Neutral Citation Number: [2022] EWHC 499 (Comm)

Case No: CL-2020-000197

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2022

Before :

THE HON. MRS JUSTICE MOULDER

- -

BP OIL INTERNATIONAL LIMITED	**Claimant**
- and -	
GLENCORE ENERGY UK LIMITED	**Defendant**

- -
- -

STEVEN BERRY QC AND ADAM BOARD (instructed by **HFW**) for the **CLAIMANT**
DAVID LEWIS QC AND ALEX CARLESS (instructed by **CLYDE & CO**) for the **DEFENDANT**

Hearing dates: 17-20, 24,25,27 January 2022

- -

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.

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THE HON. MRS JUSTICE MOULDER

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 10:30am on 9th March 2022.

Introduction

1. This is a contractual claim for damages brought by BP Oil International Limited ("BPOI") in relation to a cargo of crude oil which BPOI purchased from the defendant ("Glencore") and which BPOI alleges was contaminated with organic chlorides.

Background

2. BPOI is an oil trading company incorporated in England and carrying on business in the sale and purchase of crude oil and petroleum products. Glencore is a commodity trading company incorporated in England engaged in the sale and purchase of commodities including crude oil.

Sale contract

3. By a contract of sale formed in April 2019, the terms of which are disputed, Glencore sold 100,000 MT +/- 10% of Russian Export Blend Crude Oil ("REBCO") to BPOI, to be loaded between 13 and 18 April 2019, delivered CIF Rotterdam, and at a price of "Dated Brent + 0.53 USD" per barrel.

4. The contract of sale incorporated by reference BPOI's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products 2015 Edition (the "GT&Cs").

Sub-sale to BPESE

5. By a contract dated 5 April 2019 BPOI re-sold the cargo of REBCO to an affiliated company, BP Europa SE ("BPESE") for delivery CIF Wilhelmshaven (the "Sub-Sale"). BPESE intended to process the cargo at its Gelsenkirchen refinery.

6. The Sub-Sale was agreed on materially back-to-back terms to those in the contract of sale, save that the purchase price was "Dated Brent plus a premium of 0.43 US dollars per US barrel". However, as discussed below, the contract for the Sub-Sale made no reference to the purchase from Glencore and merely provided for a quantity of 100,000 MT of REBCO (plus/-10%) loaded at Ust-Luga between 13 – 18 April 2019.

Inspection and delivery

7. On or around 10 April 2019, the parties appointed Cargo Inspections Group ("CIG") as independent load port inspectors.

8. On 16 April 2019, a cargo of REBCO (the "Cargo") was loaded on board the M.T. "ALEXIA" at Ust-Luga, Russia. The Cargo was covered by two bills of lading dated 16 April 2019. A commercial invoice and letter of indemnity were issued dated 16 April 2019. On about 17 April 2019, CIG provided BPOI with certain shipping documents for the Cargo.

9. On about 22 April 2019 the Cargo arrived and was discharged at Wilhelmshaven.

Quality certificates

10. Two certificates of quality numbered "92a" ("CoQ 92a") and "92b" ("CoQ 92b") in respect of the Cargo were delivered to BPOI on about 17 April 2019.

11. Neither of these documents made any reference to organic chlorides.

12. Certificate of quality 92 ("CoQ 92") was sent by CIG to Glencore on 25 April 2019 following an enquiry by Ms Pelyak of Glencore by email as to whether CIG had tested the Cargo for organic chlorides and whether the terminal had organic chloride results for the Cargo. CoQ 92 was first sent to BPOI on 8 May 2019.

Resale

13. By a contract dated 20 June 2019, as amended, the Cargo was re-sold by BPESE to BPOI for a purchase price of Dated Brent minus US$8 per barrel, with delivery ex ship Castellon.

14. By a further contract dated 20 June 2019, as amended, the Cargo was then re-sold by BPOI to BP Oil Espana SA ("BPOESA") for Dated Brent minus US$8 per barrel, with delivery ex ship Castellon. The intention was for the contaminated oil to be diluted, blended and processed by BPOESA at its Castellon refinery. The oil was discharged in three tranches and then processed at that refinery.

Contamination

15. It is alleged for BPOI that upon sampling tests being carried out, it was discovered that the Cargo was contaminated by organic chlorides at a concentration of around 11.9 to 15.7 parts per million ("ppm") (Amended Particulars of Claim).

Factual witnesses

BPOI

16. The court had witness statements from the following for BPOI:

    i) Ms Tara Behtash;

    ii) Mr Robert Earl;

    iii) Mr Matthew Hague;

    iv) Mr Duncan Haines;

    v) Mr Ronald Sieder; and

    vi) Ms Yael Spier.

17. Mr Earl, Mr Hague and Mr Haines were called and were cross examined.

Robert Earl

18. Before 1 January 2021, Mr Earl was the ESA Crude and Feedstocks Bookleader. ESA stands for Europe and South Africa. That role involved liaison between the BPOI crude oil trading business on the one hand and BP's refineries on the other hand, to procure from the market the crude oil and feedstocks that the refineries need.

19. Mr Earl was not directly involved in the conclusion of the deal with Glencore. He was involved in the sub sale to BPESE briefly because he was covering Mr Haines during the week of 1 April 2019, but according to his evidence, Mr Haines would have done all of

the groundwork and liaising with BPESE in respect of their requirements before then. (Witness Statement of Robert Earl)

20. In my view Mr Earl sought to answer the questions posed in cross examination despite at times robust questioning from counsel. On the calculation of losses attributable to hedging I accept that Mr Earl was doing his best to provide a calculation which he felt reflected the actual losses attributable to hedging.

Duncan Haines

21. Mr Haines worked at BPOI where his role was to procure crude oil and feedstock for BP's refineries, including BP Gelsenkirchen. No criticism was made by Glencore of this witness.

Matthew Hague

22. Mr Hague is an oil trader for BPOI.

23. It was submitted for Glencore that:

"*On balance, Mr Hague was not a satisfactory witness. While he generally tried to answer questions directly and to help the Court, Mr Hague sometimes strayed from this approach when seeking to argue BPOI's case*"

24. I found Mr Hague to be straightforward in his evidence particularly in the face of a line of questioning that he (and BPOI) had sought to concoct a paper trail to support the value at which the Cargo was sold and that in effect BPOI had no real intention of selling to MOH, and despite the point being put repeatedly by counsel for Glencore. I note his evidence in cross examination as follows:

i) in the context of being asked about an internal discussion seeking an indication from PBF, another refinery:

"*Q. Okay, and you want an indication "even if rancid" <u>for the paper trail you've been asked to log</u> by the crude supply coordination team; correct?*

A. No, I think we're after indications because we're trying to find out where market value might be for such a contaminated cargo." (Day 3, 19/01/2022, 53:10-53:15) [emphasis added]

ii) in relation to the MOH chat on 14 May where MOH stated that "*refinery would need to see $5-6 to consider it. So I think maybe we're not the best outlet for that*" Mr Hague was asked:

"Q. *<u>Did your sale efforts to MOH slow down</u> on the Alexia cargo once this minus 5-6 indication had been given?*

A. <u>No</u>, I mean, trying to sell something to MOH is usually quite a long grind, so I would have been chasing him on that as well as dealing with the other three cargoes we were trying to sell him simultaneously, and obviously you see I chase him again on the 23rd." (Day 3 30:21-31:2) [emphasis added]

iii) In relation to the MOH chat on 16 May where MOH made no reference to the Urals oil:

"Q. Were you told not to pursue MOH –

A. No.

Q. -- as at 16 May while BP looked at its own refinery in Spain?

A. Well, I pursued them again on the 23rd, so I don't believe so.

Q. But BP considers this a problem cargo with daily costs racking up. You have had a price indication of minus 5 to minus 6, whatever that means, and nine days pass before you go back. How is that to be explained, if you can recall?

A. I mean, my job was to find value for these cargoes, whether the best thing to do was suddenly drop $5 or $6 without having had conversations with others, I don't know, and obviously the system will have been looking at what they could have done with the cargo at the same time, so I don't think it's unreasonable…" (Day 3 31:24-32:15) [emphasis added]

As noted below, Mr Hague's evidence on this point accords with that of Mr Earl in cross examination.

iv) In the context of the chat on 23 May when MOH offered Dated Brent minus 8 for part of the Cargo and Mr Hague thanked MOH for its "*feedback*":

"*Q. And you say: "... thanks for the feedback, appreciate it". Why do you describe it as "feedback"?*

A. Because he's responded to my question.

Q. It's not because you're just trying to gather information so BP internally can decide a level for its own refining?

A. No, no. I mean, feedback is a phrase often used in the market. You're just thanking a person for doing the work to attempt to be able to show your bid in the market.

Q. BPOI never countered this minus $8 indication, did it?

A. I don't recall. I mean, most of my conversations with Alex were over the phone, but I don't recall making a counter, no.

Q. Is that because there was no real intention of selling to MOH by 23 May?

A. No, I don't think so. I think it's because it was for a small piece of the cargo at the other end of the Mediterranean on Greek out-turn which would have required a ship-to-ship and a further vessel. So in equivalent to the whole cargo that would have been $1, or probably $1 or $2 cheaper than that equivalent effectively. So that's on their terms for that 150-300, that's -- you know, that's a double-digit discount, that's minus 10 or worse." (Day 3, 35:19-36:19) [emphasis added]

25. Mr Hague was doing his best in my view to give reasoned answers in response to this line of questioning. There is no evidence which would suggest that Mr Hague in giving evidence had any motive other than to assist the Court.

26. I therefore find that Mr Hague was a credible witness and give weight to his evidence accordingly.

Yael Spier/Ronald Sieder and Tara Behtash

27. The Defendant elected not to cross-examine Yael Spier, Ronald Sieder or Tara Behtash. Ms Spier was at the relevant time legal counsel for BPOI and Mr Sieder was managing counsel at BPESE. Ms Behtash is a crude oil trader for BPOI. To the extent necessary their evidence is considered below.

Glencore

28. The following witnesses gave witness statements:

    i) Mr Michal Wawrzyniuk; and

    ii) Ms Galyna Pelyak.

29. Ms Pelyak describes herself as a member of the Operations team in the Crude Oil division of Glencore. She gave oral evidence and was cross examined. To the extent necessary her evidence is considered below.

30. Mr Wawrzyniuk is also a trader for Glencore. He was not cross examined and his witness statement was admitted on the basis that Glencore is not relying on the telephone call referred to at paragraph 14 of his statement.

