[2020] EWHC 1986 (Comm)

Case No: CL-2017-000680

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2020

Before :

MR JUSTICE FOXTON

- -

Between :

NAUTICA MARINE LIMITED

Claimant

- and –

TRAFIGURA TRADING LLC

Defendant

- -
- -

Luke Pearce (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
Daniel Bovensiepen (instructed by **Ince Gordon Dadds LLP**) for the **Defendant**

Hearing dates: 7, 8 and 9 July 2020
Draft judgment circulated: 16 July 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 28 July 2020 at 0930

Mr Justice Foxton:

A THE DISPUTE

1. This is a dispute about whether a contract was concluded and, if so, what the terms of the contract were. The contract in issue is a voyage charter for the vessel "Leonidas" ("the Vessel"), of which the Claimant ("Nautica") is the registered owner.

2. It is common ground that between 8 and 13 January 2016, Nautica and the Defendant ("Trafigura") were engaged in negotiations for the chartering of the Vessel for the carriage of crude oil from the Caribbean to the Far East ("the Charterparty"). However, the parties are in dispute as to whether those negotiations "crossed the finish line", and in particular as to the effect of what it is agreed was an outstanding "subject" of those negotiations, "Suppliers' Approval" of the Vessel ("the Suppliers' Approval Subject').

3. Nautica's case is as follows:

    i) Following discussions on 13 January 2016 ("the 13 January Exchange"), the Charterparty was concluded, subject to a condition that it would cease to be binding if the Suppliers' Approval Subject was not satisfied.

    ii) It was an implied term of the Charterparty that Trafigura would take reasonable steps to satisfy the Suppliers' Approval Subject.

    iii) No such steps were taken and either (a) Trafigura cannot show (the burden being on it) that the Suppliers' Approval Subject would not have been satisfied if reasonable steps had been taken; or (b) the evidence establishes that the Suppliers' Approval Subject would have been satisfied if reasonable steps had been taken.

    iv) Accordingly, Nautica is entitled to damages in the amount of the difference between the profit it would have made on the Charterparty, and the profit it in fact made on the voyage it entered into in mitigation.

4. In response, Trafigura says:

    i) No contract was concluded, both because this was the consequence of the Suppliers' Approval Subject remaining outstanding after the 13 January Exchange, and because the parties had yet to reach agreement on all essential terms.

    ii) If a contract was concluded, it was not a term of the contract that it was required to take reasonable steps to satisfy the Suppliers' Approval Subject.

    iii) If Trafigura did owe an obligation to take reasonable steps, it performed it.

    iv) If Trafigura did not take reasonable steps when it was obliged to do so then either (a) Nautica cannot show (the burden being on it) that the Suppliers' Approval Subject would have been satisfied in time had reasonable steps been taken; or (b) the evidence establishes that the Suppliers' Approval Subject would not have been satisfied in time; and (c) in any event, Nautica is only entitled to damages on a "loss of a chance" basis.

B THE HEARING

5. Nautica was represented before me by Luke Pearce and Trafigura by Daniel Bovensiepen. I was grateful to both of them, and to the other members of the parties' legal teams, for the high quality of the written and oral submissions and of the case preparations generally, which ensured the smooth running of the trial. The trial was conducted by video link in accordance with the Civil Justice Protocol Regarding Remote Hearings and CPR PD51Y.

6. I heard evidence by video link from:

   i) Antonis Margetis, the tankers chartering manager of NJ Goulandris Maritime Inc, the commercial managers of the Vessel;

   ii) Captain Christos Gkionis, the operations and post-fixing manager of Andriaki Shipping Co Ltd, the technical managers of the Vessel; and

   iii) Jacob Christensen, a charterer employed by Trafigura.

7. In addition:

   i) Nautica relied on a witness statement from Ryan Sullivan, a broker who conducted the negotiations on behalf of Nautica, albeit Trafigura suggested that very little weight should be attached to it.

   ii) Trafigura relied on certain passages in the expert report of Julian Henry, a ship broker, which Mr Pearce did not need to subject to cross-examination.

8. Save for the issue as to what was said in the course of the 13 January Exchange, this is a case which turns principally on the documents, and the legal effect of the parties' exchanges. In these circumstances, it is not necessary to make any general findings in relation to the witnesses. To the extent that the evidence of particular witnesses is relevant to an issue I have to determine, I have addressed that evidence in the course of my findings.

C THE FACTS

9. As I have indicated, the underlying events emerge principally from the documents, and are not substantially in dispute. To the extent that there are any matters in dispute, my findings are reflected in the narrative which follows.

10. Negotiations between Nautica and Trafigura began on 8 January 2016. Those negotiations were carried out through two brokers at the firm Dietze & Associates LLC ("Dietze"): Mr Sullivan who acted for Nautica, and Mr O'Gorman who acted for Trafigura. Mr Sullivan largely received his instructions from Mr Margetis. Mr O'Gorman received instructions from Mr Christensen (who generally dealt with clean petroleum products, but was involved in this crude oil fixture in the absence on holiday of his colleague Mr Reed) and, from 13 January, from Mr Reed. When setting out the key documentary exchanges, I shall refer to communications by the respective brokers by reference to the party on whose behalf they were sent (Nautica or Trafigura).

11. At 09.53 Houston time ("HT") on 8 January 2016, Nautica offered the Vessel to Trafigura for the proposed fixture with a laycan of 5-7 February 2016, at a freight of $8 million. The offer was marked *"FIRM FOR REPLY 11 AM NY"*. Trafigura made a more detailed counter-offer at 11.36 HT. By 15.11 HT, the parties had reached what is agreed to be a non-binding agreement in principle which was stated to be "on subjects". The terms of that in-principle agreement were set out by Dietze in an email to both parties sent at 17.05 HT which I shall refer to as "the Preliminary Recap". The material provisions of the Preliminary Recap were as follows:

> "REF: M/T LEONIDAS/TRAFIGURA C/P DATED XXXXXX RECAP ON SUBJECTS …
>
> WE ARE PLEASED TO CONFIRM TERMS AND CONDITIONS OF THE FOLLOWING FIXTURE CONCLUDED JANUARY 8, 2016 **FOR ACCOUNT OF TRAFIGURA TRADING LLC OR NOMINEE** WITH **SUBJECTS TO CHTRS' S/S/R/MGT APPROVAL LATEST 1700 HOURS** HOUSTON TIME TUESDAY 12, 2016...
>
> CHARTERER: TRAFIGURA TRADING LLC OR NOMINEE
>
> REGISTERED OWNER: NAUTICA MARINE LIMITED, MONROVIA, LIBERIA …
>
> CH/PARTY FORM: BPVOY 3
>
> C/P DATED: **ON SUBJECTS**
>
> …
>
> OWNER WARRANTS:
>
> TO THE BEST OF OWNERS' KNOWLEDGE, VESSEL M/T LEONIDAS IMO # 9410234 IS NOT UNACCEPTABLE TO AT LEAST 3 OUT OF THE FOLLOWING 4 OIL MAJOR COMPANIES: BP/ CHEVRON/ EXXONMOBIL/ SHELL – **(PLEASE CONFIRM).**
>
> …
>
> GRADE(S): CRUDE OIL, MAX 3 GRADES WVNS
>
> …
>
> LOAD PORT(S): 1 TO 3 SAFE PORT(S)/STS CARIBS EXCL C/O/H BUT ALWAYS INCLUDING ARUBA-BONNAIRE-CURACAO-ST EUSTATIUS-ST LUCIA-ATLANTIC COLOMBIA.
>
> DISCH PORT(S): 1 TO 3 SAFE PORT(S)/STS LOCATION(S) SINGAPORE-JAPAN EXCLUDING NONOC ISLAND, CHINESE RIVER PORTS, NNO DALIAN EXCL NORTH KOREA.
>
> LAYDAYS: FEBRUARY 5-9 ... 2016, TO BE NARROWED TO 2 DAYS

> FRT RATE: BASE RATE: L/S USD 7,550,000 BASIS CARIBS TO STS SINGAPORE 1/1…
>
> DEMURAGE RATE: USD 82,500 PD/PR
>
> …
>
> FRT PAYMENT: IN U.S. DOLLARS BY TELE TRANFSER TO OWNER'S DESIGNATED BANK ACCOUNT AS FOLLOWS:
>
> (PLEASE ADVISE)
>
> INTERIM PORT CLAUSE: – **SUBJECT REVIEW AGREEMENT**
>
> CHARTERERS TO PAY FOR ADDITIONAL INTERIM LOAD/DISCH PORT AT COST WITH ADDITIONAL STEAMING TIME TO BE INCURRED FOR SUCH DEVIATION WHICH EXCEEDS DIRECT PASSAGE FROM FIRST LOADPORT TO FINAL DISCHPORT…
>
> OTHERWISE, AS PER THE ATTACHED TRAFIGURA/NJG TERMS WHICH **SUBJECT REVIEW/AGREEMENT**".

(emphasis added).

12. Given the disputes which subsequently developed, the following aspects of the Preliminary Recap are worth highlighting:

    i) The identity of the charterer was stated to be "Trafigura Trading LLC or Nominee" ("the Nominee provision").

    ii) The transaction was "subject to Chtrs' S/S/RMGT approval latest 1700 hours Houston time Tuesday 12". It is common ground that "S/S/R/MGT" stood for "Stem /Suppliers/ Receivers/ Management", and that "Stem" is an acronym for "subject to enough material", which meant subject to the charterers confirming that they had sufficient cargo to load on the Vessel. The result was that the conclusion of the Charterparty was subject to:

        a) The availability of sufficient cargo.

        b) The Suppliers' Approval Subject.

        c) The approval of the receivers of the cargo ("the Receivers' Approval Subject").

        d) The approval of Trafigura's management.

    iii) The loading ports were to include Aruba and St Eustatius (generally referred to by the parties as Statia).

    iv) The Charterparty was to be dated when the subjects were lifted and was to be on the BPVOY 3 form

v) Nautica was to provide a warranty that the Vessel had been approved by three of four identified oil majors (a requirement referred to by the parties as "the Colombian Statement" because it concerned the ability of the Vessel to call at Colombian ports), although the terms of that warranty had yet to be agreed.

vi) The clause addressing the right to call at intermediate ports during the voyage had yet to be agreed ("the Intermediate Port clause").

vii) The Charterparty was to be otherwise subject to the Trafigura/NJG terms, but those terms remained subject to review and agreement. This was a reference to two documents:

a) a document entitled, "Trafigura Voyage Charters: Additional Clauses and Amendments to BPVOY4 January 2010 C. TRAFIGURA ADDITIONAL TERMS TO BPVOY4 (as revised October 2009) (below clauses are amended and agreed between NJG & Trafigura November 2013)"; and

b) a document entitled, "TERMS UPDATED & AGREED 13TH NOVEMBER 2013"

(together, "the Trafigura/NJG Terms").

