase 'cosmopolitan crooks' from an article called 'Maritime Fraud.'[5] The 'cosmopolitan crooks' got their opportunity when in 1979 many oil exporting countries put an embargo on oil supplies to South Africa. *Apartheid* South Africa was already under certain sanctions (specifically a United Nations imposed arms embargo) due to its widely denounced racist policies. South African oil importers were thus under pressure and very keen to get oil supplies. The crooks made a plot to get oil from Kuwait on the pretence that it was to go to Italy, then to divert it to Durban, South Africa and deliver it to the South Africans there. It was all to be done in the name of limited companies.

Generally, countries recognize the separate corporate legal personality of every company duly registered in every other country of the world – this is also the position in customary international law. [6] The crooks used these companies as puppets with which to mount their frauds and to escape being discovered.

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[1] *Shell International Petroleum Company Ltd v Gibbs ("The Salem (CA)")* [1982] 1 Loyd's Rep. 369 (CA) at 371.

[2] Michel de Montaigne (1533 to 1592) is often regarded as the father of the modern essay.

[3] As stated in the Reverend and the Curious Case of the Crocodile, broadly speaking facts in law are what the court finds them to be on evidence presented (or agreed to) to have happened.

[4] Arthur Jay Klinghoffer *Fraud of the Century* (Routledge, London, 1988).

[5] Klinghoffer, above n 4, at 140 n. DG Powles and SJ Hazelwood "Maritime Fraud" (1984) The Journal of Business law 244 at 406.

[6] *Barcelona Traction, Light and Power Co Case (Belgium v Spain*) [1970] ICJ Rep 3 at [41], [52]-[58].

Lord Denning stated that the first step done by the crooks was to form or take over a company in the United States and that they gave it a high-sounding name – as if it were a big oil company. It was American Polamax International Inc with an address in Houston, Texas. This version of the facts already seems to be incorrect; this company had been registered quite legitimately as a commodities brokerage and indeed likely some time before the idea of the fraud was mooted. [7]

The second step (he continued) was for the crooks to form or take over a Swiss company under the name of Beets Trading AG with an address in Zug, Switzerland – a town which was (and still is) the registered headquarters for thousands of corporations, about 10 000 in 1980, now more than 27 000 companies – one for every 4 inhabitants of Zug. (Zug is also the registered home of (for example) the merged massive mining companies, Xstrata and Glencore). Again it is likely that this factual inference is incorrect; albeit that this company was indeed used in the fraud, it too had likely been registered for legitimate purposes some time before the fraud was conceived.[8]

So who were these 'cosmopolitan crooks' that the late Master of the Roll refers to? I mention only the main actors in the drama. The first and indeed the person who was most visible (and perhaps most unfortunate in the end) was Mr Frederick Soudan. Soudan, Lebanese born but a naturalised American from Houston, Texas – whom Klinghoffer describes as suave and golden throated – misrepresented many facts about himself. Among the many, that he was acquainted with Crown Prince Fahd of Saudi Arabia; had his own oil tanker; his own oil refinery; was building a massive new oil company headquarters in Houston; owned 255 drills and for good measure also owned 140 wells. [9] This is a few of the misrepresentations he made to the South Africans when he dealt with them.

In reality, and in fact he was a novice commodities broker, a junior partner in American Polamax International Inc and had been an insurance salesman for many years – he even needed to borrow money for his airplane ticket to South Africa.[10] His most erroneous and unfortunate misrepresentation however was one that he made to himself. When his erstwhile partner in the commodities business had become worried about his activities and expressed concern Soudan responded with, "*Doc, don't worry about Soudan. Soudan is like the shadow. They can see me, but when they reach for me, I'm not there."* [11] Soudan was arrested and sentenced in 1984 to 35 years in jail for his involvement in the fraud. Soudan's shadow was more tactile than ethereal.

The second of the crooks was Mr Anton Reidel. Much older and probably a good deal shrewder than Soudan, he never claimed shadow status – as far as we can tell – but would have been a better candidate. Reidel was a commodities broker from the Netherlands and Beets Trading AG was 'his' company. By most accounts, he was an organized, astute and also luckier man than Soudan, indeed more fortunate than most of the other conspirators.

In Greece there was Mr Nikolaus Mitakis, the beneficial owner of two shipping companies,[12] who had more often than what would seem reasonable experienced misfortunes with his ships, indeed some said that he had developed a reputation or even disposition for misfortune.[13] Mitakis's associate was Mr Eleftherios Aventakis. The fraud probably originated with Mitakis. He professed to have the oil to be sold to South Africa. He told Reidel, who then tried to find a buyer but he did not succeed.