Expert evidence

Chemistry

31. BPOI's chemistry expert is Mr David Jones, who describes himself as a chartered chemist and an experienced cargo surveyor. His two reports were before the court.

32. Glencore's chemistry expert is Mr Richard Minton, who is a consultant chemist. His two reports were also before the court together with a joint memorandum.

33. No criticism is made of these witnesses by either party.

Oil trading

Dr Imsirovic

34. BPOI's oil trading expert is Dr Adi Imsirovic, a senior research fellow at the Oxford Institute of Energy Studies and a former senior oil trader. He produced three reports.

35. The experts also produced a joint memorandum.

36. It was submitted for Glencore that the Court should exercise caution before placing weight on his evidence. Glencore criticised in particular his third report produced during the trial and dated 21 January 2022.

37. The court accepts that there were shortcomings in the third report produced in some haste. However, as with any witness, where the evidence is deemed relevant, the court weighs his evidence in a particular context against all the relevant evidence in order to reach a conclusion and in the event of a conflict between the experts which is necessary to resolve, this is dealt with below.

Ms Elizabeth Bossley

38. Glencore's trading expert is Ms Elizabeth Bossley.

39. In the annex to her first report her expertise is encapsulated as follows:

> "*CEO of the Consilience Energy Advisory Group LTD ('Consilience'), a consultancy specialising in crude oil, refined products and freight trading and logistics issues. Clients include FTSE 100 companies, major and independent oil companies, utilities, regulated exchanges, government authorities and law firms.*
>
> *Her own areas of first-hand practical expertise include an in-depth knowledge of oil trading, tanker freight and shipping operations. She has been, and continues to be, directly involved in numerous oil, gas and freight contract negotiations during the course of her career from production sharing contracts to transportation agreements, including Value Adjustment Mechanisms and Quality Banks, to Lifting Agreements as well as sale and purchase agreements for physical oil, paper contracts and advanced regulated and OTC derivative instruments*."

40. Ms Bossley produced two reports.

41. It was submitted for Glencore that Ms Bossley:

> "*sought to assist the Court as best she could as an independent expert, avoiding being too dogmatic on questions of reasonableness and value that are ultimately a matter for the Court*." (Closing Submissions paragraph 14.1)

42. Ms Bossley was on the whole a forthright witness who expressed her answers clearly. I accept that she had relevant expertise. However as discussed below, despite the fact that she was called as an expert witness to assist the Court (amongst other things) on the issue of value of the Cargo, she seemed reluctant to be drawn on actual value. It is unclear to the Court why she adopted this approach but as a result her evidence was of limited value on the key issue of the price at which the Cargo was sold by BPOI to BPOESA.

Issues for determination

43. During the course of the trial the parties produced an Agreed List of Issues for Closing and these are referred to accordingly in this judgment. Whilst in broad terms such a list is helpful, what was less helpful was the failure to narrow the issues. As a result, each party submitted written opening and closing submissions amounting to some 50 pages, and in the case of Glencore a further annex to its closing submissions of some 28 pages addressing what it said was the "*key evidence on cost of cure and defective value*". In my view the approach of Glencore to this trial was not in accordance with its duty to help the Court to further the Overriding Objective of dealing with matters justly and at proportionate cost. In my view it would not be in furtherance of the Overriding Objective for the Court to attempt to deal with each and every submission raised or to address every

piece of evidence. The Court has read the submissions and has had the benefit of both hearing the evidence and referring to the daily transcripts where necessary. The Court has set out its reasons for its conclusions on the issues which it determines necessary to make findings but having regard to the matters referred to above does not address in the judgment all the submissions advanced.

44. BPOI objected that four matters in Glencore's opening skeleton raised issues that were not pleaded and could not be fairly dealt with. They were (in summary) as follows:

    i) that the loss should be treated as the loss to the BP group generally;

    ii) that CIG (the independent expert) was an agent of the parties;

    iii) that there was an amendment to the sales contract reflected in the documentary instructions; and

    iv) that the contract incorporated the Russian terms GOST with the result that there was a contractual limit of 2ppm of organic chloride.

45. In my view, for reasons which will be apparent from the discussion below, it was not necessary to deal with these issues in order to resolve the issues in the case so I do not address this objection further.

Disclosure and "absent" witnesses

46. It was submitted for Glencore that there was inadequate disclosure by BPOI, and examples of the alleged shortcomings are given in the Annex to its Closing Submissions.

47. It was said that Glencore's "*key concern*" was that despite the group-wide approach taken within the BP group (as confirmed in Mr Earl's cross examination), BPOI has sought "*artificially to isolate itself, for the purposes of disclosure, from the other relevant BP group companies involved in dealing with the Cargo*"; the relevant events concerned close coordination between several BP group companies, including BPOI, BPOESA, BPESE and BP Shipping; and it is "*highly likely*" that BPOI's approach to disclosure has deprived the Court of relevant documents.

48. It was therefore submitted for Glencore that insofar as there is any doubt about what a particular BP document means, or about what any BP group entity did, and that doubt may have been resolved by documents within the possession of one of the BP group entities involved in the arrangements for the Cargo, the Court should resolve that doubt in Glencore's favour.

49. Glencore previously sought permission to rely on an amended defence which sought to plead that:

    "*the arrangements for dealing with the cargo were made by BP on a group level, taking into account losses and profits to be made by each group company… The real value of the cargo to BPOI…. falls to assessed by reference to the value of the cargo to the BP group…"*

50. Permission was refused for these amendments (referred to as Category 3 amendments) by Butcher J. I note in particular the judgment of Butcher J at [26]:

"*26. In my judgment, the position is this: if these amendments are simply particulars of the existing case, then they are unnecessary and given the opposition to them, they should not be allowed. Assuming, however, that, as Mr Berry submits, they raise or involve a new case as to the actual costs and the costs of remediation, and the amount of the profits of the other BP entities, then that would require additional evidence. It seems to me that it would also open up the possibility of further argument about what additional evidence, possibly including expert evidence, and perhaps about what additional disclosure would be required. In my judgment, there is no good explanation as to why any such new case could not have been made at an earlier stage, and again it appears to me that there would undoubtedly be prejudice to BP in preparing for any such new case in the preparation for a trial which, as I have said, is now only three months away. Therefore, for those reasons I am not going to permit the Category 3 or 4 amendments either*."

51. Given that permission was refused, the scope of disclosure reflected the issues in the case and the relevance of documents to the issues cannot be established merely by reference to evidence in cross examination of the coordination role carried out by BPOI.

52. Further, reliance on a failure to disclose documents held by BP Shipping in relation to finding ships to carry the Cargo does not establish a failure to comply with disclosure obligations in circumstances where Glencore sought permission from Butcher J to amend the pleadings in relation to the claim for storage and transportation costs, and to plead a positive case that BPOI's chartering arrangements in respect of the Cargo were unreasonable (referred to as the "Category 2 amendments").

53. I note that at [15] of the judgment, Butcher J noted that further disclosure would be required if the Category 2 amendments were allowed:

"[15] …In relation to the Category 2 amendments, the Defendant says that there will be a need for further disclosure beyond that which has already been provided pursuant to the order made at the CMC. While there is an issue between the parties as to the extent of the disclosure which will be necessary, there is agreement that if these amendments were permitted, there would be a requirement for further disclosure."

However Jacobs J (at [24]) refused permission for these amendments.

54. In the light of the foregoing, I do not propose to deal with all the detailed complaints concerning disclosure raised by Glencore in its Annex. I do not accept the submission that the late failure to disclose the Tupras documents illustrates "*inappropriate conduct as to disclosure throughout the course of the proceedings*" or that it raises significant concerns about its disclosure on value and more generally: the failure to identify these particular documents does not justify such an inference.

55. In support of its submissions that the Court should resolve doubts in Glencore's favour (paragraph18 of its Closing Submissions) Glencore relied on the principles discussed in *Herrington v. British Railways Board* [1972] AC 877 at pps 930-931 where Lord Diplock stated that:

"*The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical*

move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold." [emphasis added]

56. In my view the principles stated by Lord Diplock have no application in the circumstances of this case and it is fanciful to suggest otherwise.

57. Glencore also submitted that it was "*notable*" that BPOI chose not to tender evidence from either (i) Oliver Williams, despite his "*crucial role*" in making the arrangements with Castellon, or (ii) anybody in BPOI's Operations team (such as Martin Bradshaw or Joshua Graham), who were responsible for dealing with (amongst other things) all of the sampling and analysis of the Cargo (and who might also have been able to provide informed evidence on CoQ 92).

58. In my view Glencore have not established that adverse inferences should be drawn having regard to the principles and approach discussed in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) in particular the requirements at [154 (ii)] to set out "*clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give…*" In my view these requirements have not been satisfied. I would also note the observations of Cockerill J at [150]:

"… the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller."

What terms formed part of the sale contract? (Issue 1)

Evidence

59. Firstly I set out the evidence of the contemporaneous documentary evidence, so far as material.

The exchanges on 1 and 2 April 2019

60. On 1 April 2019 there was an email from Mr Wawrzyniuk of Glencore to Ms Behtash at BPOI:

"*Thank you very much for the deal and your effort to make it happen. Below please find the recap of what was agreed to your approval and acceptance. Thanks again and look forward to more biz opportunities hopefully very soon.*

- Seller: Glencore Energy UK LTD

- Buyer: BPOI

- Quality: Urals ex Primorsk/UL in Seller's option

- Quantity: 100kt -1+ 10% sellers option

- Loading: 13 - 18 April (Platts RR to apply)

- Delivery: CIF Rotterdam

- Price: Dated Brent +0.53 USD/BBL

- Pricing: 5 after BL

- Payment: 30 days after B/L

- Laytime: 36+6

- Demurrage: as per CP

- Law: English Law, London High Court, no arbitration

- Inspection: 50/50

- GT&C: BP 2015

- Other: Vessel to be acceptable to buyer.

- Credit: OA. 2 day laycan to be narrowed as per Platts rules, earlier loaders can be used with pxg, dem, payment deemed from 13/04".

61. On 2 April 2019 Ms Behtash responded to Mr Wawrzyniuk:

"Confirm the deal and thanks!"

Subsequent correspondence on 2 April 2019

62. On 2 April 2019 there was an email from BPOI Contracts Team to Ms Pelyak at Glencore: "*Please find attached confirmation of trade E190006544/1*".