13. At 05.55 HT on 11 January 2016, Mr Margetis asked for certain changes to be made to the position as recorded in the Preliminary Recap including a requirement that Trafigura guarantee the obligations of any nominee; and amendments to the wording of the Interim Port clause and the Colombian Statement. His email also omitted the reference to the Trafigura/NJG terms. Trafigura responded at 15.32 HT, with their own proposed amendments to the Colombian Statement, and stated in relation to the Nominee provision that it would revert on the "chartering style used for this fixture".

14. At 04.26 HT on 12 January, Nautica confirmed its agreement to Trafigura's wording for the Colombian Statement. This was the day by which the Preliminary Recap provided that the subjects were to be lifted. There were internal exchanges within Trafigura, involving Mr Christensen and his colleagues Mr Pagel and Mr Steverlynck, the upshot of which was that Trafigura was still content with the freight rate but was not yet in a position to lift the subjects, because it had yet to conclude a contract for one of the cargoes it intended to lift. Accordingly Trafigura decided to ask Nautica to move the deadline for lifting the subjects to 10.00 HT on 13 January. In an internal email of 11.11 HT on 12 January, Mr Christensen said:

> "They [Nautica] want some subs lifted to extend overnight is there anything you can give them?"

15. Mr Pagel replied:

> "What would they be looking for? We are essentially waiting on the dates from PdVSA and they make decision in groups so it takes along time to do anything".

PdVSA was a reference to Petroleos de Venezuela SA, from which Trafigura intended to source the cargo to be loaded at Statia (albeit under a contractual chain by which

PDVSA would sell the cargo to Rosneft Trading SA ("Rosneft") who would sell it to Trafigura).

16. Mr Christensen responded:

> "Well if you have neither bought nor sold the cargo all you can do is lift cma [Charterers' Management Approval] and then you can no longer fail the vessel if she clears and you buy the oil".

17. In the event, Trafigura was able to secure Nautica's approvals to move the deadline for lifting all of the subjects to 10.00 HT on 13 January.

18. On his return from holiday on 13 January, Mr Reed realised that the Vessel had yet to be approved for loading in Aruba and Statia and that Trafigura did not yet have all the information it needed to address the subjects, including confirmation that the Vessel was capable of loading from the terminals at Aruba and Statia. Accordingly at 10.19 HT on 13 January 2016, he sent questionnaires from NuStar Energy LP ("NuStar") and Valero Refining Company Aruba NV ("Valero"), which operated the crude oil terminals at Statia and Aruba respectively, for Nautica to complete.

19. Beginning at 10.46 HT, a series of texts were exchanged between Mr Reed and Mr O'Gorman on the Trafigura side:

"Mr Reed:	Going mobile
Mr O'Gorman:	Gotcha, if we can get something off demurrage are you ready to roll? Think that may be the only way
Mr Reed:	Need statia aand aruba approvals only
	But otherwise yes we can lift it
Mr O'Gorman	Ok working on em
Mr Reed:	Walking into an appt
Mr O'Gorman:	Ok, only way I think we get demo is by having full subs. So once we get Q[uestionnaire]s we will ask for more time
	Have extension til 11.45 your time.
Mr Reed:	We will need hours more to get approvals once we have questionnaire
Mr O'Gorman:	Yes warming them up for that
	We have more time still waiting on Qs
Mr Reed:	K

Mr O'Gorman:	Just hit send on Nustar and Valero Qs [a reference to the return of the completed questionnaires at 11.50 HT]
	Left msg have until 1230 Houston, give me a shout when you can
	Give me a call
Mr Reed:	Give me a few
Mr O'Gorman:	K."

20. As is apparent, Mr O'Gorman raised the prospect of seeking to reduce the demurrage rate if Trafigura could accelerate the conclusion of the fixture. Mr Reed responded that approval was still needed for Statia and Aruba, but otherwise said that the subjects could be lifted. Mr O'Gorman thought that Nautica would only agree to reduce the demurrage rate if all of the subjects were lifted. Mr Reed stated that it would take more time to obtain the approvals once Trafigura had received the responses to the questionnaires. Mr O'Gorman confirmed that he had just sent out to Mr Reed the responses to the NuStar and Valero questionnaires.

21. At 12.04 HT, Mr Reed asked one of the Trafigura Montevideo offices to seek urgent clearance from Aruba and Statia, including advice from agents as to whether the Vessel would fit at Statia.

22. At 12.13 HT, Trafigura nominated the Vessel to Valero for loading at Aruba.

23. Mr O'Gorman passed Mr Reed's offer onto Mr Sullivan (who appears to have sat in close proximity to him in the office). Mr Sullivan telephoned Mr Margetis at 12.13 HT. It is common ground that in the course of that conversation, Mr Sullivan passed on Trafigura's offer to lift all of the subjects with the exception of the Suppliers' Approval Subject, in return for a reduction of the demurrage rate to US$75,000 and an extension of the deadline for lifting that subject (although there was a dispute as to whether the initial extension was to 16.00 HT or 17.00 HT). It is also common ground that Mr Margetis accepted that offer, and that Mr O'Sullivan communicated that acceptance to Mr O'Gorman. I address the issue of precisely what was agreed in the course of the 13 January Exchange below.

24. It is at this point that Nautica contends that the Charterparty was concluded, albeit one which would cease to be binding if it was not possible for Trafigura to lift the Suppliers' Approval subject despite taking reasonable steps to do so.

25. Shortly after the 13 January Exchange:

    i) At 13.11 HT, Trafigura Montevideo sought to confirm who it should send the nomination to, saying:

        "Hi Guys, our supplier is PDVSA, right? We are doing this through Rosneft? Should we send nomination to them?"

    That confirmation was given by Mr Steverlynck at 13.16 HT, who stated:

> "We will be buying from PdVSA via Rosneft. So everything needs to be handled via Rosneft please".

ii) At 13.28 HT, Trafigura Montevideo contacted Rocargo, local agents at Statia, to confirm that the vessel was "dimensionally acceptable for DCO [diluted crude oil] loading in Nustar".

iii) 13.32 HT, Valero confirmed the Vessel was acceptable for loading at Aruba.

iv) At 13.47 HT, the Vessel was nominated to Rosneft.

v) At 14.27 HT, agents at Statia informed Trafigura that the Vessel would be able to load at the single point mooring ("SPM"), a floating buoy or jetty anchored offshore for the handling of liquid cargo, but that NuStar would need to vet the Vessel before accepting it.

26. At 15.53 HT, Mr Sullivan emailed Mr Margetis and Mr O'Gorman to state "owners have extended until 18.00 hrs NY today on suppliers approval of the vessel for Statia and Aruba". When Mr Margetis saw Mr Sullivan's email, he called Mr Sullivan. Mr Margetis' evidence in his witness statement was as follows:

> "I … called Mr Sullivan asking him to send a message confirming also that Charterers had lifted all subjects save for 'Suppliers' approval from the respective terminals at Statia and Aruba.
>
> I remember this call well, since it was at this stage that I started to become concerned that Charterers were getting cold feet about the fixture. For example, I remember noticing during the call that I was on the speaker phone and I could hear noise in the background. During the call, Mr Sullivan told me that he had been advised by Mr O'Gorman (who had in turn been instructed by Jeff Reed of Charterers) that Charterers were now flexible on dates so they no longer had to commit to a 5-9 February 2016 window and that a window 10 days later would also be fine to them, but they were willing to still fix the Vessel and lift the remaining subject provided that Owners agreed to a discount of USD 800,000 on freight …
>
> …. I … told Mr Sullivan that the terms of the Charterparty had already been fixed and that any deviation from the Charterparty terms would be contrary to what had been agreed and 'illegal'".

27. Mr Margetis sent an email to Mr Sullivan at 15.56 HT:

> "As discussed and agreed verbally, Owners hereby grant Charterers extension until 17.00hrs Houston 13/01/2016. As agreed all subjects lifted apart from vessel's clearance from Valero and Nustar at Statia and Aruba. Please confirm back the above in writing".

28. At around the same time, Mr Sullivan sent the following email to Mr Margetis copied to Mr O'Gorman:

> "As per our telecon today at around 1313 NYT, Charterers lifted all subjects apart from suppliers' approval of the vessel for Aruba and Statia. As part of that you also agreed to reduce the demurrage rate to USD 75k".

He followed this up three minutes later with a further email, also copied to Mr O'Gorman:

> "As per my previous email we where only out for suppliers approval of the vessel for Aruba/Statia. I have given Charterers notice of a further hour extension".

29. At 16.59 HT on 13 January 2016, Mr Reed sent an email to Mr O'Gorman purporting to pull out of the Charterparty. The email stated:

> "At this time we are unable to lift all subjects on the vessel.
>
> All Trafigura's rights reserved."

30. This message was forwarded by Mr O'Gorman to Mr Sullivan two minutes later (at 17.01 HT). When he saw the email, Mr Christensen emailed Mr Reed and asked "What does that mean?" Mr Reed replied:

> "Dietze are retards lifted all subs except suppliers when they shouldn't have. I say they didn't have authority but owners insisting."

31. Also at 17.01 HT, Mr Reed contacted Trafigura Montevideo stating:

> "Can we have the fuel guys nominate to our fuel storage there and get a rejection since she won't fit? We have a communication issue with brokers/owners and need to show them a rejection to close it all out".

