



Neutral Citation Number: [2024] EWHC 362 (Admlty)

Case No: AD-2022-000047

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**KING'S BENCH DIVISION**  
**ADMIRALTY COURT**

Royal Courts of Justice  
Rolls Building, Fetter Lane, London, EC2A 1NL

Date: 26/02/2024

**Before :**

**MR JUSTICE ANDREW BAKER**  
**sitting with Commodore William Walworth and Captain Stephen Gobbi,**  
**Elder Brethren of Trinity House, as nautical assessors**

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**Between :**

**DENVER MARITIME LIMITED**

**Claimant**

**- and -**

**BELPAREIL AS**

**Defendant**

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**James M Turner KC** (instructed by **Campbell Johnston Clark Ltd**) for the **Claimant**  
**Lionel Persey KC** (instructed by **Penningtons Manches Cooper LLP**) for the **Defendant**

Hearing dates: 21-23, 28 November 2023

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**Approved Judgment**

This is a reserved judgment to which CPR PD 40E has applied.  
Copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

**Mr Justice Andrew Baker :**

**Introduction**

1. The m.v. *Belpareil* and the m.v. *Kiran Australia* are identically proportioned, geared Supramax bulk carriers. At about 01:10 hrs on 9 November 2021, they collided in the Bay of Bengal, off Chattogram, Bangladesh. All times referred to in this judgment are local time in Bangladesh, which was UTC + 6 hrs; and in some places, in the conventional way, I give the number of minutes before the collision in the form ‘C-[no.]’. In the collision there was contact between *Kiran Australia*’s rudder and propeller and *Belpareil*’s port anchor cable, closely followed by hull to hull contact between *Kiran Australia*’s starboard quarter and *Belpareil*’s port bow.
2. Under the normal case management arrangements in the Admiralty Court, the Admiralty Registrar made an allocation decision and gave case management directions. Those directions assigned the case to the Admiralty Judge for a liability trial, sitting with two Elder Brethren of Trinity House as nautical assessors, and directed that any assessment of damages is to be referred to the Admiralty Registrar following determination of liability. I heard the liability trial over six days, including a reading day before the first sitting day and a reading day between evidence and closing argument.
3. The Elder Brethren sitting with me as nautical assessors were Commodore William Walworth and Captain Stephen Gobbi. I followed the usual proper procedure for obtaining their advice set out by Gross J (as he was then) in *The Global Mariner and the Atlantic Crusader* [2005] EWHC 380 (Admlty) at [12]-[17], especially [14]. Specifically:
  - (i) I ensured that counsel in closing made any submissions they wished to make as to the questions that might be put to the Elder Brethren, and I took those submissions into account when settling the questions I put, which I set out in a written brief submitted to the Elder Brethren on 29 November 2023;
  - (ii) the Elder Brethren provided their advice in response, in writing, on 15 December 2023, and my Clerk sent a copy to counsel on receipt so they could take instructions and provide observations on behalf of their respective clients, if so advised; and
  - (iii) taking account of counsel’s resulting observations, submitted in writing on 18 January 2024, I sought clarification from the Elder Brethren on 19 January 2024 of three points in their advice.
4. Before I had received the Elder Brethren’s clarifications, *Kiran Australia* sent to my Clerk, for my attention, a written submission in reply to *Belpareil*’s observations. That was done without prior notice or accompanying request for permission to provide further argument. That should not have happened. If the view was taken that in fairness *Kiran Australia* ought to be allowed to provide a further written submission, that procedural point should have been raised with *Belpareil* first, and then with the court if agreement was not reached on it.

5. *Belpareil* objected to that reply. In response, it was intimated that the reply itself included an objection, namely that *Belpareil's* observations involved an attempt to recast the case it had pursued and presented at trial. I did not think it would be possible to judge that objection fairly without reading the reply, but I was anxious to avoid as far as possible a proliferation of additional post-trial submissions. I therefore adopted the following procedure:
  - (i) On receipt of the Elder Brethren's supplementary advice on 2 February 2024, in line with *The Global Mariner* at [14(v)], I considered whether to provide it to the parties before deciding the case and, therefore, before completing and circulating any draft judgment, doing so without reference to *Kiran Australia's* initial reply, which I did not read.
  - (ii) I concluded that it was desirable for the parties to have an opportunity to comment, in a final round of written submissions, and that in view of the indicated nature of *Kiran Australia's* initial reply, and the room there may have been for different interpretations of the elements of the Elder Brethren's main advice on which I had sought clarification, it would be appropriate to allow the parties an opportunity to reply to each other's observations.
  - (iii) For a sensibly managed final process, therefore, I directed that:
    - (a) *Kiran Australia* could provide, if so advised, a single, concise written submission, setting out any (i) observations on the Elder Brethren's supplementary advice, and (ii) comments in reply to *Belpareil's* observations on their main advice;
    - (b) *Belpareil* could provide, if so advised, a single, concise written submission, setting out any (i) observations on the Elder Brethren's supplementary advice or (ii) reply to any submission under (a) above;
    - (c) *Kiran Australia* could provide, if so advised, a very brief, final written reply to any submission under (b) above, to complete the argument in the case; and
    - (d) in the circumstances, I would not read (and so indeed I never read) *Kiran Australia's* initial reply, since any parts of it that remained pertinent could be included in a submission provided under (a) above.
6. Pursuant to those directions, I received: (a) on 5 February 2024, a written submission on behalf of *Kiran Australia*; (b) on 9 February 2024, a written submission on behalf of *Belpareil*; and (c) on 13 February 2024, a final reply on behalf of *Kiran Australia*. Neither party applied for the trial to be re-listed for additional oral argument.
7. I record my gratitude to counsel, and their instructing solicitors, for all their assistance, and to the Elder Brethren for their advice, which I have found most helpful even where, as appears below, I have not accepted it.

8. The liability determination in a simple two-ship collision involves finding whether neither ship was at fault, one ship but not the other was at fault, or both ships were at fault, and in that last case, apportioning responsibility under s.187 of the Merchant Shipping Act 1995. An apportionment under s.187 involves assessing the degree of blameworthiness and the causative potency of each ship's faults and reflecting the resulting overall respective responsibilities in numerical terms. I summarised the principles recently, very briefly, in *NYK Orpheus c/w Panamax Alexander* [2022] EWHC 2828 (Admlty) at [26]-[27]; Sir Nigel Teare did so at greater length in *Alexandra 1 and Ever Smart (No.2)* [2022] EWHC 206 (Admlty) at [132]-[140].
9. In this case, *Kiran Australia* alleged that *Belpareil* should be held solely responsible for the collision, and in the alternative that if there was fault on both sides *Belpareil* should bear far greater responsibility than *Kiran Australia*. Symmetrically, *Belpareil* alleged that *Kiran Australia* should be held solely responsible for the collision, and in the alternative that if there was fault on both sides *Kiran Australia* should bear far greater responsibility than *Belpareil*.
10. For the reasons set out below, my conclusion is that the collision resulted from faults on both sides, but *Belpareil* bears substantially greater responsibility such that liability should be apportioned 70:30 in favour of *Kiran Australia*.

### **Agreed Facts**

11. The parties agreed a factual narrative for the trial, as is encouraged by Section J6.5 of the Commercial Court Guide (11<sup>th</sup> Edition). I am grateful for the parties' work in achieving it; it is a good example of its kind, and I now set it out in full as the agreed factual basis upon which the trial was conducted. At two points, I have added some additional detail that was also common ground at trial, and in paragraph below I have made some minor corrections agreed after trial, all indicated by underlining.
12. The ships involved, as I have said already, are both geared Supramax bulk carriers. They are both 199.90 metres in length overall and they have the same main engine, a MAN B&W 5S60ME-C8.2 marine diesel engine developing a maximum power of 8,050 kW at 89 rpm. *Kiran Australia* is a centimetre wider than *Belpareil*, at 32.27m in breadth overall. *Kiran Australia*'s gross tonnage is 35,353; *Belpareil*'s is 36,321. Both ships have X-band and S-band ARPA-equipped radar systems, and two anchors with 12 shackles of chain on each.
13. On 1 November 2021, *Kiran Australia* arrived at Chattogram Anchorage "A". Once *Kiran Australia* had anchored, lightering operations began into two barges moored to her, one on each side.
14. *Belpareil* arrived at Chattogram Anchorage "A" on 7 November 2021 and anchored about 0.5 nm distant from *Kiran Australia*. At this time, *Kiran Australia* was still carrying out discharging operations into barges of her cargo of slag. *Belpareil* was also laden with cargo and started discharge on the day of her arrival.

15. On the evening of 8 November 2021, both ships were still anchored in Chattogram Anchorage “A”. *Kiran Australia* had her starboard anchor down with 8 shackles in the water and *Belpareil* had her port anchor down with 9 shackles in the water. At the material time, the wind was blowing northerly at about Beaufort force 3 to 4 with clear visibility of more than 5 nm. Low water was at around 21:36 hrs at 0.5 metres and high water at 03:35 hrs at 5 metres.
16. Both *Belpareil* and *Kiran Australia* were displaying two all-round white lights, one forward and the other aft (i.e. anchor lights). Both also had deck lights on due to ongoing cargo operations, under the responsibility of the respective Chief Officers. The general watch was therefore under the command of the respective Second and Third Officers, in each case the Second Officer being on watch from 12-6, the Third Officer from 6-12. The *Belpareil* was on close to an even keel, drawing c.11 metres (11.02 metres forward, 11.20 metres aft), giving her limited under-keel clearance. The *Kiran Australia*’s draft was c.6 metres forward, c.9.9 metres aft.
17. At about 23:00 hrs (C-130), the crew on *Belpareil* first realised that their ship was dragging her anchor. At the time, the tidal current was setting at about 340° (north westerly) at around 3-4 knots.
18. The crew on board *Belpareil* set her engine to Dead Slow Ahead at 23:06 hrs. From 23:09 hrs to 23:17 hrs, the crew increased the telegraph to Slow Ahead, Half Ahead and Full Ahead, before reducing it at about 23:30 hrs to Dead Slow Ahead and then increasing it again to Full Ahead a few minutes later. Other than a brief reduction at about 23:55 hrs to Slow Ahead, and a brief increase at 00:12 hrs to Navigation Full Ahead, *Belpareil*’s telegraph remained on Full Ahead until after the collision. However, for much of the relevant period her engine’s RPM did not increase beyond about 50-55.
19. On 9 November 2021 at about 00:10 hrs, 00:11 hrs and 00:12 hrs (C-60 to C-58), *Kiran Australia* called *Belpareil* on VHF, the second and third of which calls were audible on *Belpareil*’s bridge. At about 00:15 hrs, *Belpareil* called *Kiran Australia* back. *Belpareil* acknowledged that she was dragging and had issues with her engine. At this time, *Kiran Australia* attempted to contact Chattogram Port Control (“Port Control”) but received no answer. *Belpareil* was dragging towards *Kiran Australia* at a speed over the ground (“SOG”) of around 1 knot, occasionally up to 2 knots.
20. *Kiran Australia* still had two barges alongside for her lightering operations. On her forward starboard side was the barge *Shetu 5*, and on the port side the *Akij Logistic*. *Kiran Australia*’s witnesses say that cargo operations stopped at about 00:00 hrs and that *Shetu 5* cast off at about 00:15 hrs.
21. At about 00:19 hrs (C-51), the following conversation took place on VHF between *Kiran Australia* and *Belpareil*:

[*Belpareil*]: “My engine is out of order, I cannot control my vessel.”

[*Kiran Australia*]: “I already send my crew, send my crew to forward to heave up anchor, I will try my best but it is too late.”

[*Belpareil*]: “No no, you better, you better drag your vessel to the stern, backwards.”

[*Kiran Australia*]: “I try my best my friend, I try my best, try to use your engine also, I try my best.”

22. Calls were made to Port Control by both *Belpareil* and *Kiran Australia* between 00:19 hrs and 00:21 hrs, but again no response was received from Port Control.
23. At about 00:21 hrs (C-49), a Sécurité message was broadcast by *Belpareil*. By 00:25 hrs the Closest Point of Approach (“CPA”) of the ships was 0.027 nm (i.e. 50m) in about 9.3 minutes. At the same time, *Belpareil* requested *Kiran Australia* to move as they were closing in. *Kiran Australia* acknowledged and stated that they were turning to port to keep clear of *Belpareil*.
24. Two more Sécurité messages by *Belpareil* followed at 00:22 hrs and 00:29 hrs respectively.
25. At about 00:32 hrs (C-38), *Belpareil* requested tug assistance from Port Control. No response was received.
26. At 00:37 hrs (C-33), both ships were almost parallel with each other and only about 30-50 metres apart. Various manoeuvres were taken by both ships during this period. At 00:39 hrs (C-31), *Belpareil* stated to *Kiran Australia* that “we got the engine” and that *Kiran Australia* was to maintain her course. *Kiran Australia* responded with, “Okay, first keep clear from me, first keep clear, first keep clear.”
27. At 00:42 hrs (C-28), *Belpareil* called Port Control on VHF again to request tug assistance immediately. No response from Port Control was received.
28. Just after this broadcast, *Kiran Australia* called *Belpareil* asking whether their engine was working. *Belpareil* responded with, “Yes, now we got the engine now, now we use the engine, now we use the engine.”
29. Between 00:42 hrs (C-28) and 00:51 hrs (C-19), *Belpareil* started to pull away from *Kiran Australia*, on a track to the south west until 00:47 hrs, thereafter to the south east. Meanwhile, from 00:44 hrs *Kiran Australia* was falling back with the tide on a track to the north north west. At 00:51 hrs, then, *Belpareil* was about 100 metres ahead and clear of *Kiran Australia*.
30. However, at about 00:52 hrs (C-18), *Belpareil* started to fall astern again and into the direction of *Kiran Australia*. Just before this, *Belpareil* called *Kiran Australia* and said: “Yes I am trying my best to shift the vessel as far as possible from you, but my engine is also back to abnormal condition so I suggest you, please you move your anchor position as backwards.”