63. Attached to that email was the confirmation as follows:

"*We are pleased to confirm the following purchase by BP Oil International Limited from Glencore Energy UK Ltd*

Trade Ref: E190006544 (C)

Trade Date: 2 April 2019

Seller: Glencore Energy UK Ltd

Buyer: BP Oil International Limited

Grade: RUSSIAN EXPORT BLEND

Delivery: CIF at UST-LUGA

Delivery period: 13 April 2019 to 18 April 2019

General terms and Conditions agreed: BPOI CRUDE 2007

Please send your contract to our contact as stated below and include our trade reference as promptly as possible but on no account later than one week prior to delivery start date or if the delivery start date has either passed or is within one week of the trade date, by no later than 2 days from the trade date. In the event that we do not receive your purchase contract BP Oil International Limited will normally issue a purchase contract for good order to ensure that the full terms of the trade are established prior to the delivery." [emphasis added]

64. In response on the same day Ms. Pelyak responded to BPOI:

"*Attached, please find our sales contract for the delivery of about 100kts REBCO CIF Rotterdam basis loading 13-18 April*."

65. That contract (referred to below as the "Glencore Sales Contract") included the following provisions as paragraphs 3 and 8 (numbering of subparagraphs added to paragraph 8 for convenience):

3. QUANTITY AND QUALITY

100,000 MT +1- 10 (TEN) PERCENT AT SELLER'S OPTION AND TERMINAL ACCEPTANCE OF RUSSIAN EXPORT BLEND CRUDE OIL OF NORMAL EXPORT QUALITY AVAILABLE AT THE TIME AND PLACE OF LOADING

8. QUANTITY AND QUALITY

(1) QUANTITY AND QUALITY SHALL BE DETERMINED IN ACCORDANCE WITH STANDARD PRACTICE OF THE LOADING TERMINAL.

(2) SAVE FRAUD OR MANIFEST ERROR, THE FINAL AND BINDING NET US BBLS SHALL BE THE GROSS B/L QUANTITY MINUS STRAIGHT DEDUCTION OF WATER AND SEDIMENTS, AS PER QUALITY CERTIFICATE ISSUED AT LOAD PORT, MULTIPLIED BY THE US BBLS/MT CONVERSION FACTOR IN ACCORDANCE WITH STANDARD PRACTICE OF THE LOADING TERMINAL.

(3) THE BILLS OF LADING AND CERTIFICATES OF QUANTITY AND QUALITY WITH RESPECT TO THE CARGO LOADED SHALL, EXCEPT IN CASES OF FRAUD OR MANIFEST ERROR, BE CONCLUSIVE AND BINDING ON BOTH PARTIES FOR INVOICING PURPOSES BUT WITHOUT PREJUDICE TO THE RIGHTS OF EITHER PARTY TO FILE A CLAIM FOR QUANTITY AND/OR QUALITY.

(4) ANY CLAIM FOR QUANTITY DISCREPANCIES WILL BE PASSED ON, AND WILL BE SETTLED ONLY TO THE EXTENT THAT SAID CLAIM IS RECOVERABLE FROM SELLER'S SUPPLIER. SELLER SHALL HOWEVER MAKE ALL REASONABLE EFFORTS TO RECOVER FROM SELLER'S SUPPLIER ANY COSTS, LOSSES OR DAMAGES FOR WHICH BUYER HAS SUBMITTED A CLAIM.

(5) *QUALITY SHALL BE AS PER THE LOADING TERMINAL CERTIFICATE OF QUALITY TO BE FINAL AND BINDING FOR BOTH PARTIES, EXCEPT FOR FRAUD OR MANIFEST ERROR."*

BPOI 3 April email

66. On 3 April 2019 there was a response from BPOI Contracts Team to Ms Pelyak and in the attachment BPOI set out their response on the detailed provisions in the sales contract provided by Glencore as follows:

"*We are pleased to confirm our agreement to the terms set out in your fax dated 2nd April 2019 subject to the following:*

Quantity and Quality:

Please delete "and terminal acceptance" and "time and"

…

Quantity and Quality:

Please delete second paragraph - note figure is not binding there is always a right to file a quantity claim.

Please delete final two paragraphs as this has not been agreed.

Please add "Buyer and Seller shall jointly appoint an independent inspector at the loadport. Such inspection costs shall be shared equally between the parties."

We are pleased to have concluded this further business with you." [emphasis added]

Glencore 3 April email

67. In turn Glencore responded on 3 April 2019 by email from Ms Pelyak to BPOI Contracts Team:

"Attached, please find our comments to the contract amendments for the sale of REBCO basis loading 13-18 April."

68. The attachment read as follows:

"*WE ARE IN RECEIPT OF YOUR AMENDMENTS DD 03.03.2019 TO OUR ABOVE REFERENCED SALES CONTRACT, TO WHICH PLEASE FIND OUR COMMENTS AS PER BELOW:*

3. QUANTITY AND QUALITY

WE MAINTAIN "TERMINAL ACCEPTANCE"

WE MAINTAIN "TIME AND...

4. DELIVERY

PARA 1: WE MAINTAIN "SCHEDULED" AND "WEATHER AND SAFE NAVIGATION PERMITTING..."

PARA 3 AND 4: WE MAINTAIN OUR WORDING

5. PRICE

PENULTIMATE PARA: WE MAINTAIN OUR WORDING "TO BE PAID TOGETHER WITH COMMERCIAL INVOICE"

6. PAYMENT:

YOUR COMMENTS ARE NOTED…

8. QUANTITY AND QUALITY AND INSPECTION:

WE MAINTAIN OUR WORDING IN FULL.

BILL OF LADING FIGURES ARE "FIGURE BINDING" EXCEPT IN CASES OF FRAUD OR MANIFEST ERROR.

9. LAYTIME AND DEMURRAGE:

AGREE TO DELETE PARA 4 ABOUT 50% OF DEMURRAGE SAVINGS IN CASE OF EARLY BERTHING

FOR THE REST OF THE CLAUSE - WE MAINTAIN OUR WORDING

12. LIMITATION OF ASSIGNMENT:

YOUR COMMENTS ARE NOTED

13. FORCE MAJEURE:

WE MAINTAIN OUR WORDING" [emphasis added]

BPOI 4 April email

69. On 4 April 2019 BPOI Contracts Team responded to Ms Pelyak, the attachment reads as follows:

"*Please note that only terms which have been expressly agreed by both parties, at the time of trade or subsequently, shall be binding for the agreement. We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties.*

We would be grateful if you would advise details of the bank/account to which payment should be made.

Please note that your bills of lading and other shipping documents should be sent to our Operations Department and Invoice and Letter of Indemnity faxed to our Financial Operations Department via Fax no. 44 (0) 870 900 9903 or 44 (0) 203 04 32305 at least 2 days prior to due date to ensure timely settlement.…

We are pleased to have concluded this further business with you." [emphasis added]

Glencore 8 April email

70. On 8 April 2019 Ms Pelyak responded to BPOI Contracts Team, stating in the attachment [so far as material]:

"*WE MAINTAIN OUR COMMENTS DD 03.04.2019*

WITH REGARDS TO THE CLAUSES IN DISPUTE, PLEASE BE ADVISED THAT WE DO NOT INTEND TO ENGAGE FURTHER AND WILL NO LONGER REPLY TO ANY FURTHER CORRESPONDENCE RELATING TO THIS MATTER UNLESS THERE IS A CHANGE IN YOUR POSITION. FOR THE AVOIDANCE OF DOUBT, NOTHING SHALL BE DEEMED OR CONSTITUTE ACCEPTANCE OR CONSENT ON THE CLAUSES IN DISPUTE.

KINDLY NOTE THE ABOVE OUR LAST AND FINAL COMMENTS AND WE SHALL NOT SEND ANY MORE CORRESPONDENCE ON THE ISSUE." [emphasis added]

Correspondence post 8 April 2019

71. On 9 April 2019 there was an email from a Mr Graham for BPOI to Ms Pelyak providing documentary instructions to Glencore:

"*Please find documentary instructions below, and advise below where required please.*

…

REF: E190006544: MI47Z

RE: PURCHASE OF R.E.B.C.O, 100000 MT, +/-10% AND CUSTOMS STATUS T1, CIF UST-

LUGA (PORT) (SUPPLIER GLENCORE)

VERSION: ONE

VESSEL: M/T ALEXIA (9389966) OR SUB

LOADPORT: UST-LUGA (PORT)

LOADPORT INSPECTOR: CIG (50:50)

…"

72. It is not in dispute that the Cargo was delivered, as were the shipping documents. No other written or oral response was made to the email of 8 April 2019 from Glencore.

The case advanced for each party.

73. It is BPOI's case that a binding contract of sale was made on 2 April 2019 in writing pursuant to the ordinary principles of 'offer' and 'acceptance'; and this was the express and objective intention of the parties, as stated in the relevant exchanges. [APOC, paragraphs 3-5]

74. Thus, as pleaded by BPOI, the contract of sale was:

    i) either the "*recap*" including the GT&Cs; or

    ii) the recap and certain express terms of the Glencore Sales Contract sent on 2 April which were mutually agreed, namely clauses 3 and 8 (subparagraph 1 and subparagraph 3). [Amended particulars of claims paragraphs 7 and 9]

75. In opening oral submissions, counsel for BPOI stated that BPOI no longer advanced the alternative pleaded case.

76. Glencore's pleaded case is that either:

    i) When Glencore (Ms Pelyak) replied to BPOI expressing its consent to some of the proposed amendments but otherwise maintaining the position set out in its detailed sale contract of 2 April 2019, this amounted to a counter offer by Glencore on 3 April 2019 and that this was accepted on 4 April 2019, when BPOI replied to Glencore stating *'We are pleased to have concluded this further business with you*' (which is referred to in this judgment as "Glencore Alternative 1 -3/4 April exchange"); or

    ii) by its e-mail of 8 April 2019, Glencore made its own counter-offer on the same terms as Glencore's (later) message of 3 April 2019. This counter-offer was accepted by BPOI by its subsequent conduct, in particular by providing its documentary instructions to Glencore on 9 April 2019 and/or accepting the cargo documents and/or letter of indemnity and/or the Cargo and/or by not objecting to the amendments in any subsequent communications (which is referred to in this judgment as "Glencore Alternative 2-Last shot").

77. At trial Glencore pursued the alternative abandoned by BPOI of a partial adoption of Glencore's terms and BPOI does not object to this alternative being considered by the Court. For convenience I shall refer to this as "Glencore Alternative 3-Partial case".