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[7] Klinghoffer, above n 4, at 13 and see *The Salem (CA)*, n 1 at 372.
[8] *The Salem (CA)*, above n 1, at 372.
[9] Klinghoffer, above n 4, at 13.
[10] Klinghoffer, above n 4, at 13.
[11] Klinghoffer, above n 4, at 10.
[12] In law, a legal person or shareholder may be in name only the owner or shareholder (called a legal or nominal owner or shareholder) while the true or beneficial ownership lies with someone else. Kinghoffer, above n 4, at 7-8.
[13] Klinghoffer, above n 4, at 8.

Mitakis with his reputation also could not get a tanker. Soudan became the man of choice after he fortuitously was introduced to Reidel.[14]

There was likely one other main character involved – if queerly we are not sure he ever actually existed. He was or is the true shadow in the story, a 'Mr Bert Stein'. Klinghoffer is so unsure of the identity of this figure that he always refers to him in quotation marks.[15] He was referred to by many witnesses in the trials and enquiries that followed the fraud's uncovering, but was never positively identified by anyone. 'Stein' was the one main protagonist that clearly escaped completely scot free from the caper.[16]

Using the above named companies Soudan went to South Africa (having bought his plane ticket with the borrowed money) and he approached a government entity, the South African Strategic Fuel Fund (SFF). Amongst many things (remember the misrepresentations above) Soudan told this concern that he could supply them with oil. So persuasive (deceitful) or suave was he that the SSF entered into a purchase contract to buy from Beets Trading AG 190,000 (214 000 tons of crude oil plus or minus 10%) to be delivered to Durban, payment by letter of credit in favour of American Polamax. The price would be about US $50 million (the exact price was US $48.3 million). [17]

The next step done by the crooks – specifically Soudan – was to take over (buy) a Liberian company called Oxford Shipping Co Inc. It had never traded. They took its name "off the shelf" – a shelf company is a duly registered and thus legal company with appropriate paperwork but which is not in reality trading and is available for sale.

Duly brandishing that name they, and again Soudan specifically, agreed to buy a vessel called the *South Sun*, a super-tanker of 200,000 (213.928) tons deadweight. It was owned by a Liberian company called Pimmerton Shipping Ltd. The crooks, in the name of the Oxford Shipping Co Inc, agreed to buy it for US $12.3 million payable by letter of credit on completion of the sale. As is clear it was Soudan who was most prominent – he was also to get the full shareholding in Oxford Shipping Co Inc.[18]

Lord Denning bemusedly continued that the crooks had no money with which to pay for the vessel, but they persuaded the SSF (who was buying the oil) to pay US $12.3 million in advance – on account of the US $50 million they would have to pay for the oil when it arrived at Durban. (Again what Lord Denning recounts here is most likely not strictly true, the SFF initially paid nothing. It did however put Soudan in touch with a bank. This bank provided a conditional loan, but with an irrevocable letter of credit for US $12.3 million in favour of the sellers of the *South Sun)*. With this credit the crooks as the Oxford Shipping Co Inc bought the *South Sun* and changed her name to the *Salem* – not having paid a penny for her themselves.[19] Soudan, never having seen the ship he had bought, then caused the *Salem* to be insured for a period of one year for the amount of US $24 million.[20]

The next step was to let the vessel out on charter; specifically a 'bareboat charter'– which means that the charterer of the ship and not the owner (or its agent) of the ship provides the crew and master. A bareboat charter was necessary for at least two reasons. It allowed that the movement of the ship could be controlled by the crooks and it provided a convenient level of protection (legal insulation as aptly stated by Klinghoffer) [21] for Soudan as the owner. The charterer could be blamed for any

[14] Klinghoffer, above n 4, at 9. Of course, 'fortuitously' only in the short term for Soudan.
[15] Klinghoffer, above n 4, at 21.
[16] Like the character Keyser Söze in the gripping 1990's movie The Usual Suspects.
[17] *The Salem (CA)*, above n 1 at 372 and Kinghoffer, above n 4, at 21.
[18] Klinghoffer, above n 4, at 19-20 and *The Salem (CA)*, above n 1, at 372.
[19] *The Salem (CA)*, above n 1, at 372.
[20] Klinghoffer, above n 4, at 19-20.
[21] Klinghoffer, above n 4, at 21-22.

impropriety later discovered. This was also where the true shadow 'Bert Stein' came in. His company Shipomex AG of Zurich was the charterer – it 'chartered' the *Salem* from Soudan's Oxford Shipping Co.