32. This communication merits a little unpacking. Mr Reed appears to have anticipated that Nautica (who had yet to reply to his email of 16.59 HT) would not accept that Trafigura was entitled to pull out of the fixture, and that it would be Nautica's position that unless the terminals at Statia and Aruba had rejected the Vessel, there was a concluded contract. That would be consistent with the position in the email which Mr Margetis had sent at 15.56 HT. Accordingly, notwithstanding the fact that the intended cargo was crude oil to be loaded at the SPM, Mr Reed sought to procure a document recording rejection of the Vessel by the terminal by sending a request to load a clean petroleum product (fuel oil), which would have been loaded at a berth which it was known the Vessel could not access.

33. At 17.17 HT, Mr O'Gorman sent the following email to Mr Reed:

> "Thank you for below email. I will pass onto owners. As per our previous discussions today in consideration for the reduction in the demurrage rate we lifted all subjects except for suppliers approval of the vessel for Aruba and Statia. The owners believe that with that the only reason that they can now be failed is if the vessel does not clear suppliers approval of the vessel at Aruba and Statia. So far they are not willing to change their stance and intend to contact their legal department to seek further advice and see this through to conclusion."

34. That view was rejected by Mr Reed. Nautica confirmed its position in an email timed at 17.54 HT from Mr Margetis:

> "Owners hereby wish to bring Charterers' attention that following the various offers and counters and the subsequent lifting of all subjects at 13.00 HRS New York on 13/01/2016 the fixture conclusion has been agreed – subject only to suppliers approval of the vessel in Statia and/or Aruba – on which Owners now rely and await Charterer's instructions for the prompt execution of the Charterparty. That having said, and in view of the Vessel now standing Clean Fixed both parties are now legally bound by the terms agreed…
>
> Owners now ask from Charterers to provide adequate documentation of Vessel's acceptance or rejection at Aruba/Statia."

35. Meanwhile, Mr Reed continued with his efforts to obtain a document from the Statia terminal rejecting the Vessel. At 18.26 HT, he told Mr Cardozo of Trafigura's operations team that it "would be super helpful if we could get a rejection even tonight from agents say[ing] vessel does not fit (I forget the berth names where fuel, [oil] loads)". At 18.36 HT on 13 January, he sent an email within Trafigura stating:

> "This has gone horribly wrong with Dietze/NJG – anyone close with those guys so we can talk directly?"

36. Mr O'Gorman sent Mr Reed an email at 21.08 HT stating:

> "We've kept this guy up til whatever time it is in Greece working on your behalf. He's not letting us release the ship in numerous attempts and keeps extending himself until he sees something from Nustar or Valero. We have let him know your stance and he obviously feels he has a leg to stand on at this time. At this point I'm open to suggestions … Their stance is still that this is only a technical subject for approval of the vessel. After reducing demurrage which they reluctantly agreed to they feel they have gone above and beyond to get this done".

37. Mr Reed replied at 21.28 HT:

> "The problem is those subjects should never have been lifted, I have re-read my text string to you 20 times and it doesn't make sense to me with the timing or context of the messages. I will go over with you again tomorrow, at one point around 11.30am you say we will have to be prepared to lift all subjects in order to get anything out of them to which my reply was we will need hours more to get approvals. This is nearly one hour later than the line you took as authority to lift subs. The timing and context of the conversations is completely wrong to have been interpreted as we were willing to lift, no subjects should have been lifted without express authority to do so … We will not be pushed into a deal we have not firmly committed to".

38. At 05.47 HT the next morning, Mr Reed told the operations department to "please push for a rejection from our typical loading/discharging berths. I.e. where we load doba from, soonest possible".

39. Mr Cardozo duly sent such a request to NuStar early on 14 January 2016, and received the expected and desired response that the Vessel's dimensions meant that she was not suitable for loading at berths one and two. That message (but not the message from Trafigura to which it responded) was then forwarded up-the-chain to Mr Margetis. However, the intended deception of Nautica did not succeed, because Mr Margetis smelled a rat. He ascertained that berths one and two were not the berths at which the intended cargo of crude oil would be loaded. Mr Margetis pointed this out to Trafigura, giving them until 11.00 HT to lift the Suppliers' Approval Subject or provide a "genuine rejection". When no response was received by that deadline, Nautica sent an email at 11.07 HT stating that it accepted Trafigura's repudiatory breach of contract as bringing the Charterparty to an end.

40. Nautica entered into what Trafigura accepts was a reasonable substitute charterparty ("the Substitute Fixture') on 20 January 2016. However, the fall in the freight markets between 11 and 20 January 2016 made the Substitute Fixture less profitable. Mr Bovensiepen did not mount any real challenge to Nautica's calculation of the difference between the net profit Nautica would have made under the Charterparty, and that made under the Substitute Charterparty, namely US$491,690.67, and I find this figure to be established on the evidence.

D WAS A BINDING CHARTERPARTY CONCLUDED?

The Applicable Legal Principles

41. There was little dispute as to the generally applicable legal principles, which Lord Clarke JSC set out in RTS Flexible Systems v Molkerei Alois Muller [2010] 1 WLR 753, [45] in the following terms:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement on such terms to be a precondition to a concluded and legally binding agreement".

42. In formulating this summary, Lord Clarke JSC at [49] referred with approval to the oft-cited summary of Lloyd LJ in Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601, 619:

> "As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarized as follows:
>
> (1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see Hussey v. Horne-Payne).

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see Love and Stewart v. Instone, where the parties failed to agree the intended strike clause, and Hussey v. Horne-Payne …

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see Love and Stewart v. Instone per Lord Loreburn at p. 476).

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'".

The legal effect of contractual "subjects"

43. In RTS, Lord Clarke JSC noted that sometimes the parties agree that no contract will be concluded until some formal step (such as the signing of a written contract) takes place ([46]). This is frequently done by using the "subject to contract" rubric. In those circumstances, Lord Clarke JSC noted at [55]:

> "the question is whether the parties have nevertheless agreed to enter into contractual relations on particular terms notwithstanding their earlier agreement or understanding."

Lord Clarke JSC noted at [56] that whether, against the background of "subject to contract" dealings, the parties have agreed nonetheless to enter into a contract without

signing a written contract will "depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold". He held that an agreement to be bound notwithstanding the absence of a written contract need not be express ([67]). In that case, the Supreme Court concluded that the parties had agreed to enter into contractual relations notwithstanding the absence of a signed contract because "any other conclusion makes no commercial sense" ([86]).

44. In addition to agreeing, by the use of "subject to contract" or some similar rubric, that there will be no binding contract until a written contract has been signed, the parties may agree that there will be no binding contract until all terms of the proposed contract have been agreed, whatever their relative importance to the parties' overall bargain. A well-known formulation which achieves that effect in the charter market is to provide that agreement is "subject to details". In the leading authority on those words, Star Steamship Society v Beogradska Plovidba (The Junior K) [1988] 2 Lloyd's Rep 583, Steyn J held that the effect of the phrase was to prevent any contract being concluded until all of the terms had been agreed. He stated at p.588:

> "I would respectfully suggest that it is in the interests of the chartering business that the Courts should recognise the efficacy of the maritime variant of the well-known 'subject to contract'. The expression 'subject to details' enables owners and charterers to know where they are in negotiations and to regulate their business accordingly. It is a device which tends to avoid disputes and the assumption of those in the shipping trade that it is effective to make clear that there is no binding agreement at that stage ought to be respected."

45. However, as with "subject to contract", so with "subject to details" it is possible for parties who have initially agreed to proceed on the basis that there will be no concluded contract until all the terms have been finalised, to decide nonetheless to enter into contractual relations on those terms which have been agreed while continuing to negotiate the outstanding terms (i.e. a contract of the type envisaged by Lloyd LJ in stage (4) of his summary in Pagnan).

46. The legal effect of the phrases "subject to contract" and "subject to details" is, therefore, to enable either party to avoid entering into contractual relations by refusing to sign a written contract or reach agreement on any outstanding terms, as the case may be. Similarly, no contract comes into existence when an agreement is reached "subject to board approval" by one or other party, because the effect of those words is to postpone the decision on whether to enter into legal relations to a subsequent stage. In Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm), a case involving a settlement agreement which was subject to one party obtaining board approval, Males J held (at [33]) that the agreement was not binding on either party until board approval was given.

47. When the event on which the entry into contractual relations depends is a decision by one or both parties to undertake a legally binding commitment, there is no room for the argument that some form of preliminary agreement comes into existence imposing an obligation on one or both of the parties to seek to complete the bargain. This is both because the purpose of the "subject" is to signal that the parties have not yet reached the stage of any legal commitment (as Devlin J noted in Windschuegl (Charles H) Ltd v Pickering & Co Ltd (1950) 84 Ll L LR 89, 92) and because of the

traditional hostility of the common law to "agreements to agree" given the difficulties of enforcing them (*Chitty on Contracts* 33rd edn. paras. 2-144 to 2-147).

48. In contrast, there are cases in which an agreement is said to be "subject" to some event within the control of someone other than one of the parties, and in which it has been held that the "subject" is not a "pre-condition" which prevents a binding contract coming into existence, but instead has the effect that performance does not have to be rendered if the "subject" is not satisfied for reasons other than a breach of contract by one of the parties ("a performance condition"). This is the position where a contract for international sale is made subject to obtaining an export licence (Brauer v James Clark [1952] 2 Lloyd's Rep 147) or an import licence (Windschuegl (Charles H) Ltd v Pickering (Alexander) & Co Ltd *supra*), and where a contract for the sale of land is made subject to obtaining planning permission (Batten v White (No 2) (1960) 12 P&CR 66, 71).

49. I accept Mr Pearce's submission that an important factor in determining whether a "subject" is a pre-condition or a performance condition is whether the satisfaction of the "subject" depends upon the decision of a contracting party, or on that of a third party. However, not all "subjects" fit easily into one or other of these categories. One commonly encountered "subject", which has divided judges as to its classification, is when a contract is made subject to survey or subject to satisfactory survey. There are a number of cases which have treated this expression as a pre-condition: for example Graham and Scott (Southgate) Ltd v Oxlade [1950] 2 KB 257, 261, Marks v Board (1930) 46 TLR 424 and Astra Trust Ltd v Adams and Williams [1969] 1 Lloyd's Rep 81. In reaching this conclusion, these cases emphasise the entitlement of the contracting party to determine whether the survey is satisfactory to it (e.g. Oxlade at p.267: "she had constituted herself the arbitrator of whether the survey is satisfactory").