31. *Kiran Australia* acknowledged this message, replying “*Okay, when you clear enough from me, I will try to heave up anchor, but you are now very close to me.*”
32. At 00:54 hrs (C-16), *Belpareil* called *Kiran Australia* on VHF stating, “*Please heave up your anchor and move it, my engine is out of order again.*” *Kiran Australia* responded with, “*Okay I start to heave up, I start to heave up.*”
33. At about 00:56 hrs (C-14), *Belpareil*’s stern was abeam of *Kiran Australia*’s starboard bow, distant approximately 100 metres.
34. At 01:02 hrs (C-8), Port Control finally responded to *Belpareil*’s radio calls. *Belpareil* immediately replied, informing Port Control that they were dragging anchor and that their engine was “*out of order*”. *Belpareil* requested urgent tug assistance.
35. Port Control suggested that *Belpareil* drop both her anchors in an attempt to alleviate the situation, however *Belpareil* informed Port Control that this was not possible as the anchors would “*twist*”. *Belpareil* reiterated her request for tug assistance. Port Control then informed *Belpareil* to call their local agent to arrange for a tug.
36. At 01:03 hrs (C-7), Port Control called *Kiran Australia* on VHF requesting that *Kiran Australia* keep clear from *Belpareil*. *Kiran Australia* responded to Port Control stating that they were heaving anchor to attempt to change their position, but that *Belpareil* was going astern very quickly.
37. At 01:04 hrs (C-6), *Belpareil* had almost passed astern of *Kiran Australia*. VHF conversation between *Belpareil* and Port Control continued, with *Belpareil* requesting tug assistance and Port Control requesting *Belpareil* to fix her anchor and position.
38. Between 01:07 hrs (C-3) and 01:09 hrs (C-1), the following conversation took place between *Kiran Australia* and *Belpareil* over VHF:-

[*Kiran Australia*]: “*Belpareil, please let your vessel drag little bit clear from me, let your vessel drag little bit clear from me.*”

[*Belpareil*]: “*Yes, yes, now now, now we got the engine again, so we start to – we are turning to the starboard side, so please er...please er...control your, this live position, this position. Now we start to get the hard to starboard and...please maintain your course and uh...we got the engine now.*”

[*Kiran Australia*]: “*First let vessel clear from me a little bit more, first go little bit more back. My anchor is about to aweigh now...I am going course a backwards.*”

[*Belpareil*]: “*Kiran, Kiran Australia, Kiran Australia, ...if we uh – stop, we cannot...do that because of we want to go all the way to starboard, so that’s why.*”

[*Kiran Australia*]: “*Belpareil, stop your engines! Stop your engines!*”

39. At 01:10 hrs *Belpareil*’s port bow and *Kiran Australia*’s starboard quarter contacted each other. At the time of the collision, the headings of both ships were about 180°. *Kiran Australia* still had the barge *Akij Logistic* on her port side. The ships managed to separate after the contact had occurred.

### **The Allegations of Fault**

40. Although the pleaded cases were not so limited, likewise the cases opened at trial, in closing argument only the following allegations of fault were pursued:
- (i) *Kiran Australia* said that the dangerous close quarters situation that developed was *Belpareil*’s fault, in that:
    - (a) in the first place, she dragged her anchor, which was said to be *prima facie* evidence of negligence that *Belpareil* did not rebut;
    - (b) she failed promptly to notify surrounding ships, including *Kiran Australia*, of her predicament (*viz.* that she was dragging and unable to control her position due to main engine difficulties), which was said to be negligent conduct but for which *Kiran Australia* would have weighed anchor so as to be able to ensure she could avoid any risk of collision;
    - (c) she failed promptly to call for tug assistance, which was said to be negligent conduct but for which such assistance would have been provided in time to prevent the collision;
    - (d) she failed to drop her starboard anchor at or prior to 00:05 hrs, which was said to be negligent seamanship but for which the collision would not have occurred (and as to which, to be clear, *Kiran Australia* accepted that, the second anchor having not in fact been dropped by 00:05 hrs, *Belpareil* could not be criticised for failing to drop it thereafter, as she made a bit of a beeline towards *Kiran Australia*’s position and the two ships then spent 40 minutes or so in a slow-motion maritime tango of collision avoidance before finally hitting each other as they did);
  - (ii) each ship said the other was solely, alternatively mostly, at fault in the final few minutes in which their chosen navigational manoeuvres finally brought them into contact with each other.
41. If *Kiran Australia* is right that prior fault of *Belpareil* caused the close quarters situation, then the case is one to which the following statement of principle (and common sense) will be pertinent:

*“It is axiomatic that a person who embarks on a deliberate act of negligence should, in general, bear a greater degree of fault than one who fails to cope adequately with the resulting crisis which is thus thrust upon him. The generality is subject, of course, to the particular facts. And it may be that the initial act was so slight or easily avoidable and the subsequent failure to take avoiding action so gross that the blame for the accident falls more largely or even (if the interval and opportunity for avoidance are sufficiently great) wholly upon the person who failed to avoid the consequences of another’s negligence. Between the extremes in which a man is either wholly excused for a foolish act done in the agony of the moment as the result of another’s negligence or is wholly to blame because he had plenty of opportunity to avoid it, lies a wide area where his proportion of fault in failing to react properly to a crisis thrust upon him by another must be assessed as a matter of degree.”*

*The Miraflores and The Abadesa* [1967] 1 AC 826, per Lord Pearce at 847-848.

42. As indicated by omission from the summary in paragraph above, *Belpareil* accepted in closing that *Kiran Australia* was not at fault prior to the final few minutes before impact; and *Belpareil* contended that she was also not at fault at any earlier stage, so that, she argued, the case concerned only fault, and apportionment if there was fault on both sides, in those final minutes. On the other hand, again as indicated by omission above, *Kiran Australia* did not pursue at trial any suggestion that the main engine issue experienced by *Belpareil* resulted from or continued by reason of any negligence.
43. One of the questions on which I asked for advice from the Elder Brethren was as to the proper response of a competent master of *Kiran Australia* if told, as did not occur in fact, that *Belpareil* was not only dragging (as *Kiran Australia* had observed for herself) but could not control or had difficulty controlling the dragging because of a main engine problem. I asked for that advice because I agree with a submission by Mr Turner KC for *Kiran Australia* that how a competent master should have responded is relevant to judging, on the balance of probabilities, how *Kiran Australia* would in fact have responded.
44. On one reading, the Elder Brethren’s advice in response to that question was capable of indicating a degree of criticism of *Kiran Australia* for not weighing anchor and taking avoiding action in respect of *Belpareil*’s dragging in the actual circumstances, i.e. even without being told of the main engine problem. When sending the Elder Brethren’s advice to counsel, through my Clerk, I indicated that I was minded to pay no attention to that possible criticism, since no allegation of fault prior to C-3 had been pursued against *Kiran Australia*.
45. In Mr Persey KC’s initial observations on the Elder Brethren’s advice, it was submitted on behalf of *Belpareil* that “BP did not either expressly or impliedly abandon its case on how KA should have reacted to BP’s obvious dragging at an earlier stage”, so that (in substance) I should contemplate a finding of fault against *Kiran Australia* if, contrary to *Belpareil*’s submission as to causation, I concluded that the events prior to C-3 were effective contributing causes. I do not accept that submission, and in any event I am clear that no allegation of

prior fault was pursued at trial sufficiently to make it fair to consider judging liability by reference to it.

46. *Belpareil's* skeleton argument for trial, in setting out the facts, intimated only one criticism of *Kiran Australia*, viz. that from C-3, “*Instead of either maintaining her position, or going ahead, KA allowed herself to be set astern and to her starboard side – directly in the way of BP.*” However, when summarising the case on fault to be pursued at trial, it did also submit that: by C-55, *Kiran Australia* should already have taken steps to be ready to move, by heaving in her anchor to, say, 5 cables; at C-55, on learning that *Belpareil* was unable to control her engine, *Kiran Australia* should have weighed anchor and moved her anchorage position, or dredged her anchor astern to increase the distance between the ships.
47. In his brief oral opening remarks, Mr Persey KC did not refer to the allegation of fault at or about C-55 and articulated as criticism of *Kiran Australia* only that (as he submitted) she “*allowed herself to go astern for some three minutes [i.e. from C-3] at a time when it was completely unsafe for her to do so*”. Without more, that did not mean the allegation of prior fault would not be pursued, but with hindsight it may have presaged the failure to pursue it that was to follow.
48. In cross-examination, Mr Persey KC asked only very few questions about the early stages of the incident, and put no allegation of fault in relation to them. He reminded the master of *Kiran Australia* that *Belpareil* had at one point suggested that *Kiran Australia* should drag astern (i.e. at C-51, see paragraph above), and then:

“Q:           *And you didn't do that, did you?*

A:           *No, sir, because it was not going to change anything, in my knowledge, because I had already eight shackles in the water and also there is another vessel in [sic., and] shallow water in my behind. There is a very short distance when I can drag my vessel behind.*

Q:           *So you thought it was dangerous to drag your vessel behind, did you?*

A:           *Yes, and it was also useless.”*

Thus, the master's evidence was that at the time he ruled out dredging astern on the basis that it seemed to him both dangerous and useless as a possible means of collision avoidance in the situation confronting him. There was no challenge to the reliability of that factual evidence, and no challenge to the reasonableness of the master's contemporaneous assessment. In my judgment, the master would fairly have been led by cross-examination to understand that his actions from C-3 were being criticised at trial, but not his earlier actions. In fairness to him and his owners, he should have had a chance to respond to any suggestion that his contemporaneous assessment was unreasonable if that suggestion was to be pursued in closing. The issue is an objective one, but the factual basis on which it would have fallen to be judged might have been

affected. It cannot fairly be assumed that the master's response would not have included matters of fact that I may have found, or the Elder Brethren may have advised, were of significance.

49. In *Belpareil's* written note for closing, it was noted that the story took a long time to unfold, with those on board *Kiran Australia* aware from at least C-60 that *Belpareil* was dragging, and from C-55 that she had a main engine problem, so that *Kiran Australia* should have been taking steps to avoid a collision. But in that regard, the only allegedly negligent failure relied on was that in the final few minutes, "*Rather than keeping clear of the BP, once BP was astern of her, KA instead allowed herself to come astern and to starboard. This is what caused the contact.*" The case of fault against *Kiran Australia* was stated in these simple, and limited, terms (adding my emphasis):

*"The KA failed to keep clear of BP. She deliberately allowed herself to come astern at 0107 and thereafter even though it was clearly dangerous for her to do so. This was a serious error and was contrary to the principles of ordinary good seamanship. It cannot realistically be submitted that this was an error at the last that can be attributed to the agony of collision or that was somehow attributable to all that had gone before. KA had been aware of BP's predicament and her position for 55 minutes prior to the collision and had taken steps to avoid the collision. Everything had, from the outset, happened in slow motion. Her Master acknowledged that it was incumbent upon him to do everything possible to keep clear of BP: [Day] 2/41-42 ... . He did not do everything possible. Had this error not been committed the vessels would not have come into contact."*

50. In *Kiran Australia's* written note for closing, the defence to any charge of fault on her part was summarised as follows:

*"Was KA at fault:*

- (a) *In terms of lookout? No.*
- (b) *For not having shortened its chain to 5 shackles by C-55? No – and not put to Master.*
- (c) *For not weighing anchor No – and not put to KA Master or dredging astern at C-55? No.*
- (d) *For not shifting her anchorage position at C-7? No – and not put to KA Master.*
- (e) *For coming astern at C-3? No. Can it benefit from the "agony of the moment" principle? Yes."*

The written closing did not rest solely on the complaint that allegations were not put, where that complaint was made. Mr Turner KC did make submissions on the substance of such allegations to the extent he could when they had not

been explored with the master. However, in my view that does not make it fair to judge fault by reference to those allegations.

51. In oral argument, having seen *Belpareil's* written closing, Mr Turner KC closed for *Kiran Australia* expressly on the basis that though various other points had been raised in *Belpareil's* skeleton argument, for closing she was not making any case of fault against *Kiran Australia* prior to C-3. I made it clear that that was also my reading of *Belpareil's* written closing. Mr Persey KC in oral closing said that on his side, “*We, obviously, have concentrated more on the final three minutes because we say that is where the real causative potency lies*”. He explained further that “*We rely on the last three minutes because the vessels had avoided each other for the best part of an hour and were clear of each other when the KA unilaterally decided to come astern. ...*”. Later, in describing the approach of *Kiran Australia's* master, as indicated by his evidence, Mr Persey KC submitted that “*... he was not prepared to really do anything except move – or attempt to move his vessel out of the way. He did, in fact, do so successfully ... [but] he wasn't prepared to take the risk of moving whether by dredging back or, at any very early stage, in attempting to lift his anchor. Now, I am not suggesting that he was necessarily at fault, he – I am not suggesting he was at fault. They are causative, but I am not suggesting they are at fault.*” (my emphasis). Consistently with that stance, Mr Persey KC did not address any submission in closing to the effect that *Kiran Australia* was at fault prior to C-3.
52. In *Belpareil's* reply within the exchange of observations upon the advice of the Elder Brethren, the submission was that “*BP is not taking advantage of the post-trial nautical procedure to change forensic tack. Its case is and remains that what happened before the last three minutes has either no, or alternatively very limited, causative effect. Should, however, the Court reject that submission then it is appropriate for it to bear in mind the Elder Brethren's opinion on what the KA could have done.*” I do not agree that *Belpareil's* focus on C-3 in closing was confined in that way by her argument on causation. The position is that, although a case of prior fault was intimated in the skeleton argument for trial:
- (i) it was not put to the master of *Kiran Australia*, as fairly it ought to have been if it was to be pursued in closing,
  - (ii) it was not in fact pursued in closing, in writing or orally, and
  - (iii) to the contrary, in oral closing it was made explicit that fault on the part of *Kiran Australia* prior to C-3 was not suggested by *Belpareil*.

### The Facts in Five Figures

53. Figures 1 to 5 below are extracted from the agreed ‘MADAS’ reconstruction produced by Avenca from the VDR data, on the joint instruction of the parties. Larger copies appear at the end of this judgment. The MADAS reconstruction was used at trial, along with radar images from both bridges, as the primary means of setting out and exploring the collision narrative.

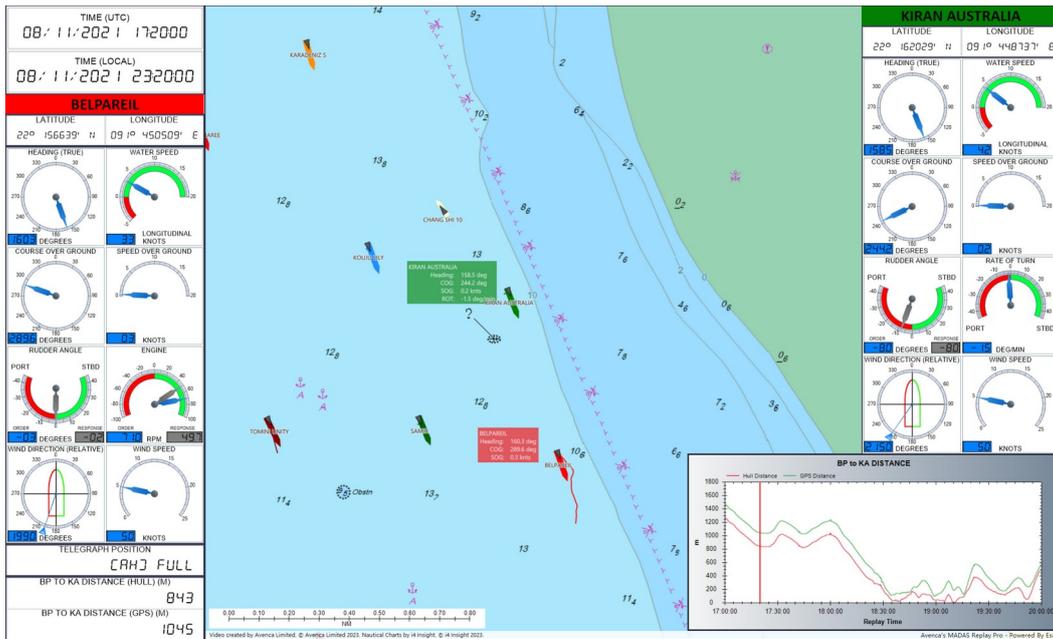


Figure 1

54. Figure 1, above, shows the position at 23:20 hrs (C-110). *Belpareil* had been dragging her anchor by then for about 20 minutes, moving her from c.7 cables off *Kiran Australia* (stern to bow) to c.4.5 cables off. Over the next 40 minutes, up to 00:00 hrs, *Kiran Australia* held station, while *Belpareil* kept herself between c.4.5 cables and c.5.5 cables off (stern to bow), describing the track shown in Figure 2, below.