At the same time, using the name of the Oxford Shipping Co Inc the crooks offered the *Salem* on the London market as available to carry a cargo of oil from the Arabian Gulf to Europe. This offer was taken up by on all accounts a very respectable company, Pontoil SA of Lausanne. It had nothing to do with the crooks and was absolutely innocent of any wrongdoing Lord Denning said. Pontoil had already made a contract with the Kuwait Oil Co to buy about 200,000 tons of oil fob (free on board – meaning it only paid for the oil, not other costs such as insurance and transport charges) in Kuwait. The Kuwait Oil Co also had nothing to do with the crooks and was not involved in any wrongdoing.[22]In order to carry out this contract of purchase, Pontoil chartered the *Salem* for a voyage from Kuwait to Europe.

There were thus now apparently two charters – the Shipomex and Pontoil charters. They could not legally co-exist, but in fact they did. The *Salem* was to go to Kuwait, load the approximately 200,000 tons of oil and proceed via the Cape of Good Hope to Europe. The freight was to be paid to Shipomex SA in Switzerland. That company was in the fraud – remember it was 'Bert Stein's' company.

Pontoil, as stated, in ignorance of the fraud as charterers directed the *Salem* to Kuwait. When she arrived there, the 'crooks' (in the name of the Oxford Shipping Co Inc, the owners of the *Salem*) put on board a new crew. They were Greek officers and Tunisian crewmen. They were confederates. They were all parties in different degrees to the conspiracy.[23]

The Kuwait Oil Co, also still in complete ignorance of the fraud, loaded 195,000 (196,232) tons of oil on to the *Salem*. Pontoil paid for it. They believed it was to be carried to Italy.[24] The crooked master issued bills of lading for the oil to be delivered to Italy to the order of Pontoil SA, Lausanne. The *Salem* left Kuwait in December 1979 apparently bound for Italy – going straight down the east coast of Africa, round the Cape and up the west coast through the Straits of Gibraltar to Italy.

Soon after she left, Pontoil sold the cargo to the plaintiff, Shell, on cif terms – meaning Shell also paid transport costs and for insurance. So Shell, also quite blamelessly (it was agreed between the parties for purposes of the case) then became the owner of the oil.[25] Shell paid slightly more than US $56 million for the oil. Klinghoffer says that Pontoil made a profit of about US $13 million on the oil.[26] Pontoil had taken out a policy of insurance on the oil in the insured amount of US $56 million, which insurance policy it transferred to Shell.

The captain (master) of the ship was Dimitrios Georgoulis. He later admitted to not owning either a Greek or Liberian master's licence but alleged a Panamanian chief's mate licence, which he however could not produce. The chief officer and chief engineer were also Greek; the crew were 14 Greeks and 10 Tunisians.

Going down the east coast of Africa, the *Salem* underwent a name-change. She changed her name to *Lema* – this was not done for innocent reasons. This was done by painting out "Sa" and adding "a."Often ships that were involved in 'sanction busting' to South Africa did the same or similarly. [27]

Instead of then going straight down to round the Cape she turned off to Durban, South Africa. She moored to a single buoy one and a half miles (about two and a half kilometres) offshore. She pumped most of the oil through hoses into the tank farms ashore. She pumped ashore 180 000 tons, leaving only 15,000 tons in the ship. The South African importers paid for the oil through their banks. It came

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[22] *The Salem (CA)*, above n 1, at 372.
[23] Also see Klinghoffer, above n 4, at 23 and *The Salem (CA)*, above n 1, at 372.
[24] Klinghoffer, above n 4, at 29 and *The Salem (CA)*, above n 1, at 372.
[25] *The Salem (CA)*, above n 1, at 372.
[26] Klinghoffer, above n 4, at 29.
[27] Klinghoffer, above n 4, at 29 and 33.

to over US $50 million according to the judgement (again not it seems correct as it was just over US $45 million as 16 000 tons of the oil was not delivered).[28] Most of this money was paid at once into numbered accounts in Switzerland – where no one could get at it.