Glencore Alternative 1 - 3/4 April exchange

78. This alternative is that when Glencore (Ms Pelyak) replied to BPOI on 3 April expressing its consent to some of the proposed amendments but otherwise maintaining the position set out in its detailed sale contract of 2 April 2019, this amounted to a counter offer by Glencore on the terms of its original detailed contract of 2 April and that this was accepted on 4 April 2019, when BPOI replied to Glencore stating "*We are pleased to have concluded this further business with you.*"

79. It was submitted for Glencore that the parties contemplated that there would be a formal sale contract and the Court should be slow to find that the parties intended to contract solely on the basis of the Recap. However in its opening submissions Glencore focused on Alternative 2 (last shot) rather than Alternative 1, and appeared to acknowledge that rather than reach an agreement on 4 April, "*both parties maintained their proposed terms*" (paragraph 102.3).

80. In my view, the fact that the parties contemplated that there would be a formal sales contract does not determine whether in fact a contract was subsequently concluded on the terms of the sales contract (or part of them).

81. I reject the submission for Glencore (paragraph 31 of its Closing Submissions) that the 4 April response amounted to "*express agreement*" to Glencore's latest proposal of 3 April. There was no express agreement in that email of 4 April to Glencore's "*latest proposal*": there was no express reference or response to the detailed comments of the email of 3 April. In my view the phrase "*We are pleased to have concluded this further business with you*" is not sufficient to lead to the conclusion that viewed objectively, by its email of 4 April BPOI accepted the terms in the Sales Contract as amended by the Glencore proposals in its email of 3 April. A trade had been concluded on the terms of the Recap and the phrase concerning the "*conclusion*" of the "*business*" can be interpreted in this light. Even if it were to be given a broader meaning, the intention of the parties has to be considered having regard to the entirety of the relevant exchanges and the email from BPOI expressly stated that "*proposed amendments*" were rejected "*unless expressly agreed*". Glencore submitted (footnote 5 to paragraph 31.2 of its Closing Submissions) that those words were intended to operate only prospectively. I do not accept that as the "*plain intention*" of the words. There is no reason to limit the natural meaning of the words "*we hereby reject <u>any</u> proposed amendments*" [emphasis added] to amendments proposed only after the date of the email.

82. Although the issue of the intention of the parties is to be viewed objectively, I note that the argument which Glencore now advances is inconsistent with the email of 8 April from Glencore following the email of 4 April in which Glencore, far from regarding the contract as having been concluded, in effect continued the negotiations and "*maintained*" its comments.

83. In my view it cannot be said that objectively BPOI accepted the terms of the Glencore Sales Contract as proposed in Glencore's email of 3 April by its email of 4 April.

Glencore Alternative 3-Partial case

84. It is convenient then to take Alternative 3, which is Glencore's case that on 3 April 2019 (or 4 April 2019 when BPOI sent its email) the parties had reached agreement on such of the detailed terms which had been expressly accepted in the correspondence and those terms formed part of the sale contract. In other words, this is a contention that there was a partial adoption of the terms in the Glencore Sales Contract insofar as some terms had been "agreed".

3 April email

85. In the 3 April email, BPOI said at the outset:

> *"We are pleased to confirm our agreement to the terms set out in your fax dated 2nd April 2019 subject to the following*"
>
> and then set out the amendments which it sought to the terms in the Glencore Sales Contract.

86. It was submitted for Glencore that:

    i) the natural meaning of the words "*subject to the following*" in the 3 April email is that BPOI agreed to Glencore's proposals save insofar as amendments, deletions or additions were put forward (paragraph 27.3 of its Closing Submissions); and

ii) this interpretation of the words "*subject to the following*" is "*analogous*" with the "*typical "accept/except" approach to contract-making in the oil trade*" whereby the counterparty "*accepts*" all of the proposed terms "*except*" those that are expressly stated in the response: *New Hampshire Insurance v MGN Ltd* [1996] 5 Lloyds Rep 103 per Staughton LJ at p108 (paragraph 27.4 of its Closing Submissions)

87. The passage in *New Hampshire Insurance* to which Glencore referred the Court reads as follows:

"*… there are cases where it is not always easy to tell where negotiations end and contract making begins. There is a well-known process among commodity dealers or chartering brokers which I would call the "accept, except" process. "A" makes an offer, "B" says "I accept, except as follows", and counters and so forth…"*

88. In my view that analogy is of no relevance to the objective assessment of the intention of the parties in this case or to the meaning of "*subject to the following*": Staughton LJ in *New Hampshire Insurance* was referring to a particular process among commodity dealers or chartering brokers. There is nothing to suggest that that process was in the contemplation of the parties here. This was a specific negotiation by two parties in relation to the terms of a particular contract when no particular commercial matrix is pleaded as relevant to the intention of the parties to create a legally binding agreement.

89. It was submitted for Glencore that the words "*subject to*" in BPOI's email of 3 April could not be conditional on Glencore agreeing to its proposed amendments (paragraph 27.2 of its Closing Submissions). Further it was submitted (paragraph 27.9 of its Closing Submissions) that it was "*uncommercial*" for BPOI to adopt a position whereby until every "i" was dotted and "t" crossed BPOI could renege on those provisions.

90. In my view it is a question of construction of the email whether the parties intended to be bound by the 3 April email as Glencore contends (the relevant legal principles are set out later in this judgment but are common ground).

91. Whilst the language is capable of bearing the meaning for which Glencore contends, that BPOI agreed to such of Glencore's proposals save insofar as amendments, deletions or additions were put forward, the issue is not whether the parties had reached agreement within the framework of the negotiations on specific points but whether the parties intended by that email and that phrase in particular, that a binding agreement should come into effect at that point which incorporated only those certain terms which were not in dispute. In my view this is not the natural meaning of the language "*We are pleased to confirm our agreement to the terms set out in your fax dated 2nd April 2019 subject to the following*…"

92. However, in reaching a conclusion the Court has to consider not only the words used but also the context, including the commercial consequences of the rival interpretations.

93. When the phrase is read in the context of the rest of the email it is clear that BPOI does not intend to be bound at that point but is part way through its negotiation: thus BPOI proposes ("*Please delete*") that certain matters should be dealt with, not in accordance with Glencore's Sales Contract but in accordance with the GT&Cs (which were expressly incorporated into the Recap). For example under "*Delivery*" the email states:

"Delivery:

Please delete "scheduled"

Please delete "weather and safe navigation permitting"

Please delete third and fourth paragraphs and refer to the GT&C's."

Similarly in relation to "*Payment*":

"*Other shipping documents shall be as per the GTCs.*

LOI format - please delete and refer to the GTCs.

Please delete penultimate paragraph and refer to GTCs for interest"

94. In accordance with the authorities, where there are two possible interpretations, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Whilst I accept that any commercial negotiation is likely to proceed by narrowing the areas of disagreement, it is in my view nevertheless in accordance with business common sense to conclude that viewed objectively, the parties did not intend to conclude a binding agreement (which varied the Recap) (unless and) until the negotiations had concluded and it is therefore implicit that unless and until that point is reached, it was open to a party to "*renege*" on the provisions it has "*agreed*" in the course of the negotiations.

95. Glencore responded to that email on 3 April with its comments, and the cover email, far from suggesting that the parties had reached a concluded agreement incorporating some of the terms proposed by Glencore, merely stated:

"please find our comments to the contract amendments".

96. Viewed objectively there is no basis to conclude that on 3 April the parties had agreed a binding contract on the terms of the Recap and such of the terms as had been "agreed" at that point.

4 April email

97. Glencore submitted (paragraph 27.8 of its Closing Submissions) that the BPOI email of 4 April "*reconfirms*" the accept/except type of approach to contract making. In my view there is no general rule which is applicable here and the language of that email indicates no such intention. Glencore sought to rely in isolation on the terms underlined below but in my view the paragraph in that email has to be read and construed in its entirety in order to establish the objective intention of the parties:

"Please note that only terms which have been expressly agreed by both parties, at the time of trade or subsequently, shall be binding for the agreement. We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties." [emphasis added]

98. The paragraph does not say that, where terms have been partially agreed, this will amount to a binding agreement. It is directed at the need for express agreement as opposed to implied agreement. It does not say that an agreement will be made part way through negotiations in circumstances where negotiations are not concluded, on part only of the terms under consideration.

99. In my view the construction advanced by Glencore of the 4 April email and that paragraph in particular would be contrary to commercial reality. The parties were engaged in a negotiation of the contract. In the course of the correspondence the issues that were acceptable to the parties were identified and the disputed issues were identified. It would in my view be wholly uncommercial for the court to construe that paragraph such that even though the parties had not concluded their negotiations on the entirety of the contract, the parties had concluded a binding agreement part way through the negotiations solely on the terms which were not in dispute.

100. Again in my view, Glencore now advances a case which is inconsistent with its position at the time: in its response to the 4 April email on 8 April there is no indication that Glencore regarded the parties as having reached a binding agreement on the terms that had been agreed; rather Glencore sought to impose its terms in relation to the disputed clauses by its statements that it would not engage further and would not reply unless there was a change in BPOI's position.

101. In my view construing the language used in the context of the entire exchanges and having regard to the commercial implications, neither basis advanced by Glencore establishes that the intention of the parties was to conclude a binding agreement part way through the exchanges on the terms that were "*agreed*" notwithstanding the continued further exchanges in relation to the outstanding issues.

Glencore Alternative 2-"Last Shot"

102. This is the alternative that by its e-mail of 8 April 2019, Glencore made its own counter-offer on the same terms as Glencore's (later) message of 3 April 2019. This counter-offer was said by Glencore to be accepted by BPOI by its subsequent conduct, in particular by providing its documentary instructions to Glencore on 9 April 2019 and/or accepting the cargo documents and/or letter of indemnity and/or the Cargo and/or by not objecting to the amendments in any subsequent communications.