50. However, similar language has been held to create a performance condition, albeit in cases in which a seller has sought to rely on the buyer's entitlement to conduct a survey as a reason why the seller is not bound. In Varverakis v Compagnia de Navegacion Artico SA (The Merak) [1976] 2 Lloyd's Rep 250, the Court of Appeal held that an agreement incorporating the terms of the Norwegian Sale Form ("NSF") for the sale of a ship, which was made "subject to superficial inspection", was a binding contract which obliged the seller to offer the ship for inspection and the buyer to conduct a survey. The Court reached this conclusion because the NSF imposes an obligation on the buyer to inspect the ship, and to do so on a timely basis, and gives *the buyer* (but not the seller) the option to cancel or maintain the contract after the survey. Ee v Kakar (1980) 40 P&CR 223 is another case in which the seller wanted to rely on the words "subject to survey" to relieve it of liability for breach of contract, albeit Walton J was clearly of the view that the buyer was bound to perform such a survey, or lose the benefit of the condition, and was bound to act *bona fide* if presented with a report which was "basically a satisfactory one".

51. The courts have frequently (but not invariably) treated "subjects" dependent on one party concluding a contract with a third party as pre-conditions rather than performance conditions (e.g. Beazley Underwriting v Travellers Companies [2011] EWHC 1520 (Comm) and Dany Lions v Bristol Cars Limited [2014] EWHC 817 (QB)). Just as the courts are reluctant in "subject to approval" and "subject to details" cases to determine what an objectively reasonable outcome of the contracting parties'

negotiations would be, they are similarly reluctant to undertake such an enquiry in relation to the putative contract between the contracting party and a third party. However, the cases addressing this issue are not all to the same effect. While the words "subject to the purchaser obtaining a satisfactory mortgage" were held to be a pre-condition in Lee-Parker v Izzet (No 2) [1972] 1 WLR 775, largely because the provision was held to be too uncertain to be enforceable, the decision has been criticised (e.g. in Lewison, *The Interpretation of Contracts* 6th para. 16.05) and a different conclusion on similar language was reached in Janmohamed v Hassam [1976] 24 EGLR 609.

52. While each case will depend on its own individual facts and commercial context, it is clear that a "subject" is more likely to be classified as a pre-condition rather than a performance condition if the fulfilment of the subject involves the exercise of a personal or commercial judgment by one of the putative contracting parties (e.g. as to whether that party is satisfied with the outcome of a survey or as to the terms on which it wishes to contract with any third party).

53. While these general principles apply to contracts whether they pertain to the domain of land rats or water rats, there is a particular feature of negotiations for the conclusion of contracts for the employment of ships which should be noted. When the main terms for a charterparty have been agreed but the parties have yet to enter into contractual relations, this is generally referred to by shipowners, charterers and chartering brokers as an agreement on "subjects" or "subs", an expression which signals that there are pre-conditions to contract which remain outstanding. The conclusion of a binding contract in respect of such an agreement is seen as dependent on the agreement of the relevant party or parties to "lift" (i.e. remove) the subjects. The position is accurately summarised by the editors of *Carver on Charterparties* (2017) at para. 2-031 as follows:

> "The parties may agree the terms of a charterparty and one such term may be a condition precedent that unless and until the condition precedent is satisfied, no binding contract comes into being. In charterparty negotiations, such conditions precedent are often referred to as 'subjects' and the satisfaction of those conditions precedents is referred to as 'lifting the subjects'".

(To similar effect see *Wilford on Time Charterparties* (4th) para. 1.11).

54. Where a "subject" is only resolved by one or both of the parties removing or lifting the subject, rather than occurring automatically on the occurrence of some external event such as the granting of a permission or licence, the "subject" is likely to be a pre-condition rather than a performance condition.

"Subjects to Chrts' S/S/R/MGT Approval latest 1700 Hours"

55. Turning to the specific phrase at issue in this case, Mr Pearce for Nautica rightly accepted that the reference to "MGT Approval" creates a pre-condition. Further, there is long-standing authority that "subject to stem" is a pre-condition, rather than a performance condition. This issue arose in Kokusai Kisen Kabushiki Kaisha v Johnson (1921) 8 Ll L Rep 434. In a judgment which is a model of concision, Rowlatt J held at p.435:

> "The point is whether that means that the whole thing is in abeyance as an actual contract; whether it is held up until Friday and then goes off if there is not a stem confirmed, or whether it only goes off if there is not a stem and if the absence of the stem cannot be attributed to the failure of the charterer to try and arrange one".

Holding that the former analysis was correct, the Judge held:

> "There is no reason, having regard to the shortness of the days and the situation of the parties, why this should not be regarded as meaning that the charterer is saying to the owner: 'we have arranged this charterparty, but I am not in a position to tell you if I can undertake to load this ship until I have found out whether I shall have a stem on Friday'".

It will be noted that it was the charterer's *confirmation* that it was willing to undertake to load the ship, rather than the conclusion of a contract to procure the cargo, which Rowlatt J thought significant. It would be open to a charterer to give such a confirmation even if it had not in fact procured a stem, if it was willing to run the commercial risk inherent in this course. It would equally be open to a charterer not to give that confirmation if it had in fact procured a stem, or could easily do so.

56. The KKK decision has been cited as authority as to the effect of a "subject to stem" provision in successive editions of the leading maritime law textbooks – for more recent examples, see *Carver on Charterparties* (1st) para. 2-031; *Scrutton on Charterparties and Bills of Lading* (24th) para. 2-004 and *Voyage Charters* (4th) para. 1.23. Mr Pearce did not invite me to reach a different decision, but in any event I would not have been willing to depart from the accepted interpretation of the expression which has stood for nearly 100 years (cf. Sunport Shipping Ltd and others v Tryg-Baltica International (UK) Ltd (The Kleovoulos of Rhodes) [2003] 1 Lloyd's Rep 138, [25]-[28]).

57. In circumstances in which the first and last parts of what is a compendious phrase create pre-conditions and not performance conditions, it would to my mind be surprising if the two intermediate elements had a different status. That is all the more so when all are described as "subjects", and the same tight deadline by which they have to be approved or lifted applies to all. As Rowlatt J noted in KKK, the "shortness of days" for compliance is a factor which supports a pre-condition, rather than performance condition, analysis. Further, the first three subjects – stem, suppliers and receivers' approval – all relate to matters which bear on the commercial desirability for the charterer of entering into the charterparty: can the charterer procure a cargo for carriage on this vessel, which can be loaded on and discharged from the vessel, and is the vessel acceptable to the suppliers and receivers? In my opinion, Mr Bovensiepen is correct in submitting that "subjects" which relate to matters affecting the commercial desirability for the charterer of the decision to charter the ship are qualitatively different from matters such as the obtaining of import and export licences in sale of goods contracts.

58. There are other reasons why I prefer Mr Bovensiepen's submission that the Suppliers' Approval Subject, in its ordinary usage, is a pre-condition and not a performance condition. There appears to be a surprising degree of uncertainty as to what the Suppliers' Approval Subject means. Nautica had originally pleaded that the phrase

had a customary meaning, namely the approval of the terminal at which the cargo would be loaded. Nautica obtained permission to adduce expert evidence as to that customary meaning, and served an expert report supporting its interpretation from Mr Colin Pearce. In response, Trafigura served an expert report from Mr Julian Henry who said that the expression meant approval of the seller from whom the charterer was acquiring the cargo. Neither expert was able to point to any third party source shedding light on the question, and understandably, in the face of this disagreement in view, Nautica did not pursue its argument as to custom, and neither expert was called to give evidence.

59. It is clear on the contemporaneous documents that the parties in this case had similarly divergent understandings. I accept Mr Margetis' evidence, which is supported by the terms of his email of 15.56 HT on 13 January, that he understood the expression to mean the approval of the terminal from which the cargo was to be loaded. However, I also accept Mr Christensen's evidence that the understanding within Trafigura was that the Suppliers Approval Subject was concerned with the approval of the seller from whom the cargo was to be acquired, not simply that of the terminal from which the cargo was to be loaded. It is noteworthy that in relation to both the Vessel, and the alternative ship which Trafigura chartered in its place, it was the sellers of the cargo to whom Trafigura nominated the ship and from whom it sought approval. The only exception related to a cargo already owned by Trafigura, which was to be loaded at Aruba, for which the only approval sought was that of the terminal. However, the fact that, in relation to the cargo to be loaded at Aruba, the only supplier-side approval Trafigura needed to gain for its own commercial purposes was that of the terminal (because it owned the cargo) cannot, in my view, have the effect of narrowing the meaning of subject when used in relation to cargos to be sourced from a third party.

60. Given the degree of uncertainty as to the meaning of the expression, it seems highly unlikely that the Suppliers' Approval Subject was intended to create a contractual obligation of some kind, which would be the inevitable consequence of classifying it as a performance condition.

61. I prefer Trafigura's contention that the phrase encompasses all those approvals which the charterer commercially wishes to obtain on the supply side (with the Receivers' Approval Subject having an equivalent meaning so far as the delivery side is concerned), and it can only be said to have been satisfied when the charterer lifts or waives the term. It is clear that FOB suppliers of oil cargoes will frequently wish to approve the vessel into which cargo is to be delivered: not simply to ensure that the vessel is dimensionally capable of accessing the load-point, but with regard to matters such as the vessel's physical and documentary condition, flag and trading history. This was the evidence of Mr Henry, Trafigura's expert, and it was supported by a number of sets of standard sale and purchase terms which Mr Bovensiepen referred me to. For example Shell International Trading and Shipping Company Limited's "General Terms & Conditions for Sales and Purchases of Crude Oil" (2010 edition) provides at Section 5.5 that the seller can reject a vessel nominated by the buyer on any reasonable ground, including by reference to the seller's internal ship vetting system and internal ship vetting policy. BP Oil International Limited's "General Terms and Conditions for Sales and Purchases of Crude Oil" (2015 edition) are to similar effect. There were broadly similar provisions in the contract of sale concluded

between Rosneft and Trafigura (by reason of the incorporation of PdVSA's general terms and conditions). In these circumstances, I see no reason to read the Suppliers' Approval Subject down so that it encompasses only one, rather than all, of the approvals which a charterer might wish to obtain in relation to the sourcing and loading of the cargo onto a particular vessel before committing itself to a charter.