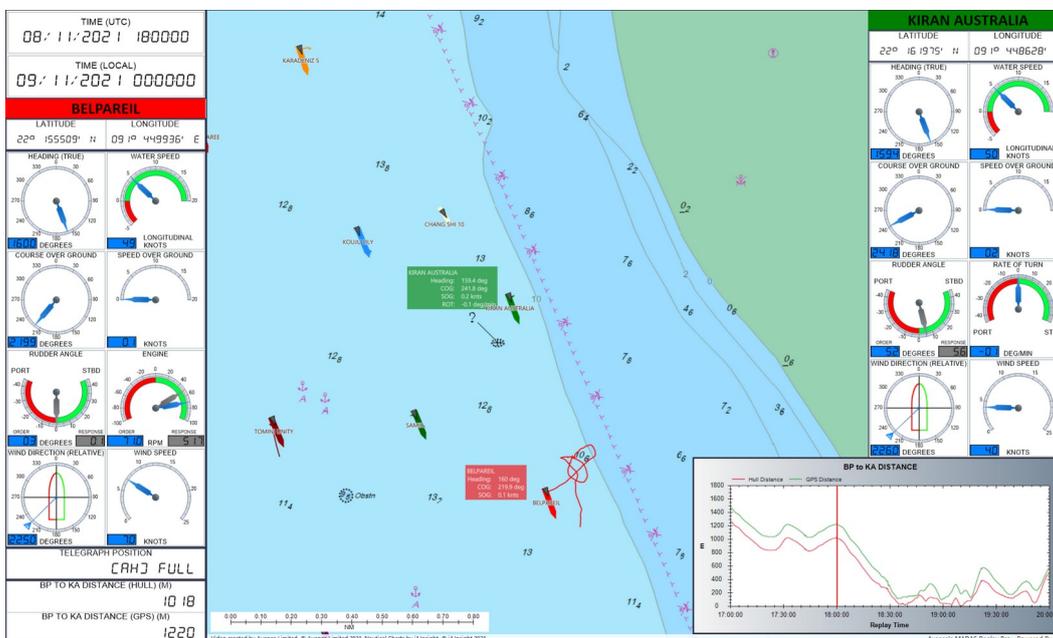


Figure 2

55. For the final 10 minutes of that period, *Belpareil*'s course over the ground was fairly steady, between 225° and 245°. Within a minute, however, it turned sharply northward, at the start of what then became a 30-minute drag in nearly

a straight line towards *Kiran Australia*'s anchored position, as shown in Figure 3, below, which gives the position at 00:29 hrs (C-41).

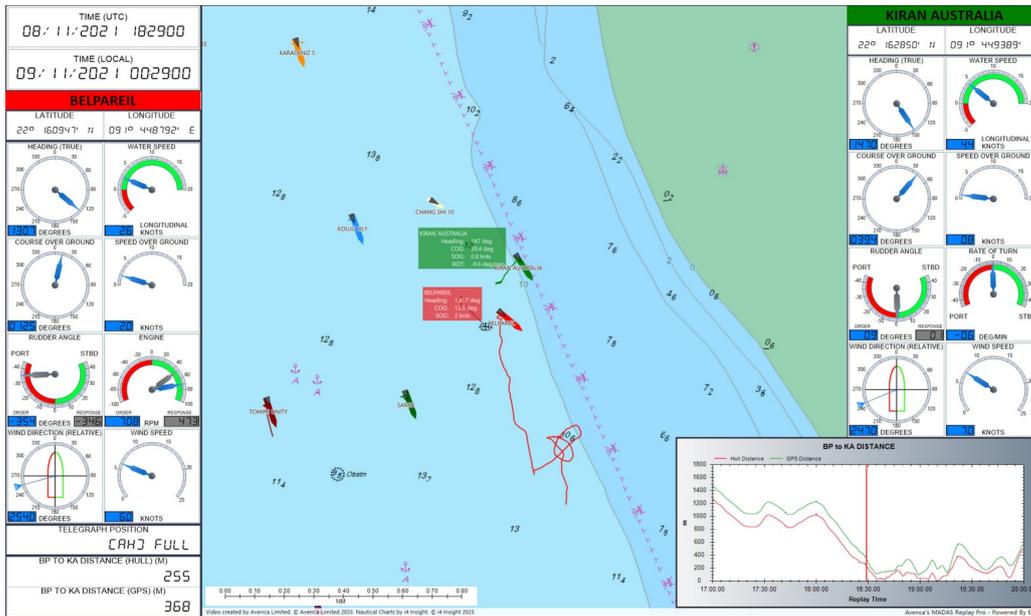


Figure 3

56. As Figure 3 indicates, by 00:29 hrs *Kiran Australia* was taking evasive action. That had been the case since c.00:20 hrs, and continued. The ships came very close to collision at c.00:36 hrs, at which time *Belpareil* was about where *Kiran Australia* is in Figure 3, and *Kiran Australia* was a little further east. By 00:53 hrs (C-17), *Belpareil* had recovered to a position close to her position in Figure 3. *Kiran Australia* had come back west a little, over the 10m contour line towards her original anchored position. The ships were then both heading 160°, *Kiran Australia* to the north of *Belpareil*, 40m or so off being line astern, about 130m distant from *Belpareil* (c.2/3 of a ship's length) in a straight line measurement between the parts of the hulls closest to each other.
57. *Belpareil* dragged astern again, passing *Kiran Australia*'s starboard side, the ships in that process again coming very close to hitting each other. Contact was avoided (just barely) as *Kiran Australia* propelled herself forward and clear, ahead of *Belpareil*, such that at 01:07 hrs (C-3) the ships were in the position shown in Figure 4, below, close to line astern, the bow of *Belpareil* 115m (a little over 1/2 a ship's length) behind the stern of *Kiran Australia*.

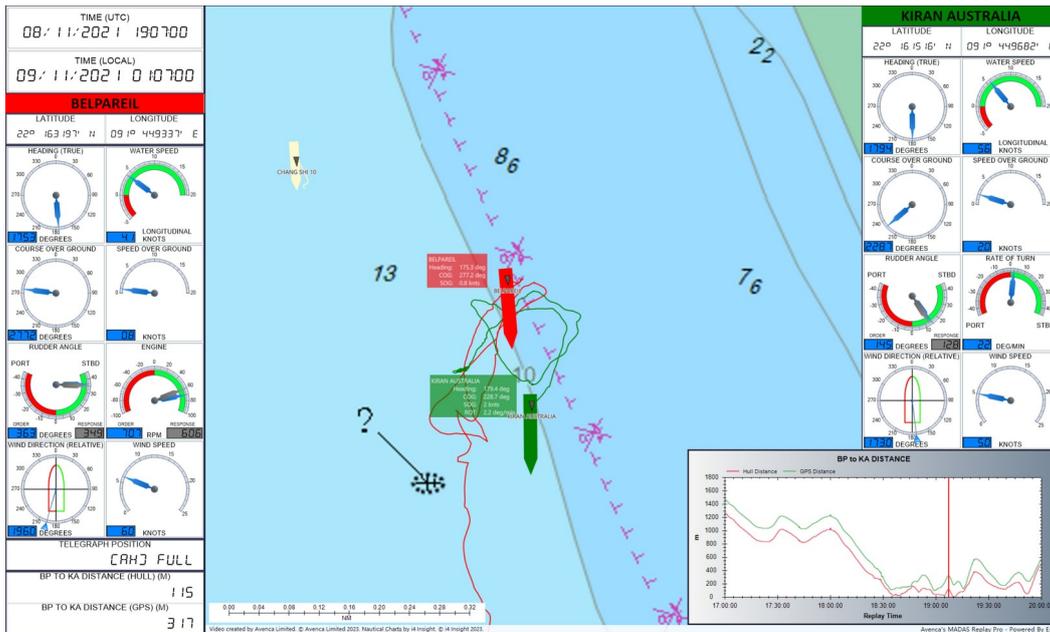


Figure 4

58. Over the following three minutes, the ships followed what became collision courses. *Belpareil* maintained Full Ahead, achieving an engine response of 60-63 RPM and steadily increasing her speed through the water from 4.1 kn at 01:07:00 hrs to 4.5 kn at 01:09:15 hrs, holding that speed until the collision. *Kiran Australia*, which was making 5.6 kn through the water at 01:07:00 hrs, reduced that speed, reaching 2.4 kn by 01:09:15 hrs, and holding that speed (or a fraction below) until the collision.
59. Meanwhile, *Belpareil*'s course over the ground altered steadily from 277° at 01:07:00 hrs to 246° by 01:07:45 hrs, after which it stayed close to 250° until the collision, while *Kiran Australia*'s course over the ground altered from 229° at 01:07:00 hrs to 275° by 01:07:45 hrs, after which it continued to alter towards north-westerly, reaching 301° by 01:08:15 hrs, 310° by 01:08:45 hrs, and finally 315° by 01:09:45 hrs, when (to within a second or two) her rudder caught on *Belpareil*'s anchor chain.
60. There was no VDR data or telegraph logger printout in evidence for *Kiran Australia*, which is very unusual and for which there was no explanation in evidence. Her speed through the water had increased from 5.5 kn at 01:04:00 hrs to 6.2 kn at 01:06:00 hrs, falling to 5.6 kn by 01:07:00 hrs. There were audible telegraph changes on the VDR record at 01:05:44 hrs, 01:06:50 hrs, 01:08:19 hrs, and 01:09:01 hrs. Her master, in evidence at trial that I accept, said he could make out his own voice on the audio saying that the first of those took the engine setting down to Half Ahead. It was also his evidence, which I accept and which is corroborated by what he said at the time to *Belpareil*, that his decision had been to take way off the engine to reduce tension in the anchor chain so he could continue weighing anchor.
61. Considering all of that, my finding is that the first telegraph change (at 01:05:44 hrs) indeed took the main engine down to Half Ahead, the next two (01:06:50 hrs and 01:08:19 hrs) were further reductions, to Slow Ahead, then

Dead Slow Ahead, and the final change (01:09:01 hrs) will have been an increase, from Dead Slow Ahead, such that the speed through the water held steady thereafter until the collision. Furthermore, the probability is, and I find, that by 01:06 hrs *Kiran Australia*'s anchor chain was tight, leading somewhere between 6 o'clock (aft) and 9 o'clock (to port), and as I have just said, her master's thinking in taking way off the main engine was to reduce the weight on the chain to facilitate weighing the anchor.

62. At the same time, by 01:06 hrs on *Belpareil*, the intention was to stay at Full Ahead and steer generally to starboard, thinking that would steer *Belpareil* clear of *Kiran Australia*. I judge that it had been noted on board *Belpareil* that the main engine response had improved and was continuing to improve (the VDR data show that 47 RPM at 01:01:00 hrs had become 54.5 RPM, and still rising, by 01:06:00 hrs). One consideration the master of *Belpareil* found weighty was the location of shallow water aft and to port of his ship, and (as he assessed it) a real danger of grounding if she dragged or steamed aft and/or to port (over the ground). That was a significant factor in his decision to (try to) get clear by staying at Full Ahead, steering to starboard.
63. In relation to the main engine response that *Belpareil* gave at this final stage of the narrative, I do not accept a submission by Mr Turner KC that the improvement in response went unnoticed on *Belpareil*. In the VHF audio, *Belpareil* used the language of not having her engine, or conversely having got the engine back, or similar, in relation to the main engine difficulty she had that night. That might have conveyed to outside parties that she was suffering intermittent breakdowns (full stoppages), and recoveries. Not so, however. As those on board *Belpareil* were well aware, the issue, rather, was that the main engine response (RPM given) was failing to match the main engine order (RPM demanded) for main engine settings above Slow Ahead. Main engine RPM was evidently being monitored; and during the final, ultimately fateful, manoeuvres, *Belpareil* told *Kiran Australia* that she had her engine again, which can only have been because the improved and improving RPM had been observed. Indeed, in my judgment, it also influenced *Belpareil*'s insistence, communicated to *Kiran Australia*, that she (*Belpareil*) wanted to continue as she was (making way ahead, steering to starboard). Her master was keen to take advantage while it lasted of the improved engine output, which had by then been unreliable for approaching two hours.
64. The upshot was that over that final three minutes, in relative terms, *Kiran Australia* fell back broadly north-westerly towards *Belpareil*, and *Belpareil* pushed on broadly west-south-westerly towards *Kiran Australia*, until finally they came together, as indicated in Figure 5, below. On a point of detail in Figure 5, in the *Kiran Australia* dashboard, the difference between the helm and rudder angles (25° starboard, ≥ 45° starboard respectively) will have been caused by the fouling of the rudder by the anchor chain of *Belpareil*.

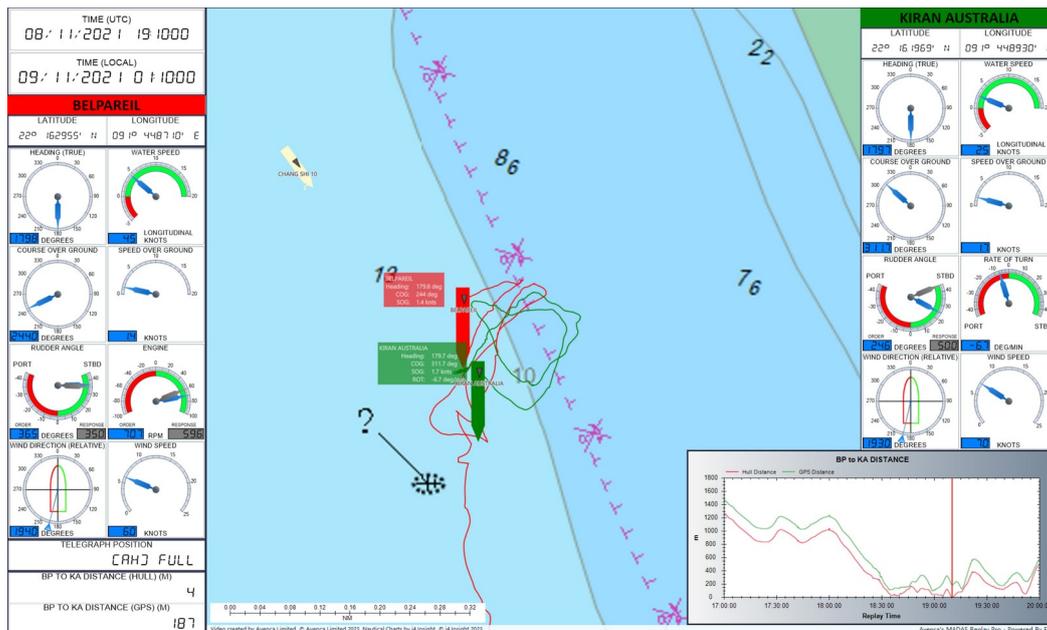


Figure 5

## Two Futile Fictions

65. Both masters were properly qualified, appropriately experienced, and (so far as I can assess the matter) generally competent to have the command of their respective ships, situated as they were off Chattogram for discharge operations on the night of 8-9 November 2021. As such, they should both have known that it was pointless to invent a story as to what had happened to bring the two ships into contact, since that story would be told, in some considerable detail, by the VDR data.
66. Each of them nonetheless made up a narrative and recorded it in writing on the day of the collision, both in their deck logs and in casualty reports, providing counsel with gifts for cross-examination. I accept the submissions made, in the light of the evident true facts and the cross-examination, that:
  - (i) the master of *Kiran Australia* did what he did because, after the fact, he felt responsible for allowing his ship to fall back towards *Belpareil*, so that they finally hit each other, after he had worked hard for nearly an hour to avoid contact; and
  - (ii) the master of *Belpareil* did what he did because, after the fact, he felt responsible for not having warned the ships around him, such as *Kiran Australia*, or Port Control, that he was having difficulty controlling or countering the dragging of his anchor because of the main engine issue, for not having considered dropping his second anchor in the early part of the incident, and for losing control of the situation in the final few minutes, during which his bridge was chaotic and, to make matters worse, he allowed himself to be distracted by a telephone call from his managers.