The SFF paid after having been presented with the bill of lading by Reidel. The bill of lading was not the original but most probably the master's copy. The original had been send to Shell; the original had never been amended or altered. On the copy presented to the SFF, Pontoil's name (as consignee) had been deleted and replaced with the name of Beets Trading AG.[29] This should of course have been a clear warning to the South Africans as to possible different claims to ownership of the oil and indeed it was, but this was (conveniently) to a degree ignored. The South Africans did get Reidel and Soudan to sign a joint and several guarantee on possible claims arising from their acceptance of the amended bill of lading.[30] It may have been sanction busting, but was still business after all. It seems likely that the South Africans did not know that the oil had been resold at sea and hence was stolen oil; they probably believed that the true owner's identity was simply being disguised or hidden.

The *Salem* aka *Lema* then took in sea-water to take the place of the oil – if she did not she would have appeared suspicious as her freeboard (height of the sides of the ship visible above the waterline) would have been too high. She set off again on her voyage round the Cape looking as if she still had her full cargo of oil. She sailed northward until she was off Dakar, Senegal; which was a deviation from the course she should have been on.[31]

Then in a calm sea (on 16 January 1980) there was a series of explosions on board. The *Salem* aka *Lema* was in danger of sinking. Not far off there was a British tanker the *British Trident*. Lord Denning stated the *British Trident* put out her lifeboats and picked up the crew. (Again not completely correct: the *Salem*'s crew had abandoned ship in her own lifeboats).[32] The *Salem* went to the bottom.

Captain Georgoulis described his ordeal: [33]

> *"The electrician complain of heart problems so I told him, well relaxing, be quiet and pray and nothing will happen to you, what can I do now? We were, I mean was on the boat for him and then later on we saw some sharks around the boat and all of them they was scared and afraid that they are going to die. So I told them, I says just relax, nothing else. Then I cannot say that I was not in panic, I was in panic too."*

The captain of the *British Trident* took a film of the sinking – an unforeseen and unfortunate happening for the plotters. It came in useful afterwards to find out why the *Salem* sank. A little oil slick (comparatively speaking of course) was seen on the water; why so little? Only 15 000 tons – the rest of her cargo was as we well know all sea water.[34]

Remarkable enough too, some of the picked up crew had prepared sandwiches with them, apparently 50 sandwiches had been made for each lifeboat; others had all their belongings neatly packed in suitcases in the lifeboats.[35] The lifeboats were also stocked with liquor and cigarettes, but once the *British Trident* was spotted, these were dumped into the sea.[36] These curious details (but specifically of course the sandwiches) added up to suspicious circumstances (facts) and were indeed the start of the unravelling of the plot.

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[28] *The Salem (CA)*, above n1, at 372 and Klinghoffer, above n 4, at 35 and 42.
[29] Klinghoffer, above n 4, at 33.
[30] Klinghoffer, above n 4, at 34.
[31] *The Salem (CA)*, above n1, at 372 and Klinghoffer, above n 4, at 35.
[32] *The Salem (CA)*, above n 1, at 371.
[33] *The Salem (CA)*, above n 1, at 371.
[34] *The Salem (CA)*, above n 1, at 371.
[35] Klinghoffer, above n 4, at 43.
[36] Klinghoffer, above n 4, at 43.

The *Salem* had been scuttled. Those aboard, of course, for a long time denied it. The *Salem* had sunk, they said, because of the inexplicable explosions. Shell was advised its cargo of oil was lost, as well as the *Salem*. Shell nevertheless paid Pontoil; it believed it was obliged in law to do so.[37] On 25 January however, according to the *Wall Street Journal,* Shell found out and much to its surprise as well that the *Salem* had actually put in at Durban.[38] Shell now seriously smelled a rat and started in-depth investigations. [39]

There was also a preliminary inquiry in Senegal. The captain produced his then credentials: initially it was a forged Liberian master's certificate. He and the chief officer were extradited to Liberia. The Tunisian crew was paid substantial "hush money" (about US $10 000 each) and went back to Tunisia. Not long afterwards there was a change of government (a coup to be exact – more about African coups in other essays) in Liberia. The master and chief officer were set free. The Liberian government apologized for their "illegal detention." [40] They went back to Greece where legal proceedings were in the end instituted – see below.