Submissions

103. Glencore submitted that:

    i) Even if there were remaining terms in dispute after the BPOI 4 April email, those terms were subsequently agreed in Glencore's favour by reason of Glencore's "last shot" in its message of 8 April and BPOI's subsequent performance of the contract without further discussion about its terms (paragraph 33 of its Closing Submissions).

    ii) Typically, an "*offer to buy containing the purchaser's terms which is followed by an acknowledgement of purchase containing the seller's terms which is followed by delivery will (other things being equal) result in a contract on the seller's terms*": *Tekdata Interconnections Ltd v. Amphenol Ltd* [2009] EWCA Civ 1209 per Longmore LJ at [1]; this is the "*last shot*" principle, which is commonly applied in

sale of goods cases: see *Benjamin on the Sale of Goods* (11th edition) at 2-013 (paragraph 102.4 of Glencore's opening skeleton).

iii) This is not one of those "*unusual cases*" where the "*last shot*" principle was not intended to apply. On the contrary, the understood practice in the industry and between the parties is that since Glencore was the seller and had issued the original sales contract, its last comments would trump BPOI's: Ms Pelyak's witness statement at paragraph 16 (paragraph 102.5 of its opening skeleton).

iv) The wording in BPOI's 4 April email was not sufficient to displace the "last shot" doctrine, especially given the understood practice in the industry that the seller's terms will prevail: Ms Pelyak's witness statement at paragraph 16.

v) BPOI did not challenge the 8 April email but proceeded to perform the contract (paragraph 35.3 of its Closing Submissions).

104. BPOI submitted as follows:

i) The 8 April email does not reiterate the disputed terms previously proposed by Glencore, which had lapsed following their rejection by BPOI. There was, therefore, no "*counter-offer*" of any terms made in this document.

ii) The 8 April email expressly, and correctly, refers to the "*clauses in dispute*". It thereby recognises that those clauses had not been agreed by BPOI in any previous correspondence. That is fatal to construing this document as a counteroffer, accepted by conduct.

iii) It makes no sense for Glencore to submit that BPOI accepted the disputed terms "*by not objecting to the amendments in any subsequent communications*", given that the 8 April email stated in terms that Glencore would "*no longer reply to any further correspondence relating to this matter unless there is a change in your position*". Glencore cannot rely on the fact BPOI did not correspond further in these circumstances.

iv) Glencore's case of acceptance by conduct is inconsistent with the parties' express intentions. In its email of 4 April, BPOI had stated that: "*Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties*". Likewise, in its 8 April email, Glencore stated: "*For the avoidance of doubt, nothing shall be deemed or constitute acceptance or consent on the clauses in dispute*".

v) This case is not an example of a "*battle of forms"*. That approach applies in favour of "*the party whose terms and conditions are in play and unanswered at the time that the work is done or the goods delivered*". It does not, by contrast, apply where there is "*evidence of the parties' objective intention that the last shot should not prevail*". The Court must, in any event, consider the documents as a whole: *TRW Ltd v. Panasonic Industry Europe GmbH* [2021] I.L. Pr. 42 at [29], [32], [35].

Discussion

105. In my view, the email of 8 April was capable of amounting to a counter-offer on the terms set out in the Glencore Sales Contract since whilst the attachment to the email did not set

out the terms in full it clearly refers to the sales contract and the terms thereof. It read (so far as material):

"WE ARE IN RECEIPT OF YOUR AMENDMENTS DD 04.04.2019 TO OUR ABOVE REFERENCED SALES CONTRACT, TO WHICH PLEASE FIND OUR COMMENTS AS PER BELOW:

WE MAINTAIN OUR COMMENTS DD 03.04.2019…

106. It therefore can be construed as a counter-offer on those terms referring expressly both to the Glencore Sales Contract which was sent with the email of 2 April and the comments of 3 April 2019 which are "*maintained*".

107. Further, in my view, the fact that in the email attachment Glencore refers to the "*clauses in dispute*" merely recognises that those clauses had not been agreed by BPOI, but nor were BPOI's proposed changes accepted by Glencore; thus there was at that date no agreement to the terms of the Glencore Sales Contract. The relevant paragraph read:

"*WITH REGARDS TO THE CLAUSES IN DISPUTE, PLEASE BE ADVISED THAT WE DO NOT INTEND TO ENGAGE FURTHER AND WILL NO LONGER REPLY TO ANY FURTHER CORRESPONDENCE RELATING TO THIS MATTER UNLESS THERE IS A CHANGE IN YOUR POSITION. FOR THE AVOIDANCE OF DOUBT, NOTHING SHALL BE DEEMED OR CONSTITUTE ACCEPTANCE OR CONSENT ON THE CLAUSES IN DISPUTE*."

108. In my view that paragraph does not prevent the email of 8 April 2019 from amounting to a further counter-offer to BPOI (on the terms of the Glencore Sales Contract) which is then capable of being accepted by conduct.

109. However given that the 8 April email stated that Glencore would "*no longer reply to any further correspondence relating to this matter unless there is a change in your position*", in my view Glencore cannot rely on the fact BPOI did not correspond further in relation to the terms specifically as acceptance of the counter-offer.

110. Glencore also relies in the alternative on the conduct of BPOI in providing its documentary instructions to Glencore on 9 April 2019 and/or accepting the cargo documents and/or letter of indemnity and/or the Cargo, and thus the crux of this issue is therefore whether this is a case where the "*last shot*" principle applies.

111. In its opening skeleton Glencore referred to the "*last shot*" principle as "*typical*" and relied on a sentence from the judgement of Longmore LJ in *Tekdata*.

112. The full quotation from *Tekdata* is as follows:

"*This appeal raises the question whether in what is sometimes called "the battle of forms", there can be circumstances in which a traditional offer and acceptance analysis can be displaced by reference to the conduct of the parties over a long-term relationship. An offer to buy containing the purchaser's terms which is followed by an acknowledgement of purchase containing the seller's terms which is followed by delivery will (other things being equal) result in a contract on the seller's terms. If, however, it is clear that neither party ever intended the seller's terms to apply and always intended the*

purchaser's terms to apply, it is conceptually possible to arrive at the conclusion that the purchaser's terms are to apply. It will be a rare case where that happens…" [emphasis added]

113. I also note Lord Dyson's observations in that case at [23]-[25]:

"23. The so-called "last shot" doctrine has been explained in Chitty on Contracts (30th edition) at para 2-037 as meaning that where conflicting communications are exchanged, each is a counter-offer, so that if a contract results at all (e.g. from an acceptance by conduct) it must be on the terms of the final document in the series leading to the conclusion of the contract. This doctrine has been criticised in Anson's Law of Contract (28th edition) at p 39 as depending on chance and being potentially arbitrary as well as on the ground that, unless and until the counter-offer is accepted, there is no contract even though both buyer and seller may firmly believe that a contract has been made.

24. The paradigm battle of the forms occurs where A offers to buy goods from B on its (A's) conditions and B accepts the offer but only on its own conditions. As is pointed out in Cheshire, Fifoot & Furmston's Law of Contract (15th ed.) at p 210, it may be possible to analyse the legal situation that results as being that there is (i) a contract on A's conditions; (ii) a contract on B's conditions; (iii) a contract on the terms that would be implied by law, but incorporating neither A's nor B's conditions; (iv) a contract incorporating some blend of both parties' conditions; or (v) no contract at all.

25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the "traditional offer and acceptance analysis", i.e. that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: "For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance". I also accept the force of the criticisms made in Anson. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships." [emphasis added]

114. From that authority it seems to me that while the "*general rule*" is that the traditional offer and acceptance analysis applies in "*battle of the forms*" cases, this assumes that:

i) there is a "*battle of the forms*"; and

ii) even if that is the case, the analysis depends on an assessment of what the parties must objectively be taken to have intended.

115. This was not in my view a battle of the forms. The parties were not in dispute as to whether or not the BP General Terms & Conditions or the Glencore terms should apply;

both parties had accepted when the Recap was agreed that the GT&Cs applied and the parties were in negotiation as to whether the contract already agreed should be varied to reflect the terms of the Glencore Sales Contract. It cannot be the case that any negotiation of any contract which gives rise to a dispute can be said to amount to a "battle of the forms" merely because one party sends a draft contract to the other and there is then a back and forth in writing in the course of the negotiations.

116. This is not a case where the rationale for the "*last shot*" principle identified by Lord Dyson (i.e. that it promotes a degree of certainty to promote effective commercial relationships) can be said to exist.

117. Even if this case were to be treated as a "*battle of the forms*", the question is what the parties must objectively be taken to have intended.

118. I accept that BPOI did not pursue the outstanding issues in correspondence (or by telephone) following the email of 8 April.

119. In assessing what the parties must objectively be taken to have intended, I have regard to the contemporaneous evidence and in particular the statement by BPOI in its 4 April email that:

"*only terms which have been expressly agreed by both parties, at the time of trade or subsequently, shall be binding for the agreement. We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties.*" [emphasis added]

120. Although Glencore submitted in its oral closings that the decision in *TRW v Panasonic* [2021] EWCA Civ 1558 was "*very different*", in my view an analogy can be drawn from that judgment and I note in particular the following:

"68. Furthermore, the PIEU General Conditions crucially protected PIEU against falling victim to what in English law is called the last shot doctrine. The words used were '[c]onditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation'. I can see no reason why those words should not mean exactly what they say. Their meaning is clear and in no way ambiguous."

121. Glencore also submitted in oral closings that the paragraph in the 4 April email was only a "*penultimate or earlier shot*" which was overridden by the last shot. It was submitted that this case was like *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 W.L.R. 401, in which the putative anti-last shot term was just part of one party's terms.

122. Glencore referred to the summary of *Butler Machine Tool* in *Chitty on Contracts* at [4-046] to [4-047] in support of its submission that wording such as that relied on by BPOI is capable of being superseded by subsequent conduct.

123. The following extract from the commentary in *Chitty* of *Butler* at [4-047] is of particular note:

"…It would, however, have been possible for the sellers to have turned their final communication into a counter-offer by explicitly referring in it not only to the subject-matter of the original offer, but also to all its other terms. In that case no contract would have been concluded, since the buyers had made it clear before the machine was delivered that they did not agree to the "price escalation" clause. Thus, it is possible by careful draftsmanship to avoid losing the battle of forms, but not (if the other party is equally careful) to win it. In the Butler Machine Tool case, for example, the sellers' conditions included one by which their terms were to "prevail over any terms and conditions in Buyer's order"; but this failed (in consequence of the terms of the buyers' counter-offer) to produce the effect desired by the sellers. The most that the draftsman can be certain of achieving is the stalemate situation in which there is no contract at all. Such a conclusion will often be inconvenient, though where the goods are nevertheless delivered it may lead to a liability on the part of the buyers to pay a reasonable price, but as a matter of restitution rather than contract. [emphasis added]

124. It seems to me therefore that *Chitty* takes the view (by reference to the decision in *Butler Machine Tool*) that it is possible by careful drafting to prevent a contract coming into effect through the battle of forms.