67. Under cross-examination, each master acknowledged that contemporaneous sense of responsibility; and the master of *Belpareil*, to his credit, accepted that he had created a dishonest account at the time because of it. The master of *Kiran Australia* refused to accept the charge of dishonesty, but I consider it was made out. For both masters, this was a first experience of a casualty, and each had evidently found the experience stressful, perhaps traumatic. Their failure at the time simply to tell the truth of what had happened, as best they could report, was unattractive as well as futile. Ultimately, though, it has little bearing on whether what they respectively did or failed to do amounted to or involved negligence.
68. It is not necessary in the circumstances to dwell at length on the fictional narratives reported by each ship, but in summary:
- (i) *Kiran Australia* invented the notion that the collision occurred at 00:36 hrs, *Belpareil* driving onto *Kiran Australia* after she (*Kiran Australia*) had stopped her engine because the anchor chain of *Belpareil* was under her, and that by 01:10 hrs her anchor was aweigh and she was clearing away from *Belpareil*. I do not accept the master's explanation in cross-examination that he mistakenly timed the collision at 00:36 hrs by looking back over radar images. He must have known that the collision was not a mere 20 minutes or so after he was called back to the bridge, and only 15 minutes or so after first VHF contact between the ships. Likewise his Chief Officer, Second Officer, Helmsman and Chief Engineer, all of whom signed up to the falsely timed report.
  - (ii) *Belpareil* invented records of having warned surrounding shipping, and Port Control, promptly upon experiencing main engine difficulties, and of having dropped her second anchor, or attempted to do so, without success as regards regaining control, and of Port Control having called upon *Kiran Australia* to take avoiding action (which it was said she had failed to do so), at about the same time, prior to 23:20 hrs.
69. Before leaving the masters' accounts, I would add this. Each of them provided the account set out in his trial witness statement only after reviewing the MADAS reconstruction that, as I have said already, was the main tool used at trial to show the court in detail how the incident had occurred. In language suggested, I imagine, by the solicitors, each statement asserted that this had been a matter of 'refreshing memory'. But it cannot have been, since the MADAS reconstruction did not exist at the time and so was not something either master was consulting as events unfolded. Listening to the audio captured on his own bridge, for times when he was on the bridge, could have been capable of refreshing the respective master's memory; likewise looking at radar display images, if and to the extent he looked at them at the time.
70. In the case of *Kiran Australia*, the resulting trial witness statement was largely useless. In my judgment, it was mostly an account, probably not written by the master but for him by the solicitors, albeit agreed by him to be accurate, of what the master says he can now see in the reconstruction, which is not his testimony of witnessing the collision at all. In addition, by reference to the true timeline of the collision shown by the reconstruction, the statement contained

new fictions, the master claiming to have seen, heard and felt things on board *Kiran Australia* from 01:07 hrs in the hope of persuading the reader that *Belpareil*'s anchor cable had fouled his propellor and rudder several minutes before the eventual hull to hull contact, and claiming to have observed *Belpareil* surging towards *Kiran Australia* from 01:09 hrs, with black smoke from her funnel and visibly increased engine wash from her propellor. The statement was not very long even so, only some 12 pages, but it could and should have been much shorter still, and obviously the master should not have invented a story to try to fit the reconstruction.

71. By contrast, the statement from the master of *Belpareil* ran to a little under 3½ pages, and it appeared to be no more than a record in writing of what he may have claimed to recall when interviewed for it, with a few cross-references to the VDR data to give probable times for events he said he remembered.

### Causative Fault

#### *Belpareil 1 – Dragging*

72. The Editors of *Marsden and Gault on Collisions at Sea* have it that, “*It is prima facie evidence of negligence for a vessel to drag her anchor,*<sup>147</sup> *but this may be displaced by evidence of severity of weather or that other vessels also dragged.*<sup>148</sup>” (15<sup>th</sup> Ed., para.5-051). For the first half of their proposition, the Editors cite (at n.147): *The Exeter City and Sea Serpent* (1922) 12 Ll. L. Rep. 423; *The Brabant* (1938) 60 Ll. L. Rep. 323 at 327; and *The Velox* [1955] 1 Lloyd’s Rep. 376. For the second half of their proposition, the Editors cite (at n.148) *The Boltenhof* (1939) 62 Ll. L. Rep. 235.

73. *The Exeter City and Sea Serpent* concerned a collision in the Barry Roads, described by Hill J as “*a place in which so many dragging collisions take place*”. In a strong gale from the west, the *Sea Serpent* dragged into collision with the *Exeter City*, and under the force of that entanglement the *Exeter City* was pushed into contact with the *London*. The *Sea Serpent* was held solely responsible for the whole episode. The basis upon which she was found to be at fault was that dragging creates a presumption of negligence that she had not rebutted (*ibid*, at 425 rhc):

“*First of all, the Sea Serpent drags. That is prima facie evidence of negligence. Ships ought not to drag. It is not pleaded that it was due to what is called inevitable accident; it is not pleaded that by the exercise of reasonable care and skill the dragging of the Sea Serpent could not have been prevented; and no such case is made; and a prima facie case of negligence is, in my view, therefore established against the Sea Serpent. She does not account for the dragging.*”

74. In *The Brabant*, the *Felix Dzerjinsky* ran into barges in the Woolwich Reach on the River Thames as a result of emergency manoeuvres to avoid hitting the *Brabant*, which (it was held) was dragging her anchor so as to be an obstacle to safe navigation. The *Brabant* claimed that she was caused to drag by the way the *Felix* was navigated. That claim was rejected. But then, *per* Sir Boyd Merriman, P., at 327 rhc: “*If she dragged her anchor, not because of any*

*trouble set up by the Felix but because, lying ... at that particular place her anchor was not in fact holding when she lay to the ebb, or rather when she had swung to the flood, I do not think [counsel] disputes that that would be negligence. If she had put her anchor down in such a way that when she swung to the flood it did not hold, that would prima facie be negligent. I cannot see how it could be otherwise, and I so hold. I am not putting it upon any admission; it seems to me that the thing speaks for itself. It must be negligence if the vessel is so anchored that, without any other possible explanation that anybody can suggest, she begins to drag her anchor shortly after she has swung to the flood tide.”*

75. In *The Boltenhof*, the *Marklyn* dragged into collision with the *Boltenhof*, at anchor off Melilla in the Mediterranean. In the judgment at 240 lhc, Bucknill J cited *The Exeter City and Sea Serpent* without demur for the proposition that dragging into a collision is *prima facie* evidence of negligence, but considered the presumption rebutted on the facts of that case by the proved severity of the weather and the fact that all the ships at anchor (apart from the *Boltenhof*) had dragged that night.
76. In *The Velox*, Willmer J held the *Velox* at fault for colliding with the *Viking Monarch* in a storm of unusual severity on Loch Eriboll, on the north coast of Scotland. Although Willmer J would have put the onus on the *Velox* to explain how without negligence she had been driven by the storm into the *Viking Monarch*, the case did not turn on the onus of proof or on a presumption (see at 379 lhc). Willmer J found fault on the basis that (at 382 rhc): “*Even if it could be said that the Velox was not to blame for dragging her anchors in the first instance, nevertheless the situation called for a lookout of the utmost vigilance*”; she had failed in that regard and she had responded inadequately to dragging; and the *Viking Monarch* had satisfied the court that the *Velox* had therefore been navigated negligently.
77. In my judgment, *The Exeter City and Sea Serpent* and *The Brabant*, taken together, stand as authority for the proposition that a ship dragging her anchor is *prima facie* evidence of negligence, to rebut which she must either establish why she dragged, showing that it was not in fact due to negligence, or prove that the dragging could not have been prevented by the exercise of reasonable skill and care. In *The Velox*, Willmer J understood that to be the law, but fault was affirmatively established without the need to invoke the presumption.
78. *The Boltenhof* meanwhile is no more than a case on its facts where that presumption of negligence was rebutted, where those facts included severe weather and the dragging of several other ships. If the second half of *Marsden and Gault*’s proposition were thought to state a rule of law that severe weather or the dragging of other ships will suffice to rebut the presumption, or a rule that other matters of fact cannot rebut it, that would misunderstand the law.
79. In the present case, *Belpareil* did not plead that the dragging of her anchor occurred without fault on her part. Her plea was that from about 23:05 hrs on 8 November 2021 until the collision, she was “*continuously dragging (without effective control of her vector) under the influence of a strong northerly/north-northwesterly tidal current with tidal current speeds varying between 3 knots*

and 5.1 knots”, and that her main engine issue caused her to be unsuccessful in her efforts to control, reduce or arrest the dragging so as to avoid a close quarters situation with *Kiran Australia*. But *prima facie* she should not have been dragging in the first place.

80. It was common ground that Chattogram Anchorage “A” is known to present poor holding ground and difficult conditions. It is evident from the VDR audio that *Kiran Australia* found it challenging to maintain position, and her master confirmed as much in evidence. But maintain her position she did, until the choice became to engage in evasive manoeuvres to try to avoid being hit by *Belpareil*, dragging northward/north-north-westward towards her. There was no evidence or suggestion that the conditions were especially or unusually severe, either at all or for the location. There was some indication on the MADAS reconstruction that the *Tomini Unity*, 8 cables or so to the west, and slightly north, of *Belpareil*’s original position, may also have dragged her anchor for the first 15 minutes or so after 23:00 hrs, but nothing to indicate that the conditions that night were creating a general difficulty in holding station that the reasonable skill and care of competent mariners could not overcome.
81. In my judgment, those circumstances fall well short of proof, had such a case been pleaded, that *Belpareil* dragged otherwise than because of negligence. Her radar records show that she swung on her anchor with the change of tide between c.22:00 and c.22:30 hrs, after the low tide at 21:36 hrs. She made very little use of her main engine as part of holding position, even though the basic reason attested to by the master of *Kiran Australia* why holding position in that area can be challenging is its call for frequent use of the engine. *Belpareil* kept her main engine at Stop from 20:53:55 hrs until 23:05:38 hrs (by when she had been dragging for at least 5 minutes), except when the order was Dead Slow Ahead for 19 seconds from 22:14:29 hrs and for 2 minutes 22 seconds from 22:15:11 hrs.
82. The position, then, is that half an hour or so after completing her swing with the change of tide, and for no reason that *Belpareil* has offered, let alone proved, let alone proved to have occurred without fault on her part, *Belpareil* dragged her anchor. Thereafter, as she admits, she dragged continuously, into a close quarters situation with *Kiran Australia*. The presumption the law makes that ships do not drag without fault has not been rebutted. *Belpareil* is to be presumed to have been at fault, and on that basis I find her at fault, in dragging her anchor.
83. That fault operated in combination with the main engine difficulty, for which it is not alleged she was at fault, that she then encountered whilst dragging, such that she came to be bearing down upon *Kiran Australia*’s position from c.00:00 hrs (C-70).

#### *Belpareil 2 – Delay in Warning*

84. On board *Belpareil*, the master’s night orders rightly required the duty officers to “pay utmost attention on anchor watch” and “not ... to carry out any other work. Pay attention on anchor watch only.” Especially at an anchorage known

to be potentially challenging, there could be no more important task. Although *Belpareil* was dragging her anchor by 23:00 hrs (and probably for a minute or two prior to that), and a risk of collision if the dragging was not arrested was evident from her radar (if it was being monitored), her main engine was not engaged until 23:06 hrs, and the evidence did not disclose when *Belpareil* first acquired *Kiran Australia* as an ARPA target.

85. The published tide tables predicted a flood tide current heading between 338° and 343° building from 0.6 kn at 23:00 hrs to 4.0 kn from 01:00 to 03:00 hrs. Given the known challenges of the location, and the initial absence on board *Belpareil* of reason to think she would have difficulty combating the dragging so as to establish a stable position on the rising tide and tidal current, I do not consider that she was at fault for not raising any alarm as soon as it was appreciated that she was dragging; and the failure promptly to identify that she was had no material impact on later events.
86. However, from 23:16 hrs *Belpareil* experienced the main engine difficulty that would plague her for the next two hours. The main engine behaved normally when set to Dead Slow or Slow Ahead, but at Half Ahead or Full Ahead, the demanded output (62 RPM and 71 RPM, respectively) was not generated. For 10 minutes, as Half Ahead, Full Ahead, then Half Ahead again, were attempted in succession, main engine response stuck between 48 and 50 RPM (cf 45 RPM = Slow Ahead). Between 23:26 hrs and 23:29 hrs, at Half Ahead, main engine RPM built from 50 to 58, which may have given some temporary reassurance, and the engine setting was stepped back down to Dead Slow Ahead; but when it was stepped back up again from 23:33 hrs, the same very troubling experience was repeated. At Half Ahead by 23:35:30, then Full Ahead by and after 23:36:00, main engine RPM stuck between 47 and 52 for more than the next 10 minutes.
87. After that experience, it should have been obvious to those in command on *Belpareil* that she was a potential danger to ships anchored to her north, most obviously *Kiran Australia* (even more so than *Samir*, which was closer to *Belpareil* but further off a course, if *Belpareil* dragged along it, in line with the flooding tide). She was at real risk of being or becoming close to a dead ship at the mercy of the elements. I considered that it needed no enquiry of the Elder Brethren to conclude, and I do conclude, that it was imprudent, and a failure to exercise reasonable care towards shipping in the vicinity, for *Belpareil* not to broadcast a clear warning that she presented that risk, explaining why.
88. In my judgment, that warning should have come no later than 23:40 hrs, several minutes into the second episode of underperformance, as main engine RPM dropped below 50 RPM despite a Full Ahead setting being maintained. It is evident from the VDR audio that, as might be expected, the main engine RPM was being closely monitored, the lack of response to the Full Ahead engine order was noted, and the view expressed on the bridge of *Belpareil* was that: “*The engine will not be enough, otherwise vessel will move backwards. RPM is decreasing again to 49, 50.*”; “*The problem is now the vessel is going to the backwards, she is dragging ..., so we need some more the RPM.*”