I have already described what happened to the vessel. But add that at Durban the South African concern, the SFF through its bankers had paid the purchase price of the oil. In this way US $12.3 million went to pay the sum due for the *Salem*. US $32 million went to Beets Trading AG. It was remitted to Switzerland immediately and distributed by Reidel among the crooks via numbered accounts of which some could not be traced. Their plan had succeeded. They had the money for the oil.[41]

Reidel seems to have kept US $4.2 million. Reidel later claimed that ‘Bert Stein’ received US $ 1.62 million in cash. ‘Stein’ paid the full office rent for Shipomex and terminated the lease, and as far as we can tell disappeared – assuming he ever existed. Two million dollars went to Georgoulis and the crew – according to Klinghoffer.[42] Soudan got US $4.25 million. He was also indirectly of course the owner of the *Salem*, which was worth about US $11 million but was insured for US $24 million. Mitakis under the false name of ‘Nicholas Trilizas’ received US $20 million, but how much he personally kept is unclear. In the Greek trials, the prosecution alleged that Mitakis personally received US $ 6.5 million.[43]

Soudan bought a new house, a Cadillac and opened a Mercedes Benz dealership. Possibly too he bought a gold chess set. He was also quite generous to his friends. Unfortunately and more tellingly though he did not show the same kind of munificence to the Internal Revenue Service.[44] Two of the Greek crew of the *Salem* with their pay-offs immediately opened restaurants in Athens.[45]

The loser initially was of course Shell. Shell had paid in full for 195,000 tons of crude oil and got none of it. After finding out about the Durban deviation, Shell further established that oil had been off loaded there. Shell went to South Africa and tried to trace the receivers of the oil. Shell instituted legal proceedings and was successful against the SFF to a material degree – the SFF settled.[46] The SFF had accepted as proof of the right to sell the oil not only not the original but also a defaced bill of lading (very risky conduct in law as the original bill of lading is a very strong indication of ownership or title but not copies or defaced ones). The original consignee, Pontoil’s name had been deleted and replaced

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[37] *The Salem (CA)*, above n 1 at 372.
[38] Klinghoffer, above n 4, at 49 and the *Wall Street Journal* (January 25, 1980).
[39] Klinghoffer, above n 4, at 49.
[40] Klinghoffer, above n 4, at 86.
[41] *The Salem (CA)*, above n 1 at 372 and Klinghoffer, above n 4, at 86.
[42] Klinghoffer, above n 4, at 38-40.
[43] Klinghoffer, above n 4, at 40.
[44] Klinghoffer, above n 4, at 41 and 94 and see below.
[45] Klinghoffer, above n 4, at 39.
[46] Klinghoffer, above n 4, at and see *The Salem*, above n 1 at 372.

with that of Beets Trading. The SFF had accepted oil in circumstances were they ought to have been suspicious about the provenance of the oil – they were, but took their chances.

But Shell was still a great deal out of pocket. So they claimed on the insurers – that is what this court case was about.[47] They also claimed against Soudan for their damages or loss among others claims for fraud and theft by conversion. (A conversion occurs when a person does such acts in reference to the personal property of another as to amount, in view of the law, to his appropriating that property for himself). They however did not proceed with this action to the end.

The claim of Shell against the underwriters rested on the transferred policy of insurance, an insurance contract (see above) for the sum of US $56 million. Shell, as stated above, took it over from Pontoil. Pontoil had an open cover policy with Lloyd's (open cover means that periodical and intermittent cargo shipments would all be covered simply on their declaration and this insurance's cover is only time period dependant and need not be renewed each time). They declared under it the shipment in the *Salem* from Mina al Ahmadi ("Mina") in Kuwait to North Europe of the cargo of 196,231.768 metric tons of crude oil under bill of lading dated December 10, 1979.

The insurance cover was subject to the then standard form of the Lloyd's Marine Policy together with the Institute Cargo Clauses (FPA) – which covered all losses or damages to cargo except those specifically excepted; and the Institute Strikes Clauses which cover losses caused by strikes, lock outs, civil commotion, persons acting maliciously etc.

The case was fought on the wording of the policy. In the lower court, Mr Justice Mustill found that Shell's loss was covered by the policy as the oil was taken under a covered clause dealing with 'Takings at sea'.[48]

The question on appeal was, as in the lower court, simply whether or not the loss of the cargo was due to one of the perils insured against and hence covered. The perils insured against were:

(1) Barratry. This 'strange word' in Mustill J's description, also surely a word not often used by parents next to their children's sport's field, or even after a few glasses of good, or bad, wine in after dinner conversation denotes an illegal practice such as fraud committed by a ship's master or crew that harms the ship's owner or charterer and occurs only when there is an act done *against* the owners of the vessel.[49] It does not apply when the owner himself does the act or is privy to it. In this case the judge held that "… *since Oxford Shipping – the owners of the vessel or the conspirators who lay behind it – were privy to the acts of the crew, there was no loss by barratry*."[50] On appeal the judge's ruling on this point was accepted by Shell.