62. The conclusion I have reached as to the true scope of the Suppliers' Approval Subject provides further strong support for the classification of this phrase as a pre-condition and not a performance condition. It is for the charterer to determine who its contractual supplier will be. It may be in discussions with more than one potential supplier at the same time or in quick succession, or have a choice between loading a cargo it already owns or buying cargo in from a third party. In these decisions, a wide range of commercial considerations will be in play. It would be wholly unreal against that background to suggest that the charterer was under an obligation to the owner to obtain the suppliers' approval from "whoever the defendant intended to be the suppliers" or "the approval of the supplier who they said they were waiting for the approval of" when the subject was imposed (which was Mr Pearce's submission if I rejected his construction of the Suppliers' Approval Subject). This would constrain the charterers' choice of supplier, hinder its ability to "change horses" during a negotiation and commit it to obtaining the approval of a particular supplier even after negotiations with that supplier had broken down and the "supplier" had no reason to engage with requests that it approve a vessel to lift a cargo which it was not going to supply.

63. Even on Nautica's construction of the Suppliers' Approval Subject, there remains the difficulty that the precise point at which a vessel would load (and in respect of which terminal approval would be required) may change depending on the commercial choices which the charterer makes either as to the seller with whom its contracts, or the particular source of cargo which it decides to lift. By way of example, it was common ground in this case that the Vessel could access the SPM at Statia, but not the jetties there. Similarly, the confirmation which Trafigura obtained at Aruba concerned the Vessel's ability to load from a specific tank (tank 956) but it is, of course, possible, that the Vessel might not have been approved by the terminal for loading from a different tank. These considerations, and the difficulties of reconciling any duty to the owners with the charterers' general freedom of action in relation to sourcing cargo, weigh heavily against the suggestion that, even if the Suppliers' Approval Subject bears the narrow meaning for which Nautica contends, it is a performance condition and not a pre-condition.

The position on the other terms prior to the 13 January Exchange

64. Mr Bovensiepen argued that there was a further obstacle to the conclusion of a binding contract, namely that the parties had yet to agree all of the terms on which agreement was required before a binding contract was concluded.

65. There are three specific terms in issue, which I deal with in turn.

66. First, there is the issue of the identity of the charterer. The Preliminary Recap had provided that the fixture was "for account of Trafigura Trading LLC or nominee". In responding to those terms for Nautica at 05.55 HT on 11 January, Mr Margetis had asked for Trafigura to guarantee the obligations of any nominee. In response, Nautica

had said that they would revert on the issue of chartering style, but they had not done so by the time the dispute between the parties materialised. While I accept Mr Margetis' evidence that, ultimately, this issue was not of great importance to Nautica, the issue of whether Trafigura could nominate another charterer, and, if so, on what terms, remained an outstanding issue between the parties and, subject to the effect of the 13 January Exchange, was an issue which the parties contemplated would be resolved as part of their final bargain.

67. Second, the Preliminary Recap contained the Interim Port Clause (regulating Trafigura's right to ask the Vessel to call at further ports in the course of the voyage), which was described as being "SUBJECT REVIEW/AGREEMENT". This made it clear that Trafigura had not committed itself to the wording in the Preliminary Recap. Mr Margetis in his response at 05.55 HT on 11 January made certain amendments to the clause. The response took the form of sending back the Preliminary Recap with additional text, and the version sent back did not delete the words "SUBJECT REVIEW/AGREEMENT" which had been included in the Preliminary Recap. In responding to Mr Margetis' email at 15.32 HT, Mr O'Gorman for Trafigura did not take issue with Mr Margetis' amendments and responded "all else (OK)".

68. I do not accept Trafigura's argument that Mr Margetis' failure to delete the words "SUBJECT REVIEW/AGREEMENT" from Trafigura's original formulation of the Interim Port Clause had the effect that Nautica was itself reserving its right to make further amendments to this clause before agreeing to it. These words were simply a drafting legacy from the Preliminary Recap. Nautica had reviewed the clause, put forward its own amendments for agreement, and Trafigura had agreed to them. Agreement on this term was not, therefore, outstanding after Mr O'Gorman's email of 15.32 HT on 11 January 2016.

69. Finally, the Preliminary Recap provided that the Charterparty would be "otherwise as per the attached Trafigura/NJG terms which subject review/agreement". When responding at 05.55 HT, Mr Margetis did not include the reference to "otherwise as per the attached Trafigura/NJG terms which subject to review/agreement", nor did he strike through these words in the way in which he did for other parts of the Preliminary Recap with which he was not in agreement.

70. In the course of his cross-examination, Mr Margetis stated that he had deliberately omitted this term, because Nautica was content to contract on the basis of an unamended BPVOY 3 form, which he regarded as a better charter. I am unable to accept this evidence. It is extremely rare for a charterparty to be concluded on the basis of a standard form without amendments or additions in "rider clauses", amendments which, in the case of what are essentially charterer-friendly standard forms produced by the oil majors, are frequently included to render the charterparty more balanced from the owner's perspective. Further, I am satisfied that if Mr Margetis had been intending to signal a change in the proposed contractual terms by omitting the reference to the Trafigura/NJG Terms, he would have left the reference in but shown the text in strike-through. It seems to me much more likely that Mr Margetis simply omitted the reference to the Trafigura/NJG Terms by accident.

71. Nor can I accept the suggestion that Mr Margetis, by omitting any reference to the Trafigura/NJG Terms from his email ,was objectively signalling agreement to those terms without any further amendments, nor that Mr Christensen's "all else OK" can

somehow to be taken as agreement to proceeding on this basis. The Trafigura/NJG Terms are lengthy and detailed provisions on matters of obvious importance, and it cannot lightly be assumed that Trafigura and Nautica had decided to commit to them without the review referred to in the Preliminary Recap. The objective interpretation of the exchanges is that the parties had not yet got to round to finalising this part of their negotiations.

72. In these circumstances, I am satisfied that, subject once again to the effect of the 13 January Exchange, the issue of which of the Trafigura/NJG Terms would form part of the Charterparty and whether any further amendments were necessary to those terms was one which the parties contemplated would be resolved as part of their final bargain. The parties' failure to return to those issues before the deadline for lifting "subjects" expired reflected the fact that their attentions were diverted elsewhere, rather than the fact that they had already put these issues to bed.

73. I will refer to the two matters on which I have found agreement remained outstanding as "the Outstanding Terms". Mr Bovensiepen did not suggest that either of the Outstanding Terms involved matters on which agreement was essential to avoid the resultant contract being too uncertain to be legally enforceable. However, he did submit, and I accept, that these were matters which the parties had identified as requiring agreement as part of the process of concluding a contract. I accept that in relation to each of the Outstanding Terms, Nautica may well not have regarded them as sufficiently important to be worth "dying in the ditch" over, if it made the difference between securing the fixture or losing it. However, that position had not been reached prior to the 13 January Exchange.

Did the 13 January Exchange lead to the conclusion of a contract, subject to a performance condition of the Suppliers' Approval Subject?

74. The key issue in this case is whether all that changed as a result of the 13 January Exchange. Nautica needs to establish that the effect of that exchange was to accomplish all of the following things:

    i) to commit the parties to the Charterparty, subject to the Suppliers' Approval Subject;

    ii) to change the legal status of the Suppliers' Approval Subject from a pre-condition which it was for Trafigura to decide to lift to a performance condition which would be resolved by the fact of the relevant terminal's approval and which Trafigura had an obligation to bring about;

    iii) to limit the content of the Suppliers' Approval Subject to the approval of the terminals at Aruba and Statia; and

    iv) to commit the parties to a contract prior to agreement on the Outstanding Terms.

75. At this point, it is necessary to explore in a little more detail what the content of the 13 January Exchange was. It involved a proposal communicated "across the line" by Mr O'Gorman to Mr Sullivan, which Mr Sullivan then passed on to Mr Margetis, and

an acceptance of that proposal which Mr Margetis communicated to Mr Sullivan, and which Mr Sullivan then passed "across the line" to Mr O'Gorman.

76. The only participant in the 13 January Exchange from whom I heard oral evidence was Mr Margetis, and I had no evidence at all from Mr O'Gorman or Mr Reed. Nonetheless, the following matters are sufficiently clear:

i) In return for a reduction in the demurrage rate on the proposed fixture to $75,000, Trafigura agreed to lift all of the "subjects" except the Suppliers' Approval Subject.

ii) The Suppliers' Approval Subject remained a subject to be "lifted", with a deadline of 17.00 HT.

iii) It was clearly communicated to Mr Margetis that the reason why the Suppliers' Approval Subject had not yet been lifted was because of outstanding approvals in respect of the cargo to be loaded at Aruba and Statia (in contrast to Coveñas), and that these were the only outstanding approvals.

iv) The discussion did not address the nuance of whether the approval in question was one to be obtained from a decision-maker located in Aruba and Statia or from a supplier who was loading cargo at those ports.

v) At no point in the exchanges between Mr O'Gorman and Mr Sullivan or between Mr Sullivan and Mr Margetis was there any agreement that the effect of leaving the Suppliers' Approval Subject outstanding was that the only issue which remained to be addressed was the approval of the *terminals* at Aruba and Statia. Nor was there any discussion as to who Trafigura's suppliers were. Mr Margetis did not suggest in his oral evidence that these matters had been discussed. He was very clear that the effect of the exchanges in which he was involved was that he was told that Trafigura could lift all of the subjects apart from "suppliers' approval at Aruba and Statia" but that Mr Sullivan did not mention NuStar and Valero (the terminals at Statia and Aruba). This was consistent both with Mr Sullivan's witness statement, and, more significantly, the emails which Mr Sullivan sent to Mr O'Gorman and Mr Margetis at 15.53 HT, 15.56 HT and 15.59 HT.