89. Instead, and negligently, *Belpareil* issued no warning until 00:21 hrs. The warning was “*All ship, all ship, all ship, this is motor vessel Belpareil call sign LAV17. My vessel is out of control, my vessel is anchor dragging, my vessel is anchor dragging and out of control.*”; and then “*Security, security, security, security, security, security, this is Belpareil, Belpareil. My engine out of order, my engine is out of order, I cannot control my vessel, anchor dragging, anchor dragging.*”
90. The master had concluded that *Belpareil* was out of control (not merely at risk of being so) by 00:07 hrs, when he told the attending supercargo, via walkie-talkie, “*Cast off, cast off your barge, I cannot control the vessel.*”, and was actively contemplating the imminent prospect of a collision, instructing the duty officer to “*Take note of all the timing. Where is note paper? If there is any collision, it can be vessel record. We have to solve with timing note.*” In fact, it was noted on the bridge from c.00:02 hrs that main engine RPM was well below what it should be and *Belpareil* was going backwards (meaning moving astern over the ground), leading to the following bridge dialogue:

“00:03:24 hrs ... *it stick, the RPM stick to 50, 55.*

*Now Full Ahead yea?*

*Yea yea, something slow with the electronics, no idea la.*

*... because you see the vessel is going to backward, we are going 4 cables, see we are going 4 cables –*

00:04:30 hrs *RPM ...*

*Oh shit, we are going to back, going backward.*

*... going backward.*

00:05:17 hrs ... *ah little bit problem, we cannot control it.*

*Ah shit, finish.”*

91. By 00:10 hrs, *Kiran Australia* was inferring from what she could observe that *Belpareil* was dragging. She hailed *Belpareil* via VHF three times, at 00:10:49 hrs, 00:11:10 hrs, and 00:11:58 hrs, but was ignored. *Belpareil* communicated with *Kiran Australia*, finally, only after, and I infer in response to, hearing *Kiran Australia* hail Port Control. The two bridges then had this exchange, so that *Kiran Australia* became aware of *Belpareil*'s true difficulty at 00:15-00:16 hrs, a little over 5 minutes before *Belpareil* issued any general warning:

“00:15:17 hrs *Belpareil, this is Kiran Australia on your – uh – port quarter, uh – Captain are you dragging?*

00:15:25 hrs *Yes yes, I am maintaining my course but my engine, my engine is totally, unable to control my engine, engine having some problem.*

00:15:38 hrs *Kiran Australia, my engine having problem.*”

92. On board *Kiran Australia*, the master’s first thought was to weigh anchor and make an escape; but he assessed, reasonably so, and told *Belpareil*, that it was too late for that. He had 8 shackles of starboard anchor chain ahead in the water (220m, over a ship’s length) that he would have needed over 20 minutes to take in, easing his ship forward towards the oncoming *Belpareil* as he did so. The master explained, in evidence in chief that I accept, that he took the decision he did “*to try and avoid [Belpareil] using the engines and rudder, with the anchor still down*”, because he had assessed that, for the reasons I have just given, it was too late for it to be prudent to follow his first instinct.
93. I agree with Mr Turner KC that that is likely to be a reliable guide to how the master would have responded to a warning 35 minutes or more earlier that *Belpareil* was or was at risk of becoming at any moment effectively dead in the water, at the mercy of the tidal current. That is to say, his first thought would then also have been to weigh anchor and get out of the way; and he would have acted on that instinct unless he then assessed that it was already too late for that to be a prudent course.
94. By 00:15-00:16 hrs, *Belpareil* was only 3 cables off *Kiran Australia* (stern to bow), and closing, such that there was a clear risk of collision in the near future (within 20 minutes). By contrast, until 00:00 hrs, she was substantially further off, not yet presenting any near-term collision risk; and it then took until 00:05 hrs or so before she would have seemed settled, in her dragging, on something that might well be or become a collision course.
95. The advice of the Elder Brethren, which I accept, is to the effect, on any view, that if *Kiran Australia* had been made aware, when I have found she should have been made aware, that *Belpareil* was not only dragging but unable to respond properly to or control her dragging, a competent mariner in command would not have wanted to move further east and should have considered taking early action that would not rely on the actions of *Belpareil*, his options being to weigh anchor and clear away from any possibility of collision or maintain station, observing *Belpareil*, but weighing anchor and then clearing away promptly if she was observed to be dragging further north (as she would have been).
96. In my judgment, the master of *Kiran Australia* had no wish to play slow motion maritime dodgems with *Belpareil*. He did so, for the best part of an hour before the ships in fact collided at 01:10 hrs, and for nearly as long again afterwards, because of his assessment that it was the only realistic course open to him in the situation *Belpareil* put him in at and after 00:15 hrs, one key element of which was the lack of prior notice that *Belpareil* was or might at any moment become out of control. If *Belpareil* had warned him of that, as I have held that she should have, by 23:40 hrs at the latest, there would have been time and space for *Kiran Australia* to act on her master’s first thought of weighing anchor and getting clear, and that would have been the first option any competent master would have considered to be available at that time. I think it more probable than not that with such prompt notification of

*Belpareil's* difficulty, *Kiran Australia* would have weighed anchor and kept well clear of *Belpareil*, and the collision would not have occurred.

*Belpareil 3 – Delay in Calling for Tugs*

97. The master of *Belpareil* gave shifting and inconsistent evidence as to what he was told, when and by whom, as to the availability or unavailability of tugs to assist ships at Chattogram Anchorage “A”. I do not accept as reliable any of his various versions of having been told there was no such availability. It is evident from the VDR audio record that, when *Belpareil* belatedly did raise a general alarm over her predicament, she called upon Port Control for urgent assistance by tugs, and neither thought, nor was told, that she was asking for the impossible. To the contrary, she was told, when Port Control eventually responded, that arrangements were being made but would take time.
98. I consider it negligent that *Belpareil* did not first call for tug assistance by c.23:40 hrs at the latest. In the event, she first called for tugs, in terms, only at 00:32 hrs. (“*Port control, port control, this is Belpareil calling, Belpareil calling. Now we are the anchor dragging and we need the tug assistance immediately.*”)
99. The stark fact, however, is that though *Belpareil* remained in difficulty well after the collision, no tug ever came to her assistance. In the absence of positive evidence that tugs were available or of some reason why though tugs may have been available none responded, the inference is that the master was correct as to the factual position, *viz.* there was no prospect of tug assistance for *Belpareil*, even while he was not telling the court the truth about having been notified of that in advance.
100. *Belpareil* was at fault in not calling for tug assistance by c.23:40 hrs, as she was at fault in not warning other ships by then of the danger she posed, but the lack of promptness in calling for tugs was not causative of the collision.

*Belpareil 4 – Failure to Drop Starboard Anchor*

101. Contrary to a submission by Mr Persey KC in defending the allegation that *Belpareil* should have dropped her starboard anchor to stabilise herself, it is irrelevant that the master of *Kiran Australia* rightly did not consider dropping his own second anchor, or wish *Belpareil* to drop hers, in the latter stages of the incident, as the ships came into close quarters and then danced around each other trying to avoid contact. The material allegation against *Belpareil* focused upon the initial hour, or just over, during which she dragged and first experienced the main engine issue, but nonetheless stayed around 5 cables off *Kiran Australia*, before then becoming somewhat settled, dragging, on or very close to a collision course, from 00:05 hrs. The view on board *Kiran Australia*, matching that on board *Belpareil*, that it was inadvisable to look at dropping a second anchor *thereafter*, could not be criticised, because of the circumstances then at hand.
102. The other introductory point to make is that I reject as untruthful the various contemporaneous documents generated by *Belpareil* that purported to record

an attempt in fact made to deploy the starboard anchor, or experience in fact noted of the ship's bow oscillating relative to the anchor chain with a decision being made because of that not to deploy (or deploy further) that anchor. Mr Turner KC demonstrated to my satisfaction through cross-examination of the master that those documentary records were a dishonest but wasted effort to cover up the truth. The truth was that those on board *Belpareil* did not think to use the starboard anchor during the initial phase of the incident. The dishonest attempt to cover that up was borne of a defensive instinct, in hindsight, that they should at least have given it serious consideration at the time. The attempt was a wasted effort *inter alia* since *Belpareil* managed to create evidence of two mutually incompatible narratives that cannot both have occurred: (i) that the starboard anchor had been deployed but failed to assist; (ii) that a conscious choice had been made, for good reason, not to try deploying the starboard anchor as a solution.

103. That defensive instinct, together with the fact that the possibility of dropping another anchor *was* mooted, as it was, even in the later circumstances of close quarters evasive manoeuvring, is evidence that dropping a second anchor is at least an obvious possibility that ought to be considered by any ship that finds herself dragging and not readily countering that by the use of her engine and rudder. But my rejection as untruthful of the evidence *Belpareil* created that, if reliable, might have supported a positive case for the defence, does not prove that the failure to deploy the starboard anchor at the earlier stage of dragging between 23:00 hrs and 00:05 hrs was negligent.
104. Nor does my rejection, as supposed record of historic facts, of the references to “*chain leading direction is oscillating between 10 o'clock and 2 o'clock long stay to medium stay. In reality, vessel have no chance to drop stb anchor due to the port anchor chain leading direction is oscillating large amount ...*”, prove that there would not have been an issue or risk of anchor chains fouling each other or twisting that might have made it imprudent to try using the starboard anchor.
105. The VDR audio record from *Belpareil* includes truly contemporaneous anchor chain reports that there is no reason to reject, tabulated below. The VDR audio disclosed by *Belpareil* begins at 23:30 hrs. It seems likely that how the anchor chain was leading will also have been reported during the first 30 minutes of her extended excursion, dragging her anchor from (just before) 23:00 hrs; but any such reports were not in evidence and it is not possible to say what they may have been.

<b>TIME</b>	<b>REPORT</b>
<b>23:33:17</b>	“... <i>anchor up and down</i> ”
<b>23:40:40</b>	2 o'clock short
<b>23:41:36</b>	2 o'clock short
<b>23:45:40</b>	2 o'clock long

<b>TIME</b>	<b>REPORT</b>
<b>23:47:58</b>	3 o'clock long
<b>23:48:37</b>	3 o'clock long
<b>23:50:20</b>	7 o'clock short
<b>23:51:33</b>	8 o'clock short
<b>23:53:36</b>	8 o'clock short
<b>23:54:27</b>	8 o'clock short, then long
<b>23:55:27</b>	8 o'clock long
<b>23:58:19</b>	4 o'clock long
<b>00:11:22</b>	12 o'clock short
<b>00:17:27</b>	4 o'clock short
<b>00:48:23</b>	7 o'clock long
<b>00:50:20</b>	6 o'clock long
<b>00:51:49</b>	6 o'clock long (and "very tight")
<b>00:53:27</b>	6 o'clock short
<b>01:16:22</b>	9 o'clock
<b>01:20:16</b>	6 o'clock long (and "very tight")
<b>01:27-01:29</b>	5 o'clock short (several reports) (anchor being heaved in)

106. Turning then to the advice of the Elder Brethren, which I accept, it was to the effect that:
- (i) Dropping a second anchor should be one of the first considerations of a good seaman when their anchor drags and they find their main engine unreliable, and "*BP master should have considered dropping a second anchor as soon as he started dragging anchor and was unable to arrest the drag with engines alone*".
  - (ii) There were considerations for and against *Belpareil* dropping her starboard anchor as a response to the dragging when it became combined with main engine problems from 23:20 hrs, but they should be understood:

*“in the context of immediate or short-term action to avoid a collision, and others that could be resolved later, perhaps the next day. ... In our opinion twisted cables were an issue to worry about later. The immediate problem was risk of collision with the KA, which the second anchor would either mitigate completely or at least slow the rate of drift.*

*Care would be needed to avoid dropping the anchor across the port anchor. We would have started by laying out two shackles, which would have damped the veering (oscillation) and alone may have been sufficient to stop the dragging. Regarding the cables twisting, this occurs when the tidal stream reverses and the ship swings to the opposite direction. In the first change of tide this has limited effect on holding power. Subsequently the competent mariner uses the rudder, and main engine if necessary, to swing back in the same direction, so as to undo the crossed cables. This mitigates the chance of several twists, which would limit holding power. This is action that both assessors have taken in the past. ...”*

(I have omitted two matters mentioned by the Elder Brethren that trespass into fact-finding that is for the court, but extracting them does not affect the substance or effect of the above advice.)

- (iii) In short, *Belpareil* should have dropped her starboard anchor at or prior to 00:05 hrs, and if she had done so *Kiran Australia* would have had plenty of time to weigh anchor and get clear without *Belpareil* ever getting dangerously close to her.

107. *Belpareil* was at fault in failing to drop her starboard anchor in response to realising that she could not rely on her main engine to arrest or control her dragging. A competent use of the second anchor would have avoided the collision, because (like the giving of proper, prompt notice of her difficulties) it would have bought the master of *Kiran Australia* the time to act on his correct first instinct as to how to avoid any risk of collision. *Kiran Australia* would have weighed anchor and kept clear of *Belpareil* without the two ships ever coming into close quarters.

#### *Both Ships – Negligent Final Manoeuvring*

108. The parties' rival cases were mirror images, reflecting the reality that for what became the final few minutes before the collision, the two masters had taken decisions that in combination set the ships up to collide, and each refused to make a change when confronted with that reality. The mutual insistence on sticking to what they had decided, demanding that the other ship make a change, is nicely captured by the VHF exchange in paragraph above.
109. Before coming directly to those final few minutes, I reject a submission by Mr Turner KC that an exchange more than 10 minutes earlier is helpful to *Kiran Australia*. At 00:51 hrs (C-19), both ships were heading c.160°. Relative to that heading, *Kiran Australia* was diagonally astern and to port of *Belpareil*, her bow c.½-cable off *Belpareil*'s port aft quarter, and the ships were on

separating vectors. By 00:54 hrs (C-16), their positions were similar, *Belpareil* having moved away fractionally over the ground, *Kiran Australia* having done so a little more.

110. At C-19, the master of *Belpareil* told the master of *Kiran Australia* that he was trying to shift away but his engine was “back to abnormal condition”. He suggested that *Kiran Australia* should “move your anchor position backwards”. The master of *Kiran Australia* replied, “Okay, when you clear enough from me, I will try to heave up anchor, but you are now very close to me.” He made sure his Chief Officer, in command of a forward anchor party, was ready to heave up. At C-16, the master of *Belpareil* requested, “Please heave up your anchor and move, my engine is out of order again”, the master of *Kiran Australia* agreed he would start to heave up, and that order was given to the Chief Officer. Just before 00:56 hrs (C-14), *Kiran Australia* reported to *Belpareil* that she was at Half Ahead and heaving up her anchor.
111. However, *Belpareil* was again dragging astern towards *Kiran Australia* by then. They passed very close to each other, *Bepareil* dragging diagonally to port astern, tracking about north-easterly over the ground, *Kiran Australia* deftly avoiding her by driving forward, using Full Ahead engine and sharp rudder manoeuvres, which is what brought the ships to the position at 01:07 hrs (C-3) shown in Figure 4. *Kiran Australia* was now ahead and clear of *Belpareil*, which was across the 10m contour but had from 01:05 hrs (C-5) arrested her north-easterly slide towards a possible grounding and was moving westerly over the ground back towards deeper water.
112. The exchanges at C-19 and C-16, and the commencement by *Kiran Australia* then of heaving up her anchor, when the ships were very differently situated relative to each other, with a view to clearing away astern of *Belpareil*, was no kind of standing agreement or precedent for what they should be doing at and from 01:07 hrs. It did not mean that *Kiran Australia* had licence from *Belpareil* to do whatever it might then take to keep weighing anchor, as some overriding priority. The Elder Brethren advise, and I accept this advice, that well run ships speaking a common language, or competent English, should have been in constant communication with each other, working out how best to resolve the situation, and exchanging information on progress. The Elder Brethren say they would have “expected [competently run ships] to agree a course of action and regularly exchange information of their progress until the risk of collision no longer existed. The conversations between KA and BP were more in the nature of statements and requests to the other to take certain actions.” That final observation accords with my assessment of the verbal exchanges, and I accept the expert view implicit in it that the tenor and content is not what the Elder Brethren would expect to see from two well run ships seeking to avoid collision and communicating professionally.
113. From the VDR audio record, I find that *Kiran Australia* did indeed heave in anchor chain from C-15 or so until C-4 (01:06 hrs), by when she had brought in 3 shackles so that she still had 5 shackles in the water during the final few minutes and when the ships collided. The push forward, to avoid contact and get clear, ahead of *Belpareil*, left the chain leading aftward and to port, albeit I cannot say at what angle exactly, and tight.