(2) Persons acting maliciously: This was covered by the Institute Strikes Clauses. However, Judge Mustill held that the crooks were not acting maliciously, that is, out of spite, ill will or the like, but for their own gain.[51] The judge's ruling on this point too was accepted by Shell on appeal.

(3) Pirates and thieves. These perils in maritime insurance law have been very narrowly construed. As Lord Denning said, there were no "pirates" here because there was no forcible (violent) theft or robbery – pirates per definition in maritime insurance law do not steal clandestinely.[52] There were no "thieves" here also because there were no violent means – this too is an apparently quaint aspect of the definition of theft in some marine policies; the requirement of the thieves to act violently

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[47] *The Salem (CA),* above n 1 at 373.
[48] *Shell International Petroleum Company Ltd v Gibbs ("The Salem")* [1982] 1 Lloyd's Rep. 316 (Com. Ct) at 330.
[49] *The Salem (CA),* above n 1, at 372.
[50] *The Salem,* above n 48, at 324.
[51] *The Salem,* above n 48, at 328. Also see *Mckeever v Northern Reef Insurance Co SA* [2019] Lloyd's Rep (Vol 2) 161 at [91]-[92] for a discussion of the later case law in this regard.
[52] *The Salem (CA),* above n 1, at 373 and see *Mckeever v Northern Reef Insurance Co SA,* above n 51, at [77].

in taking your goods, failing which in marine insurance law there was no theft. This was accepted by Shell and no claim was made in this regard before the lower court judge.

(4) Takings at sea: (a) At Mina al Ahmadi (Kuwait).'Takings' mean the taking of possession, usually of a ship or boat or their cargo.[53] Lord Denning held that he did not think that the taking of this oil at Durban was a taking "at sea." He said it was a taking in port. It was a taking (in the port of Mina in Kuwait) as soon as the oil was there pumped into the vessel. It was taken by the master and crew as agents of the ship owners, Oxford Shipping Co Inc (in law of course the acts of duly authorised agents are attributed to their masters or principals), and is evidenced by the fact that the master gave a bill of lading for it. It was taken in pursuance of a pre-concerted design of converting it to their own use. At the very moment of taking it was taken with predetermined intent of depriving the true owner permanently of it – it was larceny (theft) by a trick. [54]

Lord Denning referred to, as he called it, the old criminal law in this context. Larceny was always spoken of as a "taking." The concept of "takings" in this policy is thus the same as the concept of "taking" in the old law of larceny. It involves a change of possession. He held therefore that there was larceny by a trick at Mina al Ahmadi in Kuwait and that the taking was there 'in port' and not "at sea" and hence was not covered by the policy – as the policy covered only 'Takings *at sea*.'[55]

Taking at sea: (b) *Change of course.* The judge in the lower court had however, as mentioned above, found indeed that there had been a "taking at sea." He had held that the taking occurred "when the ship turned aside from the direct course to Europe and made for Durban." Lord Denning disagreed and stated:[56]

> *'I cannot see this at all. There was no change of possession then at all: and therefore no taking by anyone. There was no taking at all until the vessel got off Durban and pumped the oil through the hoses to the tanks ashore. It was then a taking by the South African concern from the ship owners and master into the possession of the South Africans. It was not a taking [from the true owners] "at sea." '*

Lord Denning then much to his credit admitted that he was responsible for the mistaken judgement in the lower court, by virtue of a previous court of appeal judgement by himself, on the issue of 'taking at sea'. He said:[57]

> *"I am afraid that I am the cause of all the trouble: because of what I said in Nishina Trading Co. Ltd. v. Chiyoda Fire and Marine Insurance Co. Ltd. (The Mandarin Star) [1969] 2 QB 449. I must confess now that I was wrong there".*

He then explained that he had misread a judgment and that, despite what he had held in *The Mandarin Star*, it was not sufficient for a 'taking at sea' if there was only a change in the character of the possession, there also had to be a change in legal possession, inclusive of physical or actual possession. [58]

Lord Denning does not refer in his judgement to exactly what, or more likely who pointed him to the error of his previous judgement. It is however quite clear from the judgement of the lower court who precipitated the awareness of error on the part of the Master of the Roll. Mustill J in his

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[53] *The Salem (CA),* above n 1, at 373.
[54] *The Salem (CA),* above n 1, at 372.
[55] *The Salem (CA),* above n 1, at 373.
[56] *The Salem (CA),* above n 1, at 373.
[57] *The Salem (CA),* above n 1, at 374.
[58] *The Salem (CA),* above n 1, at 374.

judgement refers to the arguments of counsel for *Gibbs* Mr Hobhouse QC [59] who there had argued that the *Mandarin Star* judgement was wrong on this point and it should not be followed.