125. It was submitted for Glencore (paragraph 35.1 of its Closing Submissions) that:

"*This boilerplate-esque wording is not, properly construed, sufficient to displace the "last shot" doctrine. There would need to be much clearer wording to make this one of those "rare cases": see the passages from Tekdata cited above. This is especially so given the understood practice in the industry that the seller's terms will prevail: see the unchallenged evidence at Pelyak ¶16 {D/7/4}. This practice is entirely consistent with, and reinforces, the orthodox "last shot" approach*."

126. The evidence of Ms Pelyak, which was not challenged in cross examination, was as follows:

"*As with most deals between Glencore and BPOI, each party subsequently maintained its position. My understanding from negotiations with BPOI and other counterparties is that, since Glencore was the seller and had issued the sales contract, Glencore's last comments would trump BPOI's*."

127. The evidence of Ms Pelyak merely reflects her subjective view. There is no contemporaneous documentary evidence to support her view and it does not appear to be directed at a "*battle of the forms*" in its usual sense but rather at which party issued the contract.

128. As stated above, *Tekdata* makes clear that the question of the "*last shot*" always depends on an assessment of what the parties must objectively be taken to have intended.

129. The evidence of Mr Hague (relied upon by Glencore) in my view provides no assistance as to the intention of the parties as to the effect of the exchange of emails on a contract coming into existence. He merely stated in his witness statement that:

"[once Glencore had sent its contract to BPOI] there is then usually a back and forth of terms but I do not have anything to with that process unless the counterparty comes back to us and says that they cannot agree something very material. If that had happened with

Glencore, I would have spoken to Mr Wawrzyniuk and try and resolve any problems. Urals is very commoditised in how it is traded and there is rarely discussion about contract terms…"

130. It is difficult to see how the wording of BPOI in its 4 April email could have been clearer. It said:

"*only terms which have been expressly agreed by both parties, at the time of trade or subsequently, shall be binding for the agreement. We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties"*

131. Whether or not it was "*boiler plate*" as Glencore suggest is irrelevant. There is nothing to suggest that it was not intended to have a meaning or should be disregarded merely because it may be inserted into BPOI emails as standard (as to which there is in any event no evidence).

132. In my view the language of the 4 April email is clear and unambiguous and Glencore has not identified any respect in which the language can be said to be ambiguous.

133. Glencore's case on this alternative therefore seems to depend on its submissions that the BPOI language was only a penultimate shot; but as discussed above, *Butler Machine Tool* does not provide assistance to Glencore in this regard where the language, as here, is clear as to the intention of the parties.

134. BPOI had made clear by its email of 4 April that it would not be bound by the disputed clauses by a failure to respond or by performance. Glencore's response was not to reject this provision but to state that in relation to the clauses in dispute "*nothing shall be deemed or constitute acceptance or consent*" of such clauses.

Conclusion on Glencore Alternative 2 – "Last shot"

135. For the reasons set out above I find that the "*last shot*" principle does not apply in the circumstances of this case.

Conclusion on terms of contract

136. For all these reasons I therefore find that:

i) There was no agreement reached between the parties on all or part of the terms of the Glencore Sales Contract.

ii) There was however a contract formed on 2 April 2019 by the exchanges of 1 and 2 April 2019 between Mr Wawrzyniuk and Ms Behtash.

137. Whilst I accept that this was not the original intention of the parties, this is nevertheless the result of the subsequent exchanges given that no subsequent agreement was reached: as noted by *Chitty* (quoted above) the draftsman (in this case BPOI) has achieved a "*stalemate situation*", although in this particular case (unlike in *Chitty*) it does not result in no contract between the parties but a contract on the terms of the Recap including the GT&Cs.

Terms relating to Quality (Issue 2 and 3)

138. The remainder of the issues on liability will be addressed in light of my findings above on Issue 1, the terms of the contract. I do not intend to address the various alternative cases which might have applied (and were advanced in submissions) had a different conclusion been reached on the terms of the contract as it is not necessary to do so in order to reach a conclusion on liability.

139. Accordingly it is not necessary for me to decide Issue 2 (Is BPOI's claim precluded under clause 8(5) by reason of COQ 92?) and Issue 3 (What is the proper construction and impact of clause 8(1)?) of the Agreed List of Issues for Closing.

Was there a breach of the Recap Quality clause and/or section 59.1.1 of the GT&Cs? (Issue 4)

140. I therefore turn to consider Issue 4, which in the light of my findings above I reformulate as follows:

"Was there a breach of the Recap Quality clause and/or section 59.1.1 of the GT&Cs?"

141. I propose therefore to disregard the reference in Issue 4 as formulated by the parties to a breach of paragraph 3 of the Glencore Sales Contract given my findings above (although I note in passing the submission for BPOI that the quality clause is essentially the same on both parties' cases).

Construction of section 59.1.1 of the GT&Cs

142. In the Recap, Glencore agreed to supply REBCO of "*Quality: Urals ex Primorsk / UL in Seller's option*".

143. Section 59.1 of the BP GT&Cs, provided that:

"*59.1 Quality*

59.1.1 Unless otherwise stated in the Special Provisions, the quality of: (i) the Crude Oil delivered hereunder shall be the quality of such Crude Oil as usually made available at the time and delivery point as specified in the Special Provisions; and (ii) Product delivered hereunder shall not be inferior to the specification (if any) set out in the Special Provisions…". [emphasis added]

BPOI submissions

144. It was submitted for BPOI that:

i) the word "*usual"* is "*controlling*" and the time and place are subsidiary; it must be a usual Urals cargo, and time and point of loading means that one can vary within what is usual according to what is available at the time and place of loading, but it does not entitle delivery of something that is wholly unusual at any time; (Day 7 45:7-45:12)

ii) Glencore's interpretation is unreasonable and absurd because if it was right there could never be a quality claim, because the only thing that is usual at the precise time and point of loading is the cargo actually loaded, and so would mean that

whatever cargo is actually loaded is by definition the usual for the time and point of loading, and by definition is contractual (Day 7 46:1-46:9)

Glencore submissions

145. It was submitted for Glencore (paragraphs 148-149 of its opening skeleton) that:

i) If (assuming that the Cargo contained elevated organic chlorides) that was all that was available at the time at the port, the Cargo complied with the contract.

ii) BPOI had not discharged its burden of proving that the Cargo contained elevated levels of organic chlorides on delivery at Ust-Luga (paragraph 60.2 of its Closing Submissions).

Relevant law on construction of contracts

146. The court was referred to the principles of contractual interpretation summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) at [8]:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

Discussion

147. There are two potential meanings of the phrase "*the quality shall be…the quality of such Crude Oil as usually made available at the time and delivery point*" advanced by the parties.

148. BPOI gives precedence to the term "*usually*" and the commercial consequence/absurdity of allowing a seller to deliver contaminated oil if that was the only oil available.

149. Glencore submitted that the Court must give effect to the words "*at the time*" within the phrase, and thus the Cargo need only be of the quality then available at the loading point. Glencore submitted that this just reflects the allocation of risk between the parties and that it had been agreed that the buyer should bear the risk of uncertainty about the quality of the oil.

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement." (Lukoil)

150. In my view the natural meaning of the word "usually" made available connotes what typically or normally happens. It does not therefore mean the oil which was available at the particular time (as in effect Glencore contend) since in my view that would give no meaning to the term "usually". I do not understand Glencore to submit that the oil usually made available (i.e. at other times) was oil with elevated levels of organic chlorides.

"If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other" (Lukoil)

151. In my view Glencore's commercial justification for their contrary interpretation removes most, if not all, the protection for the buyer in relation to the quality of the oil to be delivered. There is no evidence to support its submission that this reflects the allocation of risk nor that if it had not had this meaning, detailed specifications of the oil would have been agreed.

152. To the contrary, the court is entitled to have regard to the other provisions of the contract and the factual background. It was agreed that the oil would be tested and it is to be inferred that the testing was to ensure that the oil was indeed of the usual quality.

Conclusion on construction of section 59.1.1 of the GT&C's

153. Balancing the implications of the rival constructions against an examination of the relevant language in the contract, in my view Glencore was obliged to deliver REBCO that was of the usual quality at the time it was loaded and this does not permit Glencore to deliver oil with elevated levels of organic chlorides which would not have been "*usual*" quality within the meaning of section 59.1.1.

Did the Cargo contain elevated levels of organic chlorides such that it did not comply with the quality terms of the contract?

154. I turn then to consider the second question as posed by Glencore: whether BPOI has discharged its burden of proving that the Cargo contained elevated levels of organic chlorides on delivery at Ust-Luga (paragraph 60.2 of its Closing Submissions).

Samples

155. BPOI relies on 2 samples in support of its case that testing showed that the Cargo was contaminated by organic chlorides at a concentration of around 11.9 to 15.7 ppm. The samples were said to be taken from the load port (Ust-Luga) and at the discharge port (Wilhelmshaven).

156. A composite sample of the Cargo was taken at Ust-Luga. The sample was tested by Intertek at Sunbury Technology Centre using an ASTM D4929 test. The results, as recorded in a test report dated 3 May 2019, were that:

i) The naphtha fraction of the composite sample contained 61ppm of organic chlorides.

ii) From this result, the concentration of organic chlorides in the crude oil sample was calculated to be 11.9 ppm.

157. A sample of the Cargo was taken at Wilhelmshaven. The sample was tested by Nord-West Oelleitung GmbH ("NWO") using an ASTM D4929 test. The results, as recorded in a test report dated 23 April 2019, were that:

i) The naphtha fraction of the composite sample contained 83.5ppm of organic chlorides.

ii) From these results, the concentration of organic chlorides in the crude oil sample was calculated to be 15.7ppm.

Glencore submissions

158. It was submitted (paragraphs 137-142 of Glencore's opening skeleton) for Glencore that:

i) the burden is on BPOI to prove that the Cargo had elevated levels of organic chlorides contrary to the quality provisions of the contract;

ii) the evidence of testing by Intertek of a sample taken on board the Alexia and the testing by NWO of a discharge port sample is irrelevant because that sampling and analysis was not in accordance with the (good) standard practice of the loading terminal; and

iii) those tests are unreliable and insufficient to discharge the burden of proof.

BPOI submissions

159. In response to those submissions, it was submitted for BPOI that:

i) It is common ground between the experts that the elevated levels of organic chlorides asserted by BPOI in this action would be considered abnormal and potentially damaging to refinery equipment.

ii) The quality as stated in CoQ 92 cannot be reconciled with the findings of the experts based on the samples tested by Intertek and NWO.

iii) The obvious disparity in organic chlorides content as between CoQ 92 and later tests suggests that the Ust-Luga determination was either not performed or was erroneously performed and incorrectly reported.