114. The case for *Kiran Australia*, then, was that:

- (i) *Belpareil* should have stopped her engine at C-3, or by C-2 at the very latest, to allow *Kiran Australia* to come northward over the ground.
- (ii) Instead, and therefore negligently, *Belpareil* continued to move ahead. That she was also, as Mr Turner KC put it, “*crabbing to starboard*”, was not a virtue, as that was taking her into *Kiran Australia*’s path.
- (iii) It was notable that when creating and collating their deck log and other contemporaneous purported records of the key events, the master of *Belpareil* and his officers did not report any view that *Kiran Australia* had been at fault for (relatively speaking) coming astern from C-3. This was said to be in stark contrast to the master of *Kiran Australia*’s furious contemporaneous reaction at 01:10:42 hrs: “*Belpareil, are you a f\*\*\*ing idiot, you hit my propeller!*”.
- (iv) The striking feature of the exchange quoted in paragraph above is *Belpareil*’s stubborn insistence on continuing ahead because that was what she wanted to do.
- (v) It was reasonable for *Kiran Australia* to take way off her main engine, so she would fall backwards (relatively speaking), because that would take weight off the anchor chain and assist her in weighing anchor, as she had been trying to do.
- (vi) As regards the ships’ manoeuvres over the final few minutes, the collision was entirely *Belpareil*’s fault.

115. The case for *Belpareil*, on the other hand, was that:

- (i) *Kiran Australia* deliberately allowed herself to come astern (over the ground), and to starboard, from C-3, by taking way off the engine, without any consideration for *Belpareil*’s position at that time.
- (ii) That was an obviously dangerous thing to do, and not something that *Kiran Australia* had any immediate need to do. She could readily have kept herself clear ahead of *Belpareil*, and should have prioritised doing so above anything else.
- (iii) The striking feature of the exchange quoted in paragraph above is *Kiran Australia*’s stubborn insistence on falling diagonally backwards (over the ground) despite both being told that *Belpareil* was coming forward and to starboard, and having the explanation for that (*viz.* that *Belpareil* had her engine back), and being asked therefore just to maintain position.
- (iv) It was reasonable of *Belpareil* to maintain Full Ahead as she did, since she was otherwise at imminent risk of further dragging astern and/or to port, with consequent immediate risk of grounding.

- (v) As regards the ships' manoeuvres over the final few minutes, the collision was "*entirely caused by [Kiran Australia]'s crazy decision to let herself come astern and to starboard*".

116. The Elder Brethren were generally clear in their main advice that, in their opinion, *Belpareil* was at fault in maintaining Full Ahead, although there was some ambiguity over what, in their view, she should have done instead. Thus:

- (i) In answer to the question whether a competent mariner in command of *Belpareil*, wishing to stay clear of *Kiran Australia*, might have chosen to maintain Full Ahead from 01:07 hrs, they advised that:

*"We do not consider maintaining Full Ahead in these circumstances the actions of a competent mariner. KA was close ahead of him (115m hull to hull) weighing anchor, of which he was aware. We consider he should have identified the limited depth under the keel as a contributory cause of his engine problems. Consequently, he should have anticipated his speed may increase as he reached deeper water, as in fact it did."*

- (ii) In the Elder Brethren's opinion, it should have been apparent on board *Belpareil* by C-2 (and marginally sooner on board *Kiran Australia*) that *Kiran Australia* was losing speed through the water and was (relatively speaking) falling back towards her, and that (relatively speaking) she was pushing on towards *Kiran Australia*. Asked whether, as a matter of good seamanship, *Belpareil* should have considered taking action in response, and if so, what action(s), to be taken when, she should have considered taking, they advised that:

*"VHF exchanges between KA and BP at 00:52:00 and 01:03:13 should have left no doubt that KA was going to weigh anchor and move away. BP should have given KA sea room to achieve this."*

...

*BP should have taken such action as would have stopped them closing KA or going into shallower water given their draft and the predicted depth. ...*

*The options we consider good seamanship in these circumstances include the following:*

- *Immediately take way off the ship by reducing or stopping the main engine, as requested by KA. He was aware KA was in the final stages of weighing anchor.*
- *Pay out the rest of the cable on the port anchor. There was little cable left to deploy as far as the narrative recounts, however at this stage metres may have been significant.*
- *Set the engine to astern and drag (dredge) the cable to full scope and if necessary astern, to give KA room to weigh and move clear,*

*taking the risk of their cable contacting KA hull, rudder or propellor, with unpredictable consequences.*

- *If collision was still imminent, to slip the cable, that is to disconnect the cable at the end connection and let it run into the water. He would be free to manoeuvre clear of KA. The cable could have been recovered the next day.”*

(iii) Within their answer to one of my questions about the actions of *Kiran Australia*, the Elder Brethren said that the response by the master of *Belpareil* to being asked, at the last, to drag astern or stop engines, namely “*we cannot ... do that because of we want to go all the way to starboard, so that’s why*” (paragraph above), was “*not the response of a competent seaman. The bridge transcript of BP does not indicate why he responded in this way.*”

117. The effect of that advice, critical of *Belpareil* for maintaining Full Ahead, was clear enough, but it was not clear whether, and if so how, the Elder Brethren had taken into account, in reaching their view, the location of shallower water astern and to port, and the associated risk of grounding for *Belpareil*. The advice that *Belpareil* “*should have taken such action as would have stopped them closing KA or going into shallower water ...*”, perhaps indicated a view that *Belpareil* was correct to maintain enough way to avoid falling back towards shallower water, which would mean in turn that the criticism was only that Full Ahead was maintained, so that *Belpareil* did more than just hold station; but that was not as clear as it might have been from the way the Elder Brethren had expressed themselves, and most of the options for different action identified by them would have resulted in *Belpareil* falling back, not just holding position.

118. I asked the Elder Brethren the equivalent questions relating to *Kiran Australia*, i.e. whether a competent mariner in command of *Kiran Australia*, wishing to get clear of *Belpareil*, might have chosen to take way off the main engine from c.01:06 hrs, and whether, as a matter of good seamanship, *Kiran Australia* should have considered taking action (if so, what action(s), to be taken when), in response to appreciating that, relatively speaking, she was falling back towards *Belpareil* and *Belpareil* was pushing on towards her. I found the Elder Brethren’s advice in response unclear:

- (i) Their basic answer was that “*In the circumstances, with BP so close, a competent mariner would have attempted to weigh anchor without dropping astern*”. That is not what *Kiran Australia* did, supporting the view that *Kiran Australia* was at fault for taking way off the main engine so that she would, and did, drop astern; and the Elder Brethren were critical of both ships’ communication with a view to avoiding collision (see paragraph above).
- (ii) However, the Elder Brethren added that, “*The Master of KA may have reduced his main engine revolutions because the [anchor] cable was underfoot at 6 o’clock, or abeam at 9 o’clock and tension in the cable put the windlass under stress. Under these conditions the windlass can*

*stop working until the weight on the cable is reduced, in this case by reducing speed. It is also good practice to sight the anchor is clear of obstructions, underwater cables etc, before making way. He can have expected the Master of BP to be aware of this.”* That last sentence hinted at criticism of *Belpareil* rather than of *Kiran Australia*.

- (iii) The Elder Brethren opined that *Kiran Australia*'s “only option” upon realising that she was falling back towards *Belpareil* would have been “to increase speed, potentially over running the anchor ...”. That was advice to the effect that there was an action that *Kiran Australia* could have taken, and should have considered taking, to avoid the collision, viz. increasing engine speed, but it did not make clear whether any potential for over running the anchor was apt to cause a competent mariner not to take that action.

119. Having received the parties' written observations on the Elder Brethren's main advice, and considering the areas I have noted above where it was unclear, I raised requests for clarification, in response to which the Elder Brethren gave their supplementary advice. In view of the submissions advanced by *Belpareil* that I should not accept the Elder Brethren's advice concerning the ships' actions at and after C-3, it is appropriate to quote those requests and responses in full, as follows:

*“Question:*

*Please clarify whether, and if so how, the location of shallower water, relative to Belpareil's (BP) position, and any associated risk of grounding, influenced your advice given as Answer 1.1 [i.e. the advice in paragraphs 118.(i)above]. To the extent relevant, my finding of fact is that the Master of BP was aware of water depths in the vicinity, was concerned that they did create a risk of grounding for his ship, and that influenced his choice to stay Full Ahead from 01:07 hrs.*

*Answer:*

*Our answer was principally influenced by the proximity of Kieran Australia (KA). BP's port anchor was lying in the direction of KA and the cable was under tension. This tension would have limited the ability of the Master of BP to move his bow to starboard away from KA, even using her engines and rudder. In the final stages, when KA was close [to] BP in the final stages of weighing anchor, the tension on BP's anchor cable and her movement ahead drew her towards KA. If the reason the Master of BP set his engines at Full ahead was to avoid dropping to the north and grounding, his decision was ill founded. BP, and indeed KA, had both been close to grounding and had moved into deeper water as they moved west, and the flood tide grew. The Master of BP had the immediate risk of collision to consider, grounding was by now a second order hazard. In conclusion, while grounding may have been a factor in his decision making, we consider the risk of remaining at full ahead and the potential collision, outweighed the impact of grounding.*

*Question:*

*You advise that in the conditions described ..., a competent master in command of Kiran Australia “would have attempted to weigh anchor without dropping astern”. You then express a view as to why the Master of Kiran Australia may have reduced his main engine revolutions (resulting in his ship, as I put it, ‘falling back’ (relatively speaking) towards Belpareil).*

*Please clarify whether your advice ... is that what the Master of Kiran Australia did (i) was, or (ii) was not, something a competent master of that ship might reasonably have done in the conditions described.*

*Answer:*

*The Master of Kiran Australia was attempting to get clear of Belpareil by weighing anchor. He had informed BP of his intentions and asked them to keep clear. A windlass is not designed to recover an anchor cable under tension. As the tension increases the windlass slows and will stop. The engines and steering are used to reduce the tension, allowing the operator to power up the windlass again.*

*The manoeuvre was not straightforward. The Master of KA had to avoid over running the anchor to avoid damaging the bulbous bow or ship bottom plating, especially given the underkeel clearance. In any event, the friction of the cable on the hull could stop the windlass. If the ship dropped astern, with the cable leading ahead, the tension on the cable created by the tide may also have stalled the windlass. He also had to consider that as the anchor and cable were recovered, the holding power reduced and the tidal stream increased in effect, pushing the ship north. As is standard practice, he used the engines to mitigate the various factors. KA was a large ship in a strong tidal stream, with no close visual references to provide immediate situational awareness. The Master of KA may have allowed the vessel to drop astern, but given the situation he was in, we consider his actions were those of a competent master.*

*Question:*

*Your advice is that the only option available to Kiran Australia with a view to avoiding collision, upon appreciating (as you advise she should have by c.01:08 hrs) that having taken way off the main engine she was (relatively speaking) falling back towards Belpareil, was “to increase speed, potentially over running the anchor ...”.*

*Please clarify whether, in your opinion, not taking that option, i.e. not increasing speed at or after 01:08 hrs upon realising that she was closing on Belpareil, was something a competent master of Kiran Australia might reasonably have chosen.*

*Answer:*

*Attempting to move the KA away from BP, by increasing speed, over running the anchor, and dragging it under tension, was an option the Master of KA may have considered. In preparation for this, weighing anchor would be*

*stopped, the anchor and cable secured at the windlass, and the anchor party moved clear of the forecastle away from potential danger. This would have taken some minutes. The action may have moved the ship away from BP, but was not sustainable, even though it may have bought time to communicate with them again. Given that BP engines were at full ahead and she was increasing speed, we consider there was a risk it would have simply moved the location of collision. In the event the Master of KA remained focussed on keeping clear of BP by weighing anchor. Events were moving fast at 01:08 and we consider the actions of the Master of Kiran Australia were that of a competent master in a complicated situation.”*

120. Mr Turner KC supported the Elder Brethren’s advice, as thus clarified, and submitted, in addition, that although a competent mariner on *Belpareil* would have had well in mind that the ship was in relatively shallow water, they would also have been aware of:
- (i) the state of the tide – at 01:00 hrs, a predicted height of 2.7m above chart datum, set to increase over the following few hours;
  - (ii) the close proximity of *Kiran Australia* and the effort she was making to weigh anchor; and
  - (iii) the options for *Belpareil* other than moving ahead, including staying where she was and moving astern.
121. Mr Persey KC submitted that I should accept neither (a) the Elder Brethren’s criticism of *Belpareil* for maintaining Full Ahead nor (b) their lack of criticism of *Kiran Australia* for falling back towards *Belpareil*. I find it convenient to consider his submissions in reverse order ((b) before (a)).
- (b) *Kiran Australia*
122. In response to the Elder Brethren’s main advice, Mr Persey KC submitted that the key points were those I have already noted. *Kiran Australia* had allowed herself to fall astern when, according to the Elder Brethren, a competent master would have tried to weigh anchor without dropping astern; and she had failed to take the one course of action she should have identified as available to her to avoid a collision, namely increase ahead speed. I consider that was a justified submission, given the way the Elder Brethren had expressed their main advice.
123. In response to the supplementary advice clarifying that the Elder Brethren had not intended to criticise *Kiran Australia*, Mr Persey KC submitted that the advice, as thus clarified, had failed to take account of all known facts and had become internally inconsistent and speculative. In particular, he contended that:
- (i) The Elder Brethren failed to have proper regard to the fact that *Kiran Australia* fell significantly astern *and to starboard* for some 3 minutes, supposedly to reduce tension on a starboard anchor chain leading portside astern (see paragraph above).