Judge Mustill, although he said he had much sympathy for this argument of counsel, was not prepared – as a single judge is bound by precedent (decisions by a higher court in and on the legal point) – to find so.[60]

As counsel you will have only a very few sweet moments when you persuade a court to agree with your argument that a previous decision was wrongly decided, fewer still where you convince the same judge or justice that they had been wrong previously. But when you do so, it is very well done. And, of course, it is your duty to attempt to do so when that is your view. Seldom will it be easy.

Lord Denning continued, "There must be a change in the possession – not merely a change in the character of it. In our present case there was no change in possession when the ship changed course. The goods in the *Salem* remained in the possession of the owners throughout through the master as their servant. There was no change of possession. The change of course was not a "taking at sea."

'What then is to be done?'Lord Denning asked.[61]

> *'I think we should not follow The Mandarin Star. It was decided per incuriam* (meaning that it was decided incorrectly due to a relevant binding judgement or precedent not having been brought to the attention of the deciding court). *It is easier for me to say this than it was for the judge or for my brethren here. But even if it was not per incuriam, I am going to risk the disfavour of the House of Lords and say under my breath that we are not bound by our previous wrong decision, reminding myself of what Galileo said - when he was likewise condemned for heresy - E pur si muove - "But it does move".'*

I think Lord Denning was rather wrong again, but at least not as to substance; his decision in *The Mandarin Star* was not decided *per incuriam.* The relevant binding authorities had been brought to the attention of the court (Lord Denning said he had misread an authority) – the previous judgement was simply wrong. He continued 'Once we dispose of *The Mandarin Star*, the case is plain. When the *Salem* changed course for Durban, there was no "taking" of the goods at all.'[62]

Lord Denning thereafter dealt with causation, factually and legally determining what event caused the loss, and he continued:[63]

> *"If I am right in thinking there was a "taking" of the cargo of oil at Mina in Kuwait, there is still the question: was the whole of the 195,000 tons lost there? I think not. There was always the possibility that the fraud might have been discovered and the plan of the crooks frustrated in some way or other: so that the vessel might have carried on with the voyage specified in the policy. The truth on causation is that the cargo was lost in two batches. The first batch of 180,000 tons was lost at Durban; and the remaining batch of 15,000 tons lost when the ship went down off Dakar. The 180,000 tons is not covered by the policy, because it was not a "taking at sea." But the 15,000 tons is covered because it was lost by "perils of the sea." If there was no saving clause, the loss would be due to the "scuttling" and not to perils of the sea."*

Lord Denning referred to the second sentence of clause 8 of the Institute Cargo Clauses (FPA) which says:[64]

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[59] Later of course Lord Hobhouse.
[60] *The Salem,* above n 48, at 328.
[61] *The Salem (CA),* above n1, at 374.
[62] *The Salem (CA),* above n1, at 374.
[63] *The Salem (CA),* above n1, at 375.

"In the event of loss the assured's right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributable to the wrongful act or misconduct of the ship owners or their servants committed without the privity of the assured."

He finally concluded "Under that sentence I think the claimants are entitled to disregard the scuttling (the scuttling was of course a wrongful act or misconduct on the part of the ship owner's servants).They are entitled to look only at the fact that the water flooded into the ship and she was lost by "perils of the sea." The 15 000 tons is, therefore, recoverable."[65] Water flooding into a ship is indeed a peril of the sea in Maritime Insurance Law – if you were unsure whether common sense at least would prevail in this regard.

If one specializes in maritime law or marine insurance law you get to know the concept of "perils of the sea" well. "Perils of the sea" clauses generally cover losses caused by seawater, flooding, stranding, cyclones, storms, fog, lightning, and collision with other ships or sunken icebergs or rocks. And would apply only where the ship or cargo covered was seaworthy at the outset of its journey.[66]

The Court thus held the underwriters not liable for the 180 000 tons lost because the taking of it was not a taking "at sea "; but that they are liable for the 15 000 tons lost in the sinking of the *Salem*. It allowed the appeal accordingly. The other Court of Appeal judges on the whole agreed with Lord Denning. [67]

A further appeal by both parties (but mainly of course by Shell) to the House of Lords failed – the law lords in effect upholding the judgement of Lord Denning and his fellow judges.