vi) I accept that Mr Margetis assumed that the effect of the Suppliers' Approval Subject remaining outstanding was that all that was outstanding was approval from the two terminals. However, this understanding did not derive from anything passed on by Trafigura through Mr O'Gorman and Mr Sullivan and, as I have found, it involved a mistaken assumption as to the effect of the Suppliers' Approval Subject. It is noteworthy that when Mr Margetis expressly articulated his assumption in his email of 15.53HT, and asked Mr Sullivan to confirm it in writing, Mr Sullivan did not do so, but stuck to his formulation that what was outstanding was "Suppliers approval of the Vessel for Aruba / Statia". Further, I find it improbable that Mr O'Gorman, who was aware that Trafigura had not yet agreed a supply contract with Rosneft, communicated to Mr Sullivan that the only issue which would remain outstanding would be *terminal* approval (as opposed to the approval of the suppliers from which the cargo to be loaded at Aruba and Statia was to be sourced). In circumstances in

which it is Nautica's case that the 13 January Exchange involved its acceptance of an offer made by Trafigura, rather than any counter-offer from Nautica which Trafigura accepted, this is significant.

vii) In circumstances in which Mr Margetis' subjective interpretation of what was agreed derived from an understanding of the meaning of the Suppliers' Approval Subject which he brought to the conversation, rather than anything specifically communicated to him by Trafigura or Mr O'Gorman through Mr Sullivan, I am unable to accept Mr Pearce's submission that evidence of Mr Margetis' subjective understanding assists me in determining the terms of the offer communicated orally to Mr Margetis and accepted orally by him (c.f. Blue v Ashley [2017] EWHC 1928 (Comm), [64] which notes that evidence of subjective understanding can be relevant where it "tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding").

viii) I accept that Trafigura came to understand (certainly by the time they withdrew from the proposed fixture at 16.59 HT on 13 January), that Mr Margetis' position was that the "Suppliers' Approval Subject" was concerned only with the approval of the terminals at Statia and Aruba. Mr Reed's thoroughly discreditable conduct at 17.01 HT and thereafter in seeking to procure a misleading rejection of the Vessel from NuStar for loading fuel oil from berths one and two can be explained on no other basis. However, I do not accept Mr Pearce's submission that this was the offer Mr Reed had authorised Mr O'Gorman to pass onto Nautica, or which he knew Nautica had accepted. Nautica's interpretation of the 13 January Exchange was clear from Mr Margetis' email of 15.53 HT, and is something Mr Reed would have learned from Mr O'Gorman.

ix) There was no discussion of the Outstanding Terms.

x) No further recap was sent after the Exchange recording what the final terms of the Charterparty would be if the Suppliers' Approval Subject was satisfied.

xi) All subsequent communications continued to refer to the fixture as "on sub[ject]s" and to speak of the deadline for "lifting" subjects (Mr Sullivan at 15.53 HT and Mr Margetis at 15.56 HT).

77. As I have noted, parties who have been negotiating within a "subject to contract" or similar framework can conclude a contract without expressly addressing that "subject", where a decision to do so is objectively clear from their conduct: RTS at [67]. However, this is not something which will lightly be inferred (see RTS at [56] and Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 at [29]-[30] per Lord Briggs JSC). It must be a rare case in which something short of the parties proceeding to perform the agreement which they had negotiated subject to an unsatisfied pre-condition would be sufficient to constitute an implicit agreement to waive or remove that pre-condition.

78. In my view, the 13 January Exchange did not effect the radical change in the nature of the parties' dealings which Nautica's case presupposes:

i) There was far too much left unsaid. There was no discussion of the nature or content of the Suppliers' Approval Subject nor of the Outstanding Terms, and nothing which must necessarily have involved what would have been a significant implicit agreement to vary the status and/or content of those matters.

ii) There was no attempt for nearly three hours after the 13 January Exchange to seek to capture the terms of any agreement in an email. Nor did the communications sent after the event (up to the point when the dispute crystallised) explicitly refer to any such change. On the contrary the fixture was still described as "on subs".

iii) Even with the benefit of the extension of time (which I find, on the facts, to have been communicated to Mr O'Gorman after the call as an extension to 17.00 HT), there remained a period of under five hours before the deadline for lifting the Suppliers' Approval Subject. That tight deadline is more consistent with the parties seeing if, with the revised terms, they could get the deal "over the line" within that limited window, rather than limiting the time available to Trafigura to satisfy a performance condition in a contract which, on Nautica's case, had already been concluded.

iv) The language used in communicating the extensions of the deadline for lifting subjects suggested that the extension was a unilateral act of Nautica. Mr Sullivan's email of 15.53 HT stated "Owners have extended today until 18.00HRS NY today", his email of 15.59 HT stated "I have given Charterers notice of a further hour extension" and Mr Margetis' email of 16.56 HT said "Owners hereby grant Charterers extension until 18.00HT". There is no difficulty with Nautica unilaterally extending the time it was willing to allow for satisfaction of any pre-conditions. If, however, the contract was subject to a performance condition which Trafigura was obliged to take steps to satisfy, the consequence of extending the period for compliance would be to increase the period over which Trafigura was obliged to take steps to obtain Suppliers' Approval.

v) Finally, even on Nautica's account, and even if the Suppliers Approval Subject bore the meaning for which Nautica contends, at the end of the 13 January Exchange there remained a "subject" which it was for Trafigura to "lift" before a fixture would be concluded. Consistent with the general status of such "subjects" in charterparty negotiations, this was a pre-condition, as much after the 13 January Exchange as it had been when included in the Preliminary Recap.

79. The strongest point in Nautica's favour is that if the 13 January Exchange did not lead to a legal commitment of some kind, it might well be asked what Nautica had got in return for agreeing to reduce the demurrage rate to $75,000 a day, and what the significance of lifting three pre-conditions to a contract was if Trafigura retained an absolute right not to proceed with the Charterparty by reason of the fourth. That point clearly has force, but it involves analysing what was essentially a commercial negotiation from a purely legal perspective. For so long as no binding contract had been concluded, Trafigura had no more "bagged" a reduced demurrage rate than Nautica had secured the fixture. Nautica was not obliged to keep its offer open until

17.00 HT on 13 January. It can be said that the "subject to S/S/R/MGT Approval" rubric in legal terms involves no more than one subject: the charterer is not bound until it communicates a decision to be bound. However, from a commercial perspective, it signals some of the issues which the charterer will need to resolve before being in a position to "clean fix". Trafigura's offer to remove most of those "subjects" was a negotiating signal that the parties were moving closer to a deal but, in contractual terms at least, no more than that. It now appears that the message which Trafigura communicated was more optimistic than the circumstances justified, and suggested a higher likelihood of the outstanding subject being lifted than was in fact the case. That may well provide grounds for commercial criticism of Trafigura, and for discomfort on the part of brokers who had communicated that optimistic assessment (they would say on instructions). However, as Steyn J noted in The Junior K at p.589, the broking view may well differ from the strict legal position.

E IF THE CHARTERPARTY WAS CONCLUDED, WAS IT AN IMPLIED TERM THAT TRAFIGURA WOULD TAKE REASONABLE STEPS TO OBTAIN SUPPLIERS' APPROVAL AT ARUBA AND STATIA BY 17.00 HT ON 13 JANUARY?

80. If I had concluded that the Suppliers' Approval Subject was a performance condition, then I would have accepted Mr Pearce's submission that Trafigura was under an implied obligation to take reasonable steps to obtain that approval. That conclusion is amply supported by authority, including cases such as Brauer v James Clark at p.154; Windschugel (Charles H) Ltd v Pickering (Alexander) & Co Ltd at p.93 and Hargreaves Transport v Lynch [1969] 1 WLR 215, 219-220. As between owners and charterers, arrangements relating to the loading of cargo were the responsibility of Trafigura, who would conclude the arrangements which would determine what cargo would be loaded, where loading would take place and who would supply the cargo. Against that background, if there were no implied obligation to the effect contended for, Trafigura would in effect have an option whether to fulfil the performance condition or not, which would be inconsistent with the conclusion that a binding contract had been concluded.

81. Mr Bovensiepen sought to distinguish the licence cases because "the subject of the relevant approval is the owner's vessel". While I accept that this meant that information emanating from Nautica was of obvious relevance to obtaining the approvals, that is no reason why Trafigura should not be under an obligation in relation to those matters which were within its control – obtaining the relevant information from Nautica, providing it to the third parties whose approval was required, and making reasonable efforts to obtain decisions from the third parties before the deadline.

F DID TRAFIGURA BREACH ANY OBLIGATION TO TAKE REASONABLE STEPS TO OBTAIN SUPPLIERS' APPROVAL AT STATIA?

The burden of proof

82. In the import and export licence cases, it is clear that burden is on the party who owes the obligation to take reasonable steps to obtain the licence to show that it complied with that obligation: see e.g. Brauer v James Clark, pp.152-153; 154; Windschuegl, p93 and Malik v Central European Trading Agency [1974] 2 Lloyd's Rep 279, 282.

83. Mr Bovensiepen resisted the application of that approach in this case because, he said, the matters on which the obtaining of approval might turn were likely to relate to the physical characteristics and history of the Vessel, rather than matters which were Trafigura's responsibility.

84. This issue turns on what Trafigura actually did (as to which there is no gap in the evidence) and what it should have done (a question for the Court). The incidence of the burden of proof is of no material significance to the resolution of these questions and I do not propose to resolve this issue.

The position if "Suppliers Approval" meant Trafigura's intended supplier at Statia

85. In so far as Trafigura can be said to have had an intended supplier for loading at Statia, it was Rosneft. Trafigura nominated the Vessel to Rosneft at 13.47 HT. That communication did not identify the need for any particular urgency in responding, and did not inform Rosneft of the 17.00 HT deadline for lifting subjects. Nor was there any attempt to follow-up the communication as the deadline approached.

86. The duty to take reasonable steps to obtain approval must include taking reasonable steps to obtain a timely approval, particularly when the approval will only be of commercial significance if obtained by a particular deadline. In these circumstances, if Trafigura did come under an obligation to take reasonable steps to obtain Rosneft's approval by 17.00 HT, it did not discharge that obligation.

The position if "Suppliers Approval" meant terminal approval?

87. Once again, it is clear that Trafigura did not take reasonable steps to obtain the approval of NuStar, the terminal at Statia. The obvious way to seek that approval would have been to contact NuStar directly, supply them with the completed NuStar questionnaire and ask them to provide their approval before the 17.00 HT deadline. However, Trafigura did not contact NuStar prior to the expiry of the 17.00 HT deadline, not even after they had been told by their agents at Statia, Rocargo, at 14.27 HT that NuStar would need to vet the Vessel. Instead, as I have noted, it contacted Rosneft at 13.47 HT, but that communication did not ask Rosneft to seek NuStar's approval or refer to the 17.00 HT deadline for lifting the Suppliers' Approval Subject.