- (ii) The Elder Brethren placed inappropriate weight on the fact that on occasion *Kiran Australia* told *Belpareil* she intended to, or was trying to, weigh anchor. At no point was there any agreement between the ships on the course of action that they would each take in the positions they found themselves in from (just before) C-3. What can be seen is two ships simply doing what their respective masters had decided they wanted to do. The Elder Brethren had noted in their original advice how the “*conversations between KA and BP were more in the nature of statements and requests to the other to take certain actions*”.
  - (iii) The Elder Brethren were wrong, and inconsistent, to excuse *Kiran Australia*, but not *Belpareil*, on the basis that she was “*a large ship in a strong tidal stream, with no close visual references to provide immediate situational awareness*”. The ships are materially identical in size, and *Kiran Australia* was less compromised navigationally, since *Belpareil* was more deeply drafted and had an unpredictable main engine response.
  - (iv) The Elder Brethren failed to consider properly that *Kiran Australia* was not incidentally or inadvertently allowed to drop astern. A deliberate decision was made to take way off the engine, so as to drop astern, without giving consideration to *Belpareil*’s position, although *Belpareil* was astern and was communicating urgently that all *Kiran Australia* need do to avoid contact was maintain position, which she could easily have done, so that *Belpareil* could clear away to starboard.
  - (v) Contrary to the opinion of the Elder Brethren, events were not moving fast at 01:08. They were continuing to move at the slow pace at which the whole episode had unfolded. The suggestion that in the final stages, *Belpareil*’s full ahead engine and the tension on her own anchor chain drew her towards *Kiran Australia* was inconsistent with the MADAS reconstruction and unsupported by any other factual evidence. Moreover (I add) the suggestion that *Kiran Australia* was at that point in the “*final stages of weighing anchor*” is not correct. She still had 5 shackles in the water, having taken 11 minutes or so prior to the fateful decision to drop back towards *Belpareil* to pull in 3 shackles.
  - (vi) The opinion that if *Kiran Australia* had increased engine speed to avoid falling back towards *Belpareil* there would have been a risk of simply moving the location of collision was “*pure speculation. There would have been no risk of collision if KA had maintained her position or increased her speed. BP was always moving bodily to starboard. Accordingly, the CPA would have increased as BP would have been moving away from KA rather than towards her.*”
124. I find myself in respectful agreement with all of those criticisms of the Elder Brethren’s assessment of the actions of *Kiran Australia*. In my judgment, Mr Turner KC offered no satisfactory answer to them:
- (i) He submitted that “*Of course the competent mariner would try not to drop astern, but circumstances could (and did) arise which rendered*

*that unachievable.*” In my judgment, there is no basis for the claim that dropping astern became unavoidable, unless by that claim Mr Turner KC meant only that the point arrived at c.01:06 hrs when continuing to weigh anchor would require some measure of dropping astern, but in that case the submission simply begs the whole issue which is whether *Kiran Australia* had a sensible reason for insisting on continuing to weigh anchor at that point, given that consequence.

- (ii) He acknowledged that there is “*no direct evidence*” of tension in *Belpareil*’s anchor chain drawing her towards *Kiran Australia*, but submitted that that did not affect the thrust of the Elder Brethren’s advice. To the contrary, however, it was one of the reasons why, according to the Elder Brethren, *Belpareil* was to be criticised, and *Kiran Australia* was not, for what was, in reality, a mutual insistence upon sticking to their respective courses of action when it should have been clear that a collision would result from doing so.
- (iii) He acknowledged the mutuality contended for by the submission summarised at paragraph above, but argued that it had not been overlooked by the Elder Brethren: “*What they have in mind is that (unlike BP) KA was in the process of weighing anchor, and that BP – had it been properly mindful of the difficulties that exercise would involve – would have done more to keep out of KA’s way.*” However, that provides no answer to the key criticism summarised in paragraph above; it again begs the real issue whether it was unreasonable for *Kiran Australia* to prioritise the process of weighing anchor over the imminent risk of collision if she dropped back; and in any event, I am unable to agree that the Elder Brethren’s analysis was as sophisticated as Mr Turner KC suggested. I consider that their clarified advice on the final few minutes displayed an unjustified inconsistency of approach as between the two ships.
- (iv) He submitted that if *Belpareil* had maintained the position she was in at C-7, “*it is obvious that there would have been no collision, as KA moved [thereafter] further west than north*”. At C-7, the ships were both clear over the 10m contour line, giving *Belpareil* in particular almost no under keel clearance, and perilously close to each other, the MADAS reconstruction calculating that their hulls were only 34m apart at the nearest point. After C-7 (see paragraph above), the most significant development, until C-3, was that *Kiran Australia* drove forward over the ground, creating exactly the clear space between them that her falling astern, and to starboard, thereafter collapsed, while *Belpareil* slowly began her movement towards deeper water (course over the ground between 240° and 270°) that she then continued from C-3, picking up speed as her under keel clearance improved. There is no more force in the submission that if *Belpareil* had not shifted, or continued her shift, away from the shallower water, there would have been no collision, than in the submission that if *Kiran Australia* had continued to clear away forward, or at all events had not fallen back, no collision would have resulted.

125. In the circumstances, I respectfully do not accept the Elder Brethren's advice that *Kiran Australia* is not to be criticised for deciding to take way off the main engine, then holding to that decision even when it was evidently putting the ships on course for imminent collision. The true burden of their reliable evidence on how a competent mariner in command of *Kiran Australia* ought to have responded was captured by Mr Persey KC's submission in response to their main advice (paragraph above). There was no reason, let alone good reason, for *Kiran Australia* to fall back dangerously towards *Belpareil* as she did. Easing the tension on the anchor chain was not reason to drop back to starboard, and was not good reason to continue dropping back at all after *Belpareil* reported an improved main engine response and a desire to clear away to starboard, astern of *Kiran Australia*, while she could.
126. *Kiran Australia's* actions from (just prior to) C-3, maintained thereafter, were without proper thought to the situation of *Belpareil*, were not calculated to avoid a collision, and in my judgment were not the actions that should have been ordered and then insisted upon by a competent mariner acting with due care to avoid contact.
127. I do not accept a submission by Mr Turner KC that *Kiran Australia* benefits from the principle that a wrong step taken in the agony of the moment is not negligence (see *Marsden and Gault, supra*, at 5-021), or the principle that it is not negligent to choose, on the horns of a dilemma, a perilous course that does not turn out well (*ibid.*, at 5-022 to 5-023). It was inventively suggested, in the absence of evidence, that the master of *Kiran Australia* was caught on the horns of a dilemma between (i) continuing to heave anchor and avoid fouling a dangerous wreck shown on the chart and (ii) interrupting that process to try and keep clear of *Belpareil* unexpectedly coming ahead when she had no obvious need to do so at that precise time. There was no agony of the moment and no such dilemma.
128. *Kiran Australia* was at fault in allowing herself to fall astern and to starboard, so as to be on course to collide with *Belpareil*, and for sticking to that course in the face of *Belpareil's* communicated insistence on continuing to shift to starboard, further away from the shallower water, in an attempt to clear astern of *Kiran Australia*. She (*Kiran Australia*) could and should have increased engine speed to avoid the imminent risk, and ultimate reality, of the collision that occurred.
- (a) *Belpareil*
129. One criticism of the Elder Brethren I have thus accepted, leading me not to accept their advice that *Kiran Australia* behaved as a competently navigated ship should have in the circumstances, is that they were inconsistent in their approach, failing to carry through to their ultimate views a mutuality present in much of their basic advice as to how competent mariners ought to have reacted. It follows that my rejection of their view that *Kiran Australia* was not at fault does not provide a reason to reject their view that *Belpareil* was.
130. There can be no defence on the part of *Belpareil* of acting in the agony of the moment or on the horns of a dilemma. In contrast to *Kiran Australia*, there

was a basis in evidence for proposing the latter, other things being equal. *Belpareil* faced a real risk of grounding, the flooding tide notwithstanding, and that risk in fact operated on the mind of her master in deciding, as he did, to push on with Full Ahead engine, achieving and then maintaining a course over the ground to escape the shallower water without (he hoped) getting too close to *Kiran Australia* (see paragraph above).

131. However, other things are not equal, because the doctrines do not avail a ship through whose prior fault the situation of peril has been created in the first place (*Marsden and Gault*, at 5-024). Here, the hazardous close encounter in which both ships had been caught up continuously for over half an hour since *Belpareil* arrived at or about where *Kiran Australia* had been safely anchored was entirely brought about by the prior faults of *Belpareil* in dragging, failing to use her starboard anchor to arrest the dragging, and failing to give proper, prompt warning that she was not merely dragging but unable to control or counter that through use of her main engine.
132. Mr Persey KC invited me not to accept the Elder Brethren's view that it was not good seamanship to maintain Full Ahead, as *Belpareil* did, from C-3, and especially still to do so from C-2 when it should have been apparent that the ships were set to collide unless something changed, because:
- (i) *Belpareil* kept her engine at Full Ahead, he submitted, as “*the only way that she could maintain her position and make very limited headway without falling further back into shallow water*”;
  - (ii) there was no reason, he submitted, for *Belpareil* to anticipate that *Kiran Australia* might fall back towards her as she in fact did;
  - (iii) none of the four options identified by the Elder Brethren (see paragraph above (the bullet points)), he submitted, was an option that a competent mariner would choose, as each would have led to *Belpareil* “*going astern, into ever shallower water, with a serious risk of damaging her stern gear and of going aground*”;
  - (iv) in his submission, the Elder Brethren's view that the risk of grounding should have been considered a second order hazard for *Belpareil* was unreasonable and unrealistic, and should be rejected.
133. I consider there is force in the submission that *Belpareil* acted reasonably in seeking to shift to starboard, as she did between C-7 and C-3, so as to get back to deeper water, not anticipating that *Kiran Australia* would fall astern and to starboard as she then did from C-3 onwards. However, by C-2 it should have been apparent to *Belpareil* that *Kiran Australia* was indeed falling back towards her, and I see no reason to reject the Elder Brethren's view, which is also my assessment, that it was unreasonable of *Belpareil* to insist upon what had become a collision course. It is not necessary to decide whether, had it come to it, *Belpareil* should have risked grounding rather than continue on that course. She had only to halt further progress to starboard rather than pursue it into hull to hull contact. In my judgment, Mr Persey KC's criticisms of the

Elder Brethren's advice, and his submissions generally on behalf of *Belpareil*, did not provide any satisfactory defence to that simple charge.

134. *Belpareil* was at fault in maintaining Full Ahead after C-2, thereby failing to take action to avoid collision and in fact driving into the collision that resulted. She was as unreasonable for sticking to her course in the face of *Kiran Australia*'s communicated insistence on continuing to come astern towards her as was *Kiran Australia* for sticking to that course. *Belpareil* could and should have used reduced engine speed after C-2 to avoid the imminent risk, and ultimate reality, of the collision that occurred.

#### *Causation*

135. The ships' faults from C-3 were undoubtedly effective causes of the collision. *Belpareil* contended that nothing prior to C-3 should be considered. In the course of explaining my conclusions on fault, I have already found that *Belpareil*'s prior faults in dragging, failing to use her starboard anchor, and failing to give proper, prompt warning of her difficulty, were 'but for' causes of the collision, whereas her failure to call more promptly for tug assistance was not (even) such a cause.
136. Of course, 'but for' causation is not enough. At the same time, assessing effective causation is not a simple matter of chronology, treating later events as more significant than earlier events. The rule that 'but for' causation is not sufficient must not become a reincarnated 'last opportunity' rule (as to which, see *The Ouro Fino* [1988] 2 Lloyd's Rep 325, at 328 rhc to 329 lhc).
137. True it is, as Mr Persey KC emphasised and I have mentioned, that the whole episode culminating in the moment of collision (and in fact continuing for a time thereafter) played out over a substantial period of time, largely in slow motion. But that may be the nature of unplanned, close encounter manoeuvres by large, laden cargo ships that were, and all things being equal had intended to remain, stationary at an anchorage, after one of them loses her station.
138. The lengthy period and slow speeds do not mean this was other than a single, continuous episode. It is not realistic to view the creation of the unplanned, and unwelcome, close quarters conditions the two ships inhabited from 00:30 hrs or thereabouts as mere background or history providing an opportunity for the two masters to perform well, or not, as the case may be, in trying to avoid contact. A sensible characterisation of the events of this case, and the lived experience on board both ships I have no doubt having read and listened to the bridge transcripts and having seen both masters give their evidence, is and was that *Belpareil* and *Kiran Australia* were at all material times in the grip of the perilous situation created by *Belpareil*'s negligence. Her uncontrolled dragging towards where *Kiran Australia* was stationed, safely at anchor, for want of proper notice of *Belpareil*'s difficulties, operated upon the ships' situation throughout.
139. The failure by *Belpareil* to call more promptly for tug assistance aside, all of the faults I have found contributed together to bring about the collision. They

were all effective causes, so that, there being causative fault on both sides, the question of apportionment arises.

### **Apportionment**

140. *Belpareil* bears much greater responsibility for the collision than does *Kiran Australia*. Her faults taken as a whole are greater in number and importance, since they include multiple initial faults but for any one of which the perilous situation the ships found themselves in would never have developed. The principle set out in paragraph above applies. In relation to the respective faults from C-3, in my judgment *Kiran Australia*'s were clearly greater than *Belpareil*'s, even tempering the assessment of *Kiran Australia*'s culpability by the application of that principle.
141. In the final few minutes, there was on *Kiran Australia*'s part both the bad decision not to maintain the separation she had created after C-7, instead setting herself on what could easily prove to be a collision course, and the bad decision to stick to what had plainly become a collision course. On *Belpareil*'s part the navigational fault was only of the latter kind, the initial decision to clear away to starboard having been sensible and not one that she ought to have identified as likely to set the ships up to collide. The two ships were equally guilty of poor communication with each other.
142. This is not a case in which a difference in causative potency of the various faults plays a material role. All the causative faults played a part together in causing a collision to occur of the type that occurred, with whatever damage resulted. It is not a case, for instance, of different faults of poor navigation or other negligence combining to cause a collision but where one (for example, excessive speed on one side) does most of the damage. Apportionment in this instance is driven by the relative degrees of blameworthiness on both sides.
143. I consider that the balance of responsibility in the circumstances of this case can be described in two equally fair and sensible ways, each of which properly translates to an apportionment of 70% to *Belpareil*, 30% to *Kiran Australia*. Firstly, taking the case as a whole and bearing in mind all causative faults on either side, I think it right to say that *Belpareil* was more than twice, but not close to three times, as blameworthy as *Kiran Australia*. Secondly, I think it fairly represents the case to say that the collision is equally *Belpareil*'s fault for creating the close quarters situation in the first place and the two ships' combined fault in how they acted and communicated in the final few minutes, as to which, as I have said, *Kiran Australia* was distinctly more blameworthy than *Belpareil*, even taking account of the fact that it was through *Belpareil*'s faults that the dangerous situation developed. The complementary arithmetic, then, is:  $70 \div 30 = 2.33$ ; and  $50 + 40\% \text{ of } 50 = 70$  vs.  $60\% \text{ of } 50 = 30$ .

### **Conclusion**

144. For the reasons set out above, I have concluded that *Belpareil* and *Kiran Australia* were both at fault and that all the fault on both sides was effective, acting in combination, to cause the collision between them early on 9

November 2021, except that *Belpareil*'s negligent failure promptly to call for tug assistance had no causative impact.

145. *Belpareil* was substantially more blameworthy, having been responsible by her faults for bringing the ships into a potentially dangerous situation in the first place and having been at fault again, albeit less so than *Kiran Australia*, in her actions from C-3 that ultimately brought the ships into damaging contact. A significantly greater share of responsibility rightly lies with *Belpareil*, and judgment will be entered apportioning liability for the collision 70% to *Belpareil* and 30% to *Kiran Australia*.