Discussion

160. The chemistry experts agreed that the organic chlorides content result reported in CoQ 92 was on-specification but the levels reported by Intertek and NWO were off-specification and would be considered abnormal for REBCO.

161. In particular, in their joint memorandum the chemistry experts agreed that:

i) There is no industry-wide applied standard limit for the maximum allowable concentration of organic chlorides in crude oil. However, the subject REBCO loaded to the MT "Alexia" was certified at the load port against the Russian National Standard GOST R 51858. This standard includes a limit on the organic chlorides content in the naphtha fraction of the crude oil of maximum 10 mg/kg. Taking into account the expected naphtha fraction of a REBCO crude oil (around 20%), a specification limit of maximum 10 mg/kg organic chlorides in the naphtha fraction would be roughly equivalent to a specification limit of maximum 2 mg/kg organic chlorides in the crude oil as a whole (Joint Memorandum paragraphs 3 and 4).

ii) There was a significant discrepancy in the levels of organic chlorides found in the samples tested by Intertek Sunbury and the NWO laboratory when compared to the results reported in the load port CoQ 92 (Joint Memorandum paragraph 10).

iii) Whilst the organic chlorides content result reported in CoQ 92 (less than 1 mg/kg) was on-specification when compared to the GOST R 51858 limit, the levels reported by Intertek Sunbury (61 mg/kg in the naphtha fraction) and the NWO laboratory (between 82.5 mg/kg and 86.2 mg/kg) were off-specification and would be considered abnormal for REBCO and potentially damaging to refinery process equipment, without further treatment, for example, by blending (Joint Memorandum paragraph 11).

162. There are three issues which fall to be considered:

i) In order to determine whether the Cargo is off-specification, is it permissible under the contract terms (namely section 9.1 of the GTCs) to have regard to the samples and test results from Intertek and/or NWO?

ii) If the samples or any of them and the test results are admissible as evidence of the quality of the Cargo, are the samples and the tests reliable evidence such that they can be regarded as having probative value?

iii) If the samples and tests have probative value what conclusions should be drawn in light of the discrepancy between CoQ 92 and the results of the Intertek and/or NWO samples?

Question 1 – Section 9.1 of the GT&Cs

163. Section 9.1 and 9.2 of the GT&Cs provide as follows (so far as material):

"*9 1 Measurement and sampling*

9.1.1 Measurement of the quantities and the taking of samples and analysis thereof for the purposes of determining the compliance of the Crude Oil or Product with the quality and quantity provisions of the Special Provisions shall be carried out in the following manner:

(a) where the Loading Terminal is operated by the Seller or the Seller's Affiliate, …

(b) where the Loading Terminal is not operated by the Seller or the Seller's Affiliate and if jointly agreed upon by the Buyer and Seller, by an independent inspector …

(c) should the parties fail to agree upon an independent inspector, or should the Loading Terminal refuse access to any independent inspector appointed by the parties, then by the Loading Terminal's own qualified inspector(s) in accordance with the good standard practice at the Loading Terminal at the time of shipment…

9.1.2 Notwithstanding the provisions of Sections 9.1.1(a) to 9.1.1(c), if an independent inspector has already been appointed by the Seller or any third party in respect of the Crude Oil or Product prior to the nomination of such cargo by the Seller to the then both parties shall be bound by the results of such measurement of quantity, sampling and analysis thereof as carried out by such independent inspector to the extent set out in Section 9.2.1 below, provided always that the certificates of quantity and quality (or such other equivalent documents as may be issued at the Loading Terminal) of the Crude Oil or Product comprising the cargo are issued in accordance with Section 9.2.2 below.

9.2 Certificates of Quantity and Quality

9.2.1 Provided always that certificates of quantity and quality… of the Crude Oil or Product comprising the cargo are issued in accordance with Sections 9.1 and 9.2.2 then they shall, except in cases of manifest error or fraud, be used for invoicing purposes and the Buyer shall be obliged to make payment in full in accordance with Section 63 but without prejudice to the rights of either party to make any claim pursuant to Section 59.

9.2.2 Any certificate of quantity and quality issued by an independent inspector pursuant to Sections 9.1.1 (a) or 9.1.1(b) shall record that the independent inspector did witness, or himself undertook, the taking of samples, the analysis of such samples and the measurement of quantity. For the avoidance of doubt, the parties agree that a certificate of quantity and quality countersigned by an independent inspector confirming these matters shall be a certificate of quantity and quality for the purposes of Section 9.2.1 above.

9.2.3 In the event that the independent inspector did not undertake or did not witness the measurement of quantity, the taking of samples or the analysis of such samples then the certificate of quantity and quality issued or countersigned by him must expressly reflect this and it will not, in these circumstances, be a certificate of quantity and quality for the purposes of Section 9.2.1 but merely evidence of those matters undertaken or witnessed by the inspector." [emphasis added]

164. It was submitted for Glencore that:

"[BPOI] would have the court accept that the question of cargo quality is an open question that can be answered by reference to any and all available evidence, but the plain intent of paragraph 1 of clause 8 is to narrow the parameters for determining questions of cargo quality. In context, for BPOI to show the cargo was offspec as to quality, they must establish the fact of it being offspec by reference to a determination that is in accordance with the standard practice of the loading terminal, i.e., as we saw, the Transneft terminal at Ust Luga." (Day 1 57:20-58:5)

165. Glencore submitted (in substance and by analogy with its submissions on Clause 8(1) of the Glencore Sales Contract) that this agreement in Section 9.1.1(c) is an agreement as to how quantity and quality shall be determined "*for all purposes under the contract*" not just for the process at the loadport (paragraph 109-110 of its opening skeleton). Glencore

submitted that it was "*analogous*" to a contractual provision that requires quality to be determined exclusively in accordance with a particular testing method or standard. Glencore cited a number of authorities as illustrative: *Veba Oil v. Petrotrade* [2002] 1 Lloyd's Law Reports 295 discussed in *The Kriti Palm* [2007] 1 Lloyd's Rep. 555; *Agroexport v. Goorden Import* [1956] 1 Lloyd's Rep 319.

166. BPOI submitted (paragraphs 59-64 of its Closing Submissions) that:

i) Section 9.1.1 (c) does not provide that the determination is conclusive, final, binding or definitive, nor does it exclude all other evidence. BPOI submitted that, by contrast, all the authorities relied upon by Glencore include the words "*final*" or "*binding*" or "*definitive*".

ii) Glencore's interpretation would lead to absurdity as, if the loading terminal failed to make any determination, all evidence would be excluded.

iii) There is no authority to support Glencore's interpretation and it is inconsistent with the provisions (in Section 9.2.1) which preserve the rights of the parties to file a claim for quality.

Discussion

167. The key provision to be construed reads:

"...the taking of samples and analysis thereof for the purposes of determining the compliance of the Crude Oil or Product with the quality and quantity provisions of the Special Provisions shall be carried out in the following manner... by the Loading Terminal's own qualified inspector(s) in accordance with the good standard practice at the Loading Terminal at the time of shipment..."

168. Applying the approach to construction summarised in *Lukoil*, the Court considers first the natural meaning of the language. There is nothing in the language which provides expressly that the taking of samples and analysis by the Loading Terminal's inspectors shall be conclusive and as a result the parties are precluded from challenging any such determination by reference to any other evidence.

169. If however there is any ambiguity in the words "*for the purposes of determining the compliance of the Crude Oil ...with the quality provisions*" such that it is a possible interpretation (that it is to be inferred that this is the sole method of determining the compliance with the quality provisions), the natural meaning of the language has to be considered in the context of the contract as a whole.

170. In my view the structure of section 9 is that, having stated the procedure which will be adopted in order to take samples and analyse the Crude Oil, it then provides for certificates to be issued which it is to be inferred will reflect the result of that sampling and analysis. However, section 9.2.1 expressly states that such certificates:

"...shall, except in cases of manifest error or fraud, be used for invoicing purposes ... but without prejudice to the rights of either party to make any claim pursuant to Section 59."

171. In other words, section 9.2.1 does not say that the certificate is final and binding so far as quality claims are concerned.

172. In my view, when the language of section 9.1 is considered in the context of the section 9 as a whole, it is clear that section 9.1 provides a procedure for testing and analysis but it does not provide for that testing and analysis to be conclusive; and in my view, it would be contrary to the expressed intention of the parties to find that whilst the certificate which is issued by the Loading Terminal inspectors is not binding (by virtue of section 9.2.1) as to compliance with the quality provisions, the underlying sampling and analysis is nevertheless binding by virtue of section 9.1. It would have the result that a certificate issued by the Loading Terminal could not be challenged as to quality (provided that the Loading Terminal inspector followed the standard practice as to testing and sampling at the Loading Terminal) irrespective of the actual quality delivered. As stated in Lukoil:

"*If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

173. In my view the construction of BPOI is consistent with business common sense.

Conclusion on section 9.1.1

174. For these reasons I find that section 9.1.1 does not have the effect of excluding all other evidence as to whether the Cargo complied with the contractual specification.

Question 2 – Are the samples and tests reliable?

Objections to the samples

175. The experts were agreed that there is an "*overall paucity of information available in terms of the identity and provenance (for example, due to a lack of seals/seal numbers) of many of the tested samples relating to the MT "Alexia" REBCO, contrary to what would be considered good practice in terms of sample custody transfer between parties*" (Joint memorandum paragraph 5).

Intertek samples

176. However, in relation to the sample tested by Intertek, the agreed evidence of the experts was that notwithstanding the failure to comply with standards concerning the provenance of the samples, the Intertek test "*was likely*" to have been a "*deck composite*" sample taken after loading at Ust-Luga:

"The Experts agreed that the sample tested by Intertek Sunbury and reported in their test report No. RT/SUN/03256, dated 3rd May 2019, was likely to have been a portion of an after loading "deck composite" sample drawn by CIG at Ust-Luga, albeit no seals appear to have been applied to the sample and the exact identity could not be confirmed from the information included in the Intertek Sunbury test report, or the correspondence relating to the transfer of the sample from CIG to Intertek Sunbury. This sample was reported to have an organic chlorides content in the naphtha fraction of 61 mg/kg and in the crude oil as a whole of 11.9 mg/kg. Whilst Intertek Sunbury reported that a modified version of test method ASTM D4929 was used, the test report did not identify the specific procedure (A, B or C) that was carried out, in breach of the reporting requirements of the test method, or the modification to the method that was performed." (Joint memorandum paragraph 8)

177. The position was confirmed by Mr Minton in his evidence in cross examination:

A. Well, it's not really possible to identify what sample Intertek Sunbury tested from their report, but by reading into the email correspondence that surrounded the dispatch of that sample, it would appear that it is a such sample from what is likely to be a deck composite drawn by the CIG inspectors after loading, but there's no way of actually confirming that from the Intertek report." (Day 5, 58:6-58:13)

Q. "Do you understand from that email exchange that CIG sent BP a sample they had taken from the Alexia at the load port?