88. Nor do I accept Trafigura's submission that if the Suppliers' Approval Subject required only NuStar's approval, it could not have sought that approval directly from NuStar. Trafigura felt able to approach NuStar directly when disingenuously seeking a rejection of the Vessel for loading at berths one and two to show to Nautica, and received a prompt reply. There is no reason why Trafigura could not have made a similar approach to NuStar before the 17.00 HT deadline.

G DID ANY BREACH BY TRAFIGURA CAUSE NAUTICA LOSS?

The legal issues in summary

89. This aspect of Nautica's case gives rise to three interesting issues of law.

90. First, the cases addressing the obligation to take reasonable steps to obtain an import or export licences suggest that if such steps are not taken, the burden of proving that

the licence would not have been obtained even if the required steps had been taken lies on the defendant, and that it is a particularly onerous burden. *Benjamin's Sale of Goods* (10th) para. 18-868 summarises the law as follows:

> "If he takes no steps at all, he will be liable unless he can discharge `the difficult burden' of showing that any steps which he could have taken (in performance of his duty to take reasonable steps) would have been useless".

91. That formulation admits of a possible distinction between a party who takes no steps at all, and one who takes insufficient steps. However in Overseas Buyers Ltd v Granadex SA [1980] 2 Lloyd's Rep 608, 612, Mustill J formulated the position as follows:

> "(1) The seller must first set out to prove that he used his best endeavours to obtain any necessary permission to export, but nevertheless was unsuccessful.
>
> (2) If the seller fails to satisfy this requirement, he is liable for failure to ship, unless he can prove that nothing which he could have done would have enabled him to ship.
>
> It will be seen that the second stage of the enquiry, on the cases as they now stand, postulates a stricter test than the first. The seller has to exclude the possibility that any steps, not any reasonable steps, would have been successful. The reasons for this contrast may one day have to be explored, but it is important to note that where (as here) the seller has tried to obtain permission to ship, he need do no more than prove that his efforts were reasonable."

92. In Brauer v James Clark, p.154, Lord Denning said that to avoid liability the party in breach was "required to show it was useless for him to take any such steps, or any further steps, because it was quite impossible for him to obtain a licence". Other cases have suggested that the seller has to show there was "no reasonable possibility" of securing the licence, or that any attempt to obtain a licence would "necessarily" have been unsuccessful (see Professor Bridge, *The International Sale of Goods* (4th) para. 5.28).

93. Mr Pearce relies on these authorities to suggest that Trafigura must show that "any steps it could have taken to obtain its suppliers' approval would necessarily have been unsuccessful, failing which it cannot rely on its failure to obtain its suppliers' approval to escape its obligations". Mr Bovensiepen argues that the principle in the licence cases does not apply because "it was not … a matter for Trafigura to satisfy or persuade any supplier as to the qualities of Nautica's vessel", merely to "check with its suppliers whether Nautica's vessel was acceptable".

94. Accordingly the first issues of law which arise are:

i) Whether the burden of proving causation in this case lies on Nautica or Trafigura?; and

ii) If the burden of proof lies on Trafigura, what is the standard of proof?

95. Second, there are a number of cases which suggest that where a party is in breach of an obligation to assist in satisfying a condition, then the court will proceed as if the condition was satisfied (rather than engage in an assessment on conventional principles of the loss suffered by reason of the breach). Rix LJ had cause to consider the juridical basis of this approach in Compagnie Noga d'Importation et d'Exportation SA v Abacha (No 3 [2002] CLC 207, [95]-[108]. He considered the judgment in Mackay v Dick (1881) 6 App Cas 251, the facts of which he summarised as follows:

> "A contract for the sale of a digging machine was subject to a condition precedent that it should be shown to be capable of excavating a given quantity of clay in a fixed time at a defined site. If it failed the test, the buyer was entitled to return the digger within two months. The buyer did not co-operate in carrying out the contractual test but purported to reject the digger nevertheless. The seller sued for the price and obtained judgment for it."

96. He noted that Lord Blackburn had analysed the case as one of waiver (by refusing to permit the test, the buyer had waived the right to return the digger if it failed the test). Lord Watson, in resolving what was a Scottish appeal, relied on a doctrine of "deemed fulfilment" taken from the civilian text *Bell's Principles*. Lord Selborne LC agreed with both speeches. Rix LJ traced the subsequent judicial consideration of the different approaches in Mackay v Dick. At [106]-[107] he concluded:

> "In these circumstances, there is the rather odd situation where Mackay v Dick is regarded as authority for a well-founded and general principle of English law, but there is a certain divergence of opinion as to how that principle can best be expressed. It is at any rate clear that there must be a relevant breach of contract on the part of the defendant: by relevant, I mean causatively relevant. The breach must bear on the condition which otherwise needs to be fulfilled. A doctrine of waiver perhaps sounds more like the common law than a doctrine of deemed fulfilment taken from the civil law: but they are both fictions designed to achieve the right result to which common sense and fairness seem to point.
>
> In the present case, it seems to me that Mackay v Dick is not only authority for the implication of the implied term of co-operation, but also authority for the potential waiver or deemed fulfilment of the condition precedent …
>
> Thus there is no necessary dichotomy between damages and debt. On suitable facts, a claimant … may be entitled to relief in both. Where the subject matter of the dispute is a payment, it seems to me that the primary relief should be in debt, if that is possible, unless an element of damages is necessary to ensure that the value of that debt at a later time matches the value of its earlier payment, in a case where earlier payment has been delayed by the defendant's breach".

97. In this case, Mr Pearce contends that he can rely on the principle in Mackay v Dick in support of the argument that damages should be assessed on the basis that the Suppliers' Approval Subject had been lifted, on which basis, damages should not be assessed on a "loss of a chance" basis, but on the basis that Trafigura repudiated a contract which was not subject to a performance condition. The second issue of law for determination is whether damages fall to be assessed on the assumption that the Suppliers Approval Subject was satisfied.

98. Third, where the loss suffered by a claimant depends on how a third party would have acted if the defendant had complied with rather than breached its obligations, the claimant must show that there was a significant chance of the third party acting in a way which would have benefited it. If that burden is met, the court will then award damages based on its assessment of the chance that has been lost (so-called "loss of a chance" damages). That principle of law was first clearly formulated in Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, and was subject to detailed analysis by Bryan J in Assetco plc v Grant Thornton UK llp [2019] Bus LR 2291. Cases in which the decision or approval of a third party such as a licensing authority is a performance condition which one party has a contractual duty to try and satisfy can be analysed as "loss of a chance" cases (namely the loss of the chance that the third party would have acted in such a way as to satisfy the performance condition), but this is not the basis on which those cases have been reasoned.

99. Mr Bovensiepen argues that Nautica's claim, properly analysed, is one in which causation of loss depends on the hypothetical action of a third party, and that the claim is, therefore, governed by the loss of a chance doctrine. Mr Pearce, in response, argues that the loss of a chance doctrine has only a residual role in a case in which a party has breached its obligation to take reasonable steps to satisfy a performance condition to obtain a decision from a third party. Mr Pearce submits that if Trafigura can meet the burden of showing that Suppliers' Approval would not have been forthcoming even if reasonable steps had been taken, it is nonetheless open to Nautica to recover substantial damages on a loss of a chance basis if it could show that there was at least a real or substantial chance of such approval having been forthcoming.

100. The final issue of law which arises, therefore, is whether there are any, and if so what, circumstances in which Nautica's loss falls to be quantified on a loss of a chance basis.

The burden and standard of proof

101. The principles relating to the burden and standard of proof where a seller or buyer breaches its duty to take reasonable steps to obtain an export or import licence, and the cases in which those principles were formulated and applied, do not appear to have been applied outside their specific context. For example in Dany Lions v Bristol Cars Limited [2014] EWHC 817 (QB), [62], when addressing an alleged failure to exercise reasonable endeavours to conclude a contract for work to be done on a car in order to satisfy a condition precedent to a contract to sell the cargo, Andrews J applied the conventional approach that the burden of proving causation lay on the party seeking to recover damages.

102. The rationale given in the licence cases for the incidence of the burden of proof is that the seller is relying on the absence of a licence as an excuse for non-performance of its otherwise strict obligation to deliver the goods, and that the words "subject to licence" in that context operate as something akin to an exemption or force majeure clause. In Windschuegl, for example, Devlin J suggested that the seller was seeking to establish that it was "excused by the condition in the contract 'subject to licence' from being obliged to perform their part of it and tender the goods". In Agroexport v Cie Europeene de Cereales [1974] 1 Lloyd's Rep 499, 506, Ackner J referred to the "subject to licence" provision as "a special exemption clause" and in Brauer the "subject to licence" provision was described as "a special exemption inserted in

favour of the applicant". Professor Bridge notes that there is much to be said for the view that there should be an absolute, rather than due diligence, obligation to obtain the licence "if our starting point is the strict duty of delivery of a seller of goods and the question is whether an implied term should mitigate that duty" (*The International Sale of Goods* para. 5.17). The incidence of the burden of proof does, to some extent, temper that criticism. Further, there are strong parallels between the treatment of "subject to licence" provisions and the operation of force majeure or prohibition clauses. Professor Bridge explains the position as follows (para. 5.30):

> "The same approach should be and is adopted when the applicant seeks the protection of a force majeure clause or prohibition clause or of the doctrine of frustration. The presumptive position is that the obligations of a seller to deliver and of a buyer to accept delivery are strict obligations. If they are not to be enforced as such, the party claiming relief should be put in the position of having to justify this"

103. I have concluded that it would not be appropriate to apply the particular principles on burden and standard of proof in the import and export licence cases in the present case, because the Suppliers' Approval Subject does not have a status akin to a "special exemption clause" qualifying otherwise strict duties.