Figure 1

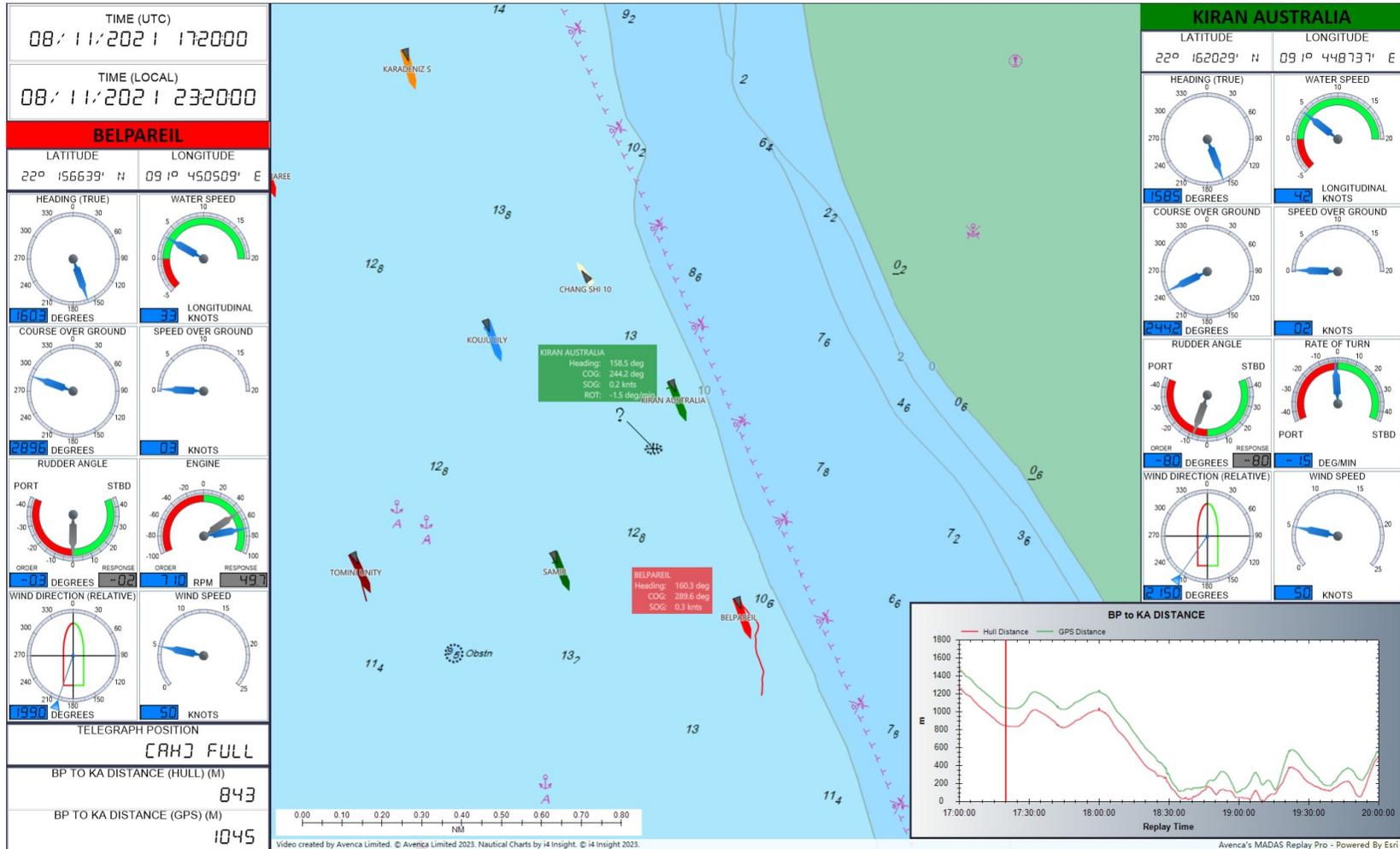


Figure 2

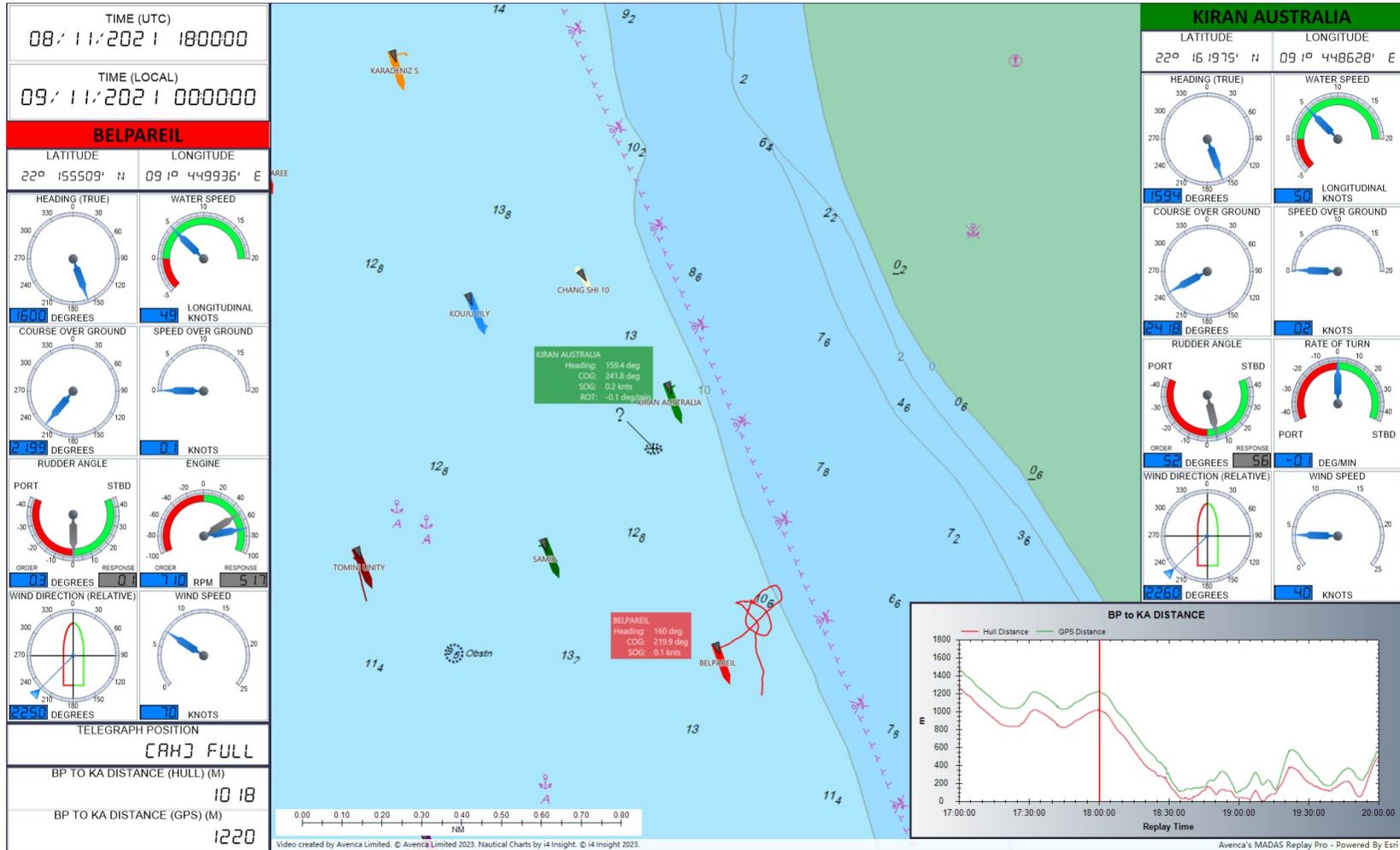


Figure 3

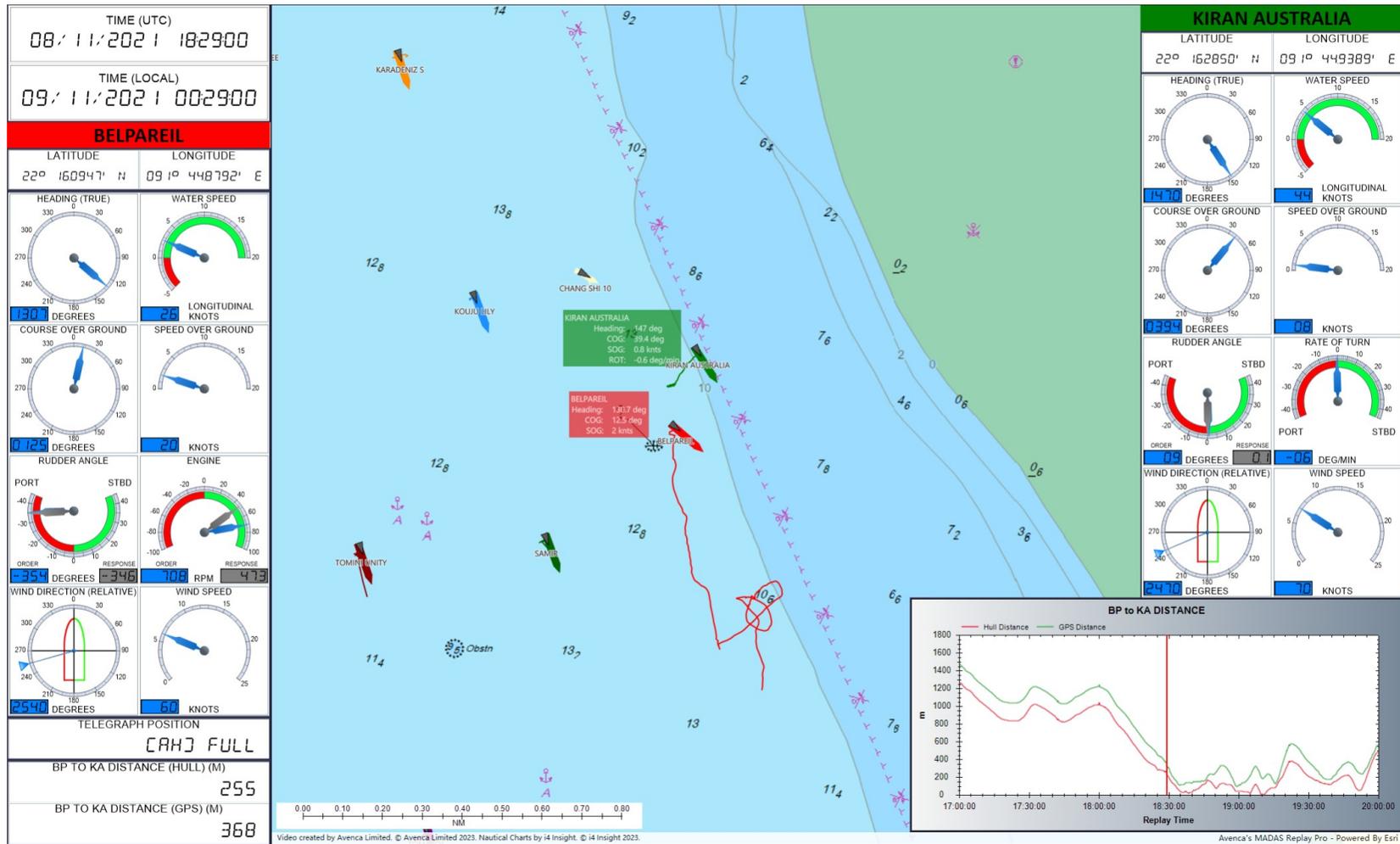
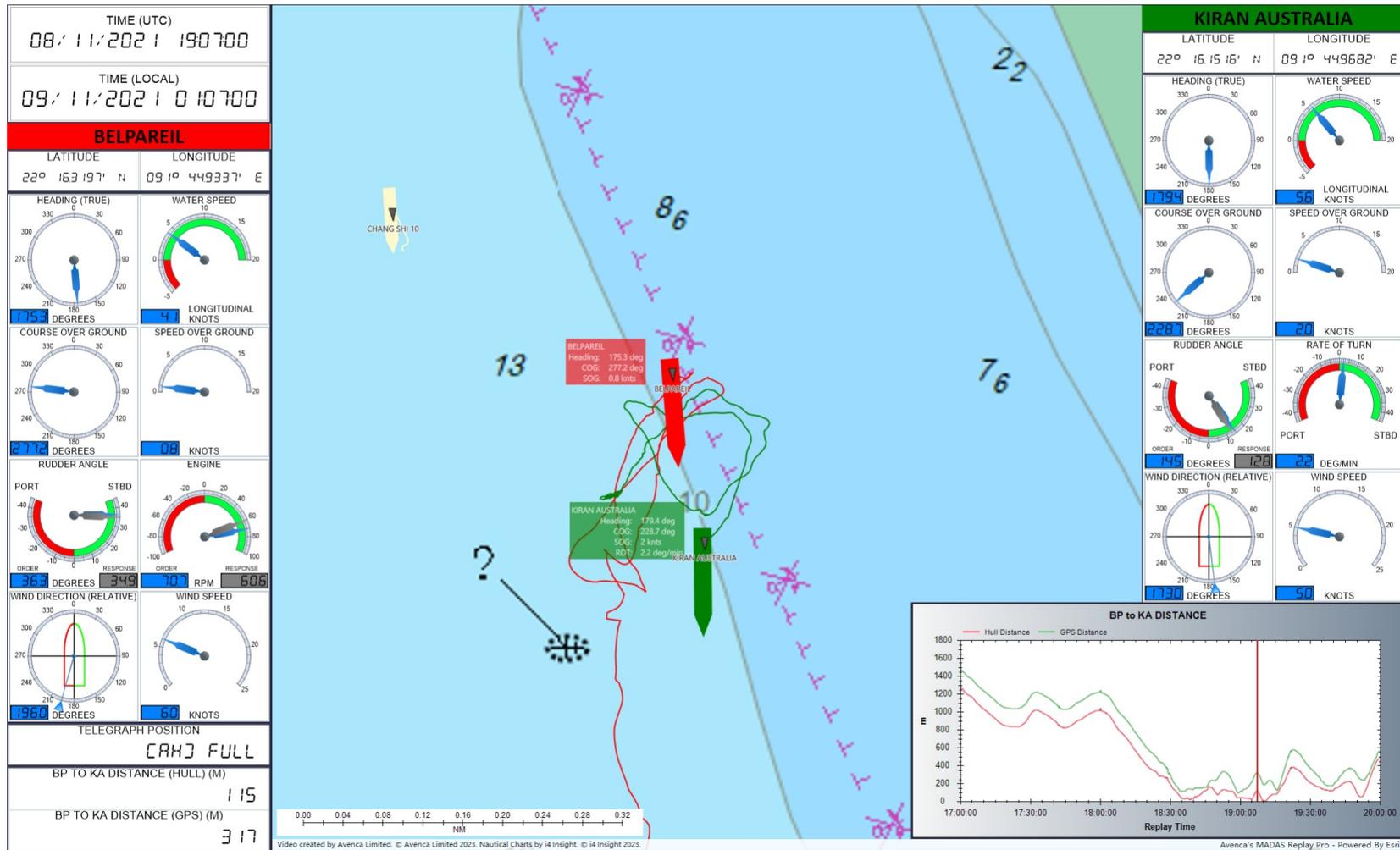


Figure 4



**Figure 5**