In Greece, criminal charges were brought in September 1981 against twenty five accused including Georgoulis, Mitakis, Kalomiropoulos and 10 other Greeks. Charges were also brought against seven foreigners: Reidel, Soudan and one Johannes Locks, who it was said by the Greeks to be the elusive 'Stein', were charged *in absentia*, meaning of course in their physical absence. The charges ranged from complicity to theft to embezzlement, conspiracy to attempted insurance fraud. Klinghoffer says that the gist of the proceedings on the facts was that the accused admitted the delivery of the oil to South Africa, but they denied the scuttling. [68]

The Court of Piraeus did not agree and on 8 April 1984 convicted Mitakis to 11 years imprisonment, the chief engineer A Kalomiropoulos to 4 years, second and third engineers I Mavros and G Theodossiou, to 3 years each, radio officer V Enangelides to 2 years and 2 months.[69] Captain Georgoulis was convicted for cargo fraud and the scuttling and he got twelve years. Reidel was convicted in his absence. All the above sentences were appealed. On appeal Mitakis admitted to receiving the amount of US $ 20 million but still denied cargo fraud or the scuttling. On 26 May the appeal court reduced the sentences of Mitakis to 8 years, of Georgoulis to 7 years and that of Kalomiropoulos to 3 years.[70] Riedel also successfully appealed his conviction and it was set aside on the procedural basis that there had been no proper steps taken by the prosecuting authorities to obtain his attendance at the trial. In total five of the total 13 accused Greeks were convicted.

Reidel was arrested in the Netherlands on 6 March 1981. He was held for eighty days but released as required by Dutch law as the prosecution was obviously not ready then to proceed to trial. Klinghoffer holds a dim view of the efforts of the Dutch prosecutors – he is in my view unkind. His judgement in this regard seems to be one based on a counsel of perfection. Defence counsel for Reidel

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[64] *The Salem (CA)*, above n1, at 375.
[65] *The Salem (CA)*, above n1, at 375.
[66] See generally *Mckeever v Northern Reef Insurance Co SA*, above n51, at [60].
[67] *The Salem (CA)*, above n1, at 380 and 384.
[68] Klinghoffer, above n 4, at 111.
[69] Klinghoffer, above n 4, at 111.
[70] Klinghoffer, above n 4, at 111.

was certainly quite astute and barring one in hindsight erroneously conceived appeal – they appealed the indictment on which they already had had quite some success in reducing the number of counts against Reidel but then the previously quashed charges were reinstated on appeal – conducted the eventual trial with a clear strategy and sharp tactics.[71]

Reidel was tried in February 1986 in Rotterdam. His lawyers raised factual and legal points on the absence of factual knowledge of unlawfulness, and hence intention (*mens rea*) on the part of Reidel to commit any crime – while he admitted the intention to circumvent the sanctions against South Africa and making certain false representations, these did not constitute offences in Dutch law (also as no one testified that they were indeed deceived).[72] Reidel also ascribed the defacing of the bill of lading, the representation of ownership of the oil and the falsification of documents to the attempts to secretly sell the oil to South Africa and not to an intention to defraud. He was acquitted in 1987. There had been a lack of cooperation it seems between the Dutch authorities and South Africa which did hamper the prosecution. [73]

The 'shadow' Frederick Ed Soudan, was convicted by a US district court on 26 March 1985 on among others several counts of wire fraud, making false statements, also to the revenue service; and was sentenced to 35 years imprisonment.[74] His judgement on appeal to the Circuit Court started off with the appeal judge – apparently surprised – remarking laconically that while Soudan earned US $4.25 million from the *Salem* plot ('shell game') he did not declare any of this to the Internal Revenue Service. Soudan had advised his accountant what his income was, as well as that for American Polamax's. Based on this information the accountant prepared a 1980 income tax return showing that Polamax's total income was only $21, and that appellant's personal income was only $1,950.[75]

He perhaps unsurprisingly also got no sympathy from the appeal court and his sentence was confirmed.

[71] Klinghoffer, above n 4, at 102 – 105.
[72] Klinghoffer, above n 4, at 104.
[73] Klinghoffer, above n 4, at 105 – 107.
[74] *US v Soudan*, US District Court for Southern District of Texas, Houston division, May 3, 1985.
[75] *US v Soudan*, above n75, in Judgement and Probation Commitment order, and Klinghoffer, above n 4, at 116.