104. In those circumstances, it is not necessary to consider how far the observations on the standard of proof in the licence cases can be reconciled with statements of high authority that in civil cases, there is only one standard of proof, and that it is the balance of probabilities: (In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563; In Re B (Children) (Care Proceedings: Standard of Proof (CAFCASS intervening) [2009] 1 AC 11 and Braganza v BP Shipping Ltd and another [2015] 1 WLR 1661, [34]. Either the standard of proof applicable in such cases is one which arises as a matter of substantive law on the proper construction of the "special exemption", or the statements are not postulating a higher standard of proof as such, but recognising that meeting the conventional civil burden may be particularly difficult in such cases.

Are damages to be assessed on the assumption that the Suppliers' Approval Subject was satisfied?

105. The precise status of the Mackay v Dick rule is one which may well merit exploration by a higher court on a future occasion. There will be cases in which a failure to take steps which a contracting party is obliged to take which are necessary for the satisfaction of a condition which operates in its favour can readily be seen as a waiver of that condition. Mackay v Dick, in which the buyer's refused to permit the contractual test which was a condition of its right to return the machinery after two months, is just such a case. Another example is that of the buyer who purchases property subject to a performance condition, rather than pre-condition, of a satisfactory survey, who then fails to commission a survey (considered by Walton J in Ee v Kakar p.228).

106. There are other cases, however, where the waiver argument (at least as that concept is conventionally understood) is much more difficult, particularly where the complaint is not that no steps were taken towards satisfying the condition, but rather that the steps

taken were inadequate. For the reasons I have set out when addressing the issue of breach, this is such a case.

107. The editors of *Chitty on Contracts* (33rd) at para. 2-166 comment on the decision that the buyer was liable in debt in Mackay in the following terms:

> "In principle it seems wrong to hold him so liable, for such a result ignores the possibility that, in that case, the machine might have failed to come up to the standard required by the contract, even if proper facilities for trial had been provided. It is submitted that the correct result in cases of this kind is to award damages for breach of the subsidiary obligation; in assessing such damages, the court can take into account the possibility that the condition might not have occurred, even if there had been no such breach. To hold the party liable in breach for the full performance promised by him, on the fiction that the condition had occurred, seems to introduce into this branch of law a punitive element that is inappropriate to a contractual action. The most recent authority rightly holds that such a doctrine of fictional fulfilment does not form part of English law".

108. The "most recent authority" referred to is the decision of Scott J in Thompson v ASDA-MFI Group Plc [1988] Ch 241, 266, a case which was reviewed by Rix LJ in his later decision in Abacha (No 3). Rix LJ concluded that Thompson was addressing a different point (whether the cause of the failure of the condition had to be a breach of contract) and that Mackay v Dick remains authority for the view that where one party's breach of contract has caused the failure of a condition to the accrual of a debt in favour of the counterparty, an action in debt may nonetheless be permitted on the basis of "deemed" compliance, even if the financial consequences of doing so (in that case in terms of interest payable) are different to those of a claim in damages. In Société Générale (London Branch) v Geys [2012] UKSC 63, [131], Lord Sumption JSC referred in his dissenting judgment to:

> "the doctrine of deemed performance endorsed by the House of Lords in Mackay v Dick (1881) 6 App Case 251, according to which a party who is prevented by the non co-operation of the counterparty from satisfying a condition precedent to his right to receive remuneration may be deemed to have earned it notwithstanding the condition".

109. Here too, Lord Sumption JSC was referring to Mackay v Dick as a rule which allowed a party to bring a claim for debt or an agreed sum when the counterparty had, in breach of contract, prevented satisfaction of a condition precedent to the right to payment.

110. Whatever the position in such cases, in the present case Mr Pearce seeks to rely upon "deemed fulfilment" not to accrue a claim in debt, but to argue for a different approach to assessing damages for breach of contract (and in particular to avoid the loss of a chance doctrine when it would otherwise apply). I am not persuaded that it is possible to "deem" compliance with the Suppliers' Approval Subject for this purpose, even assuming it were otherwise a condition of a kind of which "deemed fulfilment" was possible. In circumstances in which Nautica's complaint is breach of an obligation to take reasonable steps, I can see no good reason why the ordinary legal principles of causation and quantification of loss should not apply, including the doctrine of loss of a chance. Although the point does not appear to have been argued,

I note that in Obagi v Stanborough Developments Ltd (1995) 69 L&CR 5731, damages for breach of an obligation to exercise reasonable endeavours to satisfy a performance condition to a contract of sale of obtaining planning permission were assessed on a "loss of a chance" basis, rather than on a basis which assumed "deemed fulfilment" of the condition. This appears more consistent with the increasing recognition of the overriding importance of the compensatory principle in the law of damages, with rules of law in relation to the assessment of damages intended to serve this principle, rather than displace it (for example Bunge SA v Nidera BV [2015] UKSC 43).

The relevance of loss of a chance

111. For the reasons set out above, I am satisfied that Nautica's claim for damages for breach by Trafigura of an obligation to take reasonable steps would have fallen to be assessed on "loss of a chance" principles, it being a case in which the "lost" benefit for which Nautica claims it is entitled to compensation – the loss of profit under the Charterparty – was dependent on the decision of a third party to approve the Vessel.

112. Had I concluded that the principles applicable in the import and export licence cases were applicable, then I would have rejected Trafigura's argument that the principles set out in those authorities should now be made subject to the general principles of loss of a chance. In my view, the principles in the licence cases governing the circumstances in which a party can escape liability for non-performance of its otherwise strict duty to make or accept delivery represent a self-contained and special principle of law, to which the principle of loss of a chance does not apply. I would further note that there may be some difficulty in applying loss of a chance principles to a case in which the burden of disproving causation is placed on the defendant.

113. I would in any event have rejected Nautica's submission that it was entitled to "fall back" on a loss of a chance if its claim had not otherwise been made good. It has been held by Bryan J in Assetco and by Nugee J in Wellesley Partners llp v Withers llp [2014] PNLR 22 that in those circumstances in which it applies, the loss of chance doctrine is mandatory rather than permissive, and that a claimant is not entitled to choose whichever approach best serves its interests.

The position if "Suppliers Approval" meant Trafigura's intended supplier at Statia

114. If the Suppliers' Approval Subject required Rosneft's approval, then I find that there was no realistic chance of Rosneft providing its approval by 17.00 HT had reasonable steps been taken by Trafigura to obtain it.

115. Rosneft would not have provided its approval without first obtaining PdVSA's approval as its intended supplier. When the Vessel was nominated to Rosneft at 13.47 HT on 13 January, no sale contract had yet been concluded with Rosneft nor between Rosneft and PdVSA. It is not clear when Rosneft sent the nomination to PdVSA, but it had done so by 09.15 HT on 14 January 2016 when Rosneft sent an email suggesting that it might be necessary to move the loading window for the Vessel to 14-16 February if the Vessel was to be accepted. At 14.33 HT on 14 January 2016, PdVSA had still not responded to the request for acceptance, and Rosneft informed Trafigura that they did not expect a formal confirmation from PdVSA that day. That

remained the position as at 13.34 HT when Trafigura's operations team were told that Trafigura was no longer pursuing its nomination of the Vessel.

116. At some point between 09.50 HT and 10.12 HT on 15 January 2016, Trafigura nominated the proposed substitute vessel, the BUNGA KASTURA LIMA, to Rosneft, and shortly after 15.08 HT, Trafigura asked for approval of another vessel, the OLYMPIC LUCK. PdVSA did not revert on those nominations until 10.15 HT on 18 January, when it raised certain questions. It was only at 11.23 HT on 19 January 2016 that the vessels were finally accepted by PdVSA.

117. Against that background, in circumstances in which no agreement had yet been concluded between PdVSA and Rosneft or Rosneft and Trafigura for the supply of the cargo, and when the loading window for the cargo was still under negotiation, I have concluded that there was no realistic prospect of PdVSA (and hence Rosneft) approving the Vessel before 17.00 HT on 13 January 2016, even if an urgent request for such approval stressing the deadline for lifting the subjects on the Vessel had been sent to Rosneft immediately after the 13 January Exchange.

The position if "Suppliers Approval" meant terminal approval?

118. If Suppliers' Approval meant the approval of NuStar, then I find that there was a very high likelihood that such approval would have been obtained by 17.00 HT if Trafigura had taken reasonable steps to seek it from NuStar:

i) There was no suggestion that there was any objective characteristic of the Vessel or its trading history which would have given NuStar any reason not to approve the Vessel for loading at the SPM.

ii) I accept the evidence of Mr Margetis that the Vessel had never been rejected by any terminal.

iii) It is clear from the confirmation given by the agents at Statia that the Vessel's dimensions gave rise to no difficulties in loading at the SPM.

iv) The speed with which NuStar responded to Trafigura's request for confirmation that the Vessel was not suitable for loading at berths one and two (within 45 minutes) strongly suggests that NuStar would have responded to any request for approval before the 17.00 HT deadline.

v) A request from NuStar would not have engaged the commercial complications relating to the terms of sale which arose in relation to Rosneft's approval.

119. Even approaching this issue on a loss of a chance basis, the chance lost is sufficiently high that no discount for a realistic possibility that approval may not have been forthcoming in time need be given (see *McGregor on Damages* (20th) para. 10-094).

H IF SO, WHAT IS THE QUANTUM OF NAUTICA'S LOSS?

120. If I had found that, but for Trafigura's breach of contract, the Suppliers' Approval Subject would have been satisfied (or that by reason of such breach it is to be treated as satisfied), then I would have accepted Nautica's case that it suffered loss of $491,690.67 calculated as follows:

i) The gross profit which Nautica would have made under the Charterparty is $6,407,078.20. The Charterparty would have taken 63 days to perform, such that the gross profit would have been $101,699.66 per day.

ii) Nautica's gross profit on the Substitute Fixture was $6,478,757.77 earned over a period of 69 days, amounting to US$93,895.04 per day.

iii) Apportioned over the period of 63 days which the Charterparty would have taken to perform, the gross profit made under the Substitute Fixture was US$5,915,387.53.

iv) Accordingly, on the hypothesis under consideration, the measure of Nautica's damages is US$491,690.67.

I CONCLUSION

121. For the reasons set out above, Nautica's claim for damages fails, because no contract was concluded and, because, on the proper construction of the Suppliers' Approval Subject, there was no realistic chance of such approval being forthcoming by 17.00 HT on 13 January even if Trafigura had taken reasonable steps to obtain that approval.

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