A. That's what it indicates, yes.

Q. And it's the same sample they use for the certificate of quality by the looks of it, isn't it?

A. By the looks of it, yes, but, as I've said, it's not possible to confirm that from the Intertek report." (Day 5 61:19-62:1)

178. Although Glencore point to the evidence of Mr Jones that Mr Jones agreed that "*sample provenance remains a problem in this case*", I did not understand him to withdraw from the agreed position set out in the Joint Memorandum.

179. As to the significance of the fact that this was a deck sample, Mr Minton's evidence in cross examination was in substance that this made no difference to the conclusion concerning whether the sample was contaminated since his evidence was that it was agreed between the experts that the vessel could not have been the source of the contamination. His evidence was as follows:

Q. Help me with this: if organic chlorides are found in a deck composite sample taken at a load port, the only place they could have come from is the terminal. Do you agree?

A. Yes, I think we've agreed in the experts' memorandum that there's no indication -- there's no way that the Alexia could have been the source of the organic chlorides. (Day 5 66:5-66:12)

NWO samples

180. In relation to the NWO samples the experts were originally unclear whether the samples from the test reports issued by the NWO laboratory on 23 April 2019 were automatic in-line samples drawn during discharge into NWO shore tanks 53, 54, 91, 93 and 112 (Joint memorandum paragraph 9).

181. However, in his second report Mr Minton stated as follows:

"*6.1 On the basis of a review of the additional email correspondence disclosed by BPOI on 28th October 2021, it would appear that samples tested by NWO and reported in an 'Analysis Report' dated 23rd April 2019 were in-line samples drawn during discharge from the MT "Alexia" to shore tanks 91, 53, 54, 93 and 112, rather than samples drawn directly from the shore tanks after discharge.*

6.2. This would in turn indicate that the organic chlorides content results reported by NWO for these samples would have been reflective of the organic chlorides content of the REBCO being discharged from the MT "Alexia", rather than the quality of the

REBCO discharged from the MT "Alexia" after mixing with crude oil already present in the five receiving shore tanks at the NWO terminal."

182. Although therefore the evidence of Mr Minton in cross examination was that it was unclear how many sets of samples were taken at the time of discharge and thereafter from the shore tanks, he agreed that the test report from NWO of 23 April 2019 was likely to be the results of automatic in-line samples and to reflect the quality of the Cargo being discharged from the Alexia. (Day 5 68:2-68:4) He also agreed that the test results were "*abnormal*". (Day 5 68:18-69:2)

183. This supports the agreed position in the Joint Memorandum, where the experts agreed that:

"... based upon the reported results issued by the NWO laboratory, the samples drawn at the time of discharge had organic chlorides contents of between 82.5 mg/kg and 86.2 mg/kg in the naphtha fraction, which NWO calculated as 15.4 mg/kg to 16.2 mg/kg in the crude oil as a whole."

184. Given this evidence as to the results of the in-line sampling, it is not necessary to resolve the issues which were raised by Mr Minton in relation to the samples which apparently were taken from various shore tanks.

185. The evidence of the level of contamination as shown by the in-line testing carried out by NWO is relevant evidence which can be taken into account in order to determine whether the Cargo met the contractual specification as to quality.

186. The significance of the NWO samples being samples on discharge (and not on loading) is in my view eliminated by the agreed evidence of the experts that the MT "Alexia" was not the source of the reported high organic chlorides content in the REBCO crude oil (Joint memorandum paragraph 14).

187. It is also noteworthy, given the objections raised by Glencore to the provenance of the samples, in relation to the samples tested both by Intertek and NWO that the experts were agreed that the test data suggested that all three samples – i.e. those used for CoQ 92, Intertek and NWO respectively – were drawn from the "*same body of crude oil*":

"... with the exception of the organic chlorides content result, the test data reported by the respective laboratories for other quality parameters for (i) the sample tested under load port Certificate of Quality No. 92, (ii) the presumed after loading "deck composite" sample tested by Intertek Sunbury and (iii) the "average" sample taken at the time of discharge were broadly consistent and would suggest that the samples had been drawn from the same body of crude oil albeit it would have been beneficial to confirm this by joint witnessed analysis of samples in the same laboratory." (Joint memorandum paragraph 12)

Objections to the tests

188. It was submitted for Glencore in its oral opening that:

"*pursuant to, we say, the contractual requirements to determine quality in accordance with the standard practice at the loading terminal, any testing and certainly any testing*

in the event of dispute should have been done and reported in line with GOST R 52247." (Day 160:25-61:4)

189. However, the evidence of Mr Minton in cross examination was that ASTM D4929 is an alternative method to the GOST procedure such that either GOST or ASTM was permissible:

Q. I'd like to ask you a bit more about GOST. I think you say in your report, don't you, that GOST permits either the GOST R52247 test or the ASTM D4929 test to be used at the load port; is that right?

A. That's right, the ASTM D4929 is an alternative method to the GOST procedure.

Q. So to the extent that the GOST procedure is relevant to practice, either test is permissible, isn't it?

A. Either test would be permissible in terms of routine testing, but the specification has a clause in it, which I think we've seen earlier, that specifies which is to be used in a dispute situation, which would be the GOST procedure." (Day 5 53:23-54:10)

190. Glencore submitted that:

i) Mr Jones had speculated that, of the available procedures within test method ASTM D4929, Intertek had used procedure B; and

ii) the experts assumed that both Intertek and NWO used procedure B but it is not possible to tell which method was in fact used by Intertek.

191. The experts were agreed that:

"…Whilst Intertek Sunbury reported that a modified version of test method ASTM D4929 was used, the test report did not identify the specific procedure (A, B or C) that was carried out, in breach of the reporting requirements of the test method, or the modification to the method that was performed." (Joint memorandum paragraph 8)

192. As to the manner of testing, the expert evidence was as follows:

"*The Experts agreed that test method ASTM D4929 requires the precision data of the test method to be applied to organic chlorides results for the crude oil as a whole. The Experts agreed that the difference between the Intertek Sunbury and NWO laboratory results for the after loading composite sample and the "average" sample taken at the time of discharge were within the stated reproducibility for ASTM D4929 Procedure B, but also agreed that it is unclear whether the precision data could correctly be used, given that it is not known whether identical sample material was tested, neither is it known whether Intertek Sunbury used Procedure B, or the nature of the modifications to the test method they made*." (Joint memorandum paragraph 13)

193. I note that in his first report Mr Minton stated (at paragraph 7.17):

"*Although the later samples have all been analysed by different test methods to the presumed shore-side load port sample, I think it unlikely that the difference in test methods can explain the large difference in reported organic chloride contents, given the*

similarities between the GOST R 52247 method and the ASTM D4929 method that I have described in Section 6 of this report. However, in the case of the Intertek Sunbury analysis, without knowing exactly which procedure of ASTM D4929 they followed and exactly what modifications were made to the test method, one must be cautious when comparing the Intertek Sunbury results with the other test data."

194. Accepting that expert evidence and therefore adopting a cautious approach to the Intertek results, it is nevertheless accepted by Mr Minton (and by BPOI) that procedure B was used on the samples taken by NWO. His evidence in cross examination was as follows:

Q. "... Now in terms of procedure B, I understand that the NWO in-line sample tests were performed according to procedure B, ASTM procedure B. Do you agree with that?

A. Yes, that's the indication from the test certificates that were produced.

Q. That's essentially identical, isn't it, to the GOST procedure B?

A. Yes, there are some very minor differences in wording and I think some differences in the allowed consumables, but to all extents and purposes it's identical." (Day 5 54:23-55:7)

195. Thus in answer to the question as to whether the samples taken by NWO can properly be compared to CoQ 92, it is clear on the evidence of Mr Minton that ASTM D4929 is an acceptable alternative.

196. The highest Glencore put their case is that testing should be done in accordance with the standard practice of the loading terminal. Glencore do not plead that the GOST procedure was agreed such that it would apply on a dispute and I see no relevance therefore to the position which would apply under GOST on a dispute.

197. Glencore raised a particular objection to the tests on the basis that Glencore was not invited to witness the testing. However this objection has no substantive weight in light of the conclusion of the experts referred to above that, "*albeit it would have been beneficial to confirm this by joint witnessed analysis of samples in the same laboratory*", given that the test data were aligned with the results of COQ 92 for other quality parameters, the experts were agreed that this would suggest that the samples had been drawn from the "*same body of crude oil"*.

198. I note that in his supplemental report Mr Minton stated in this regard:

"*I also remain of the view agreed in the Joint Memorandum that it would have been beneficial for a joint sampling and analysis exercise to have taken place - had this been performed at the time of the initial identification of a problem, it would have meant that some of the uncertainties regarding the sample identities and provenance and relevance of the shore tanks to the MT "Alexia" cargo would likely have been resolved at the time*." (Second expert report paragraph 5.3)

199. In my view this merely confirms the conclusions above concerning some of the uncertainties about samples and shore tanks but does not affect the validity of the overall conclusions concerning the relevance of the samples and the tests.

Question 3 – What conclusions should be drawn in light of the discrepancy between CoQ 92 and the results of the Intertek and/or NWO samples?

200. The experts agreed that there was a "*significant discrepancy*" in the levels of organic chlorides found in the samples tested by Intertek Sunbury and the NWO laboratory when compared to the results reported in the load port Certificate of Quality No. 92. (Joint memorandum paragraph 10)

201. Given the findings above that the samples and tests by NWO should be given weight the question is what conclusions should be drawn from the difference between CoQ 92 and the later test results.

202. In relation to the samples drawn at the time of loading, the experts agreed that there is insufficient information available on CoQ 92 to identify what sample was tested and who it was tested by. The experts agreed that this sample was reported to have an organic chlorides content of less than 1 mg/kg in the naphtha fraction of the crude oil, as determined by test method GOST R 52247, procedure B. (Joint memorandum paragraph 7)

203. Mr Minton's evidence in cross examination in relation to COQ92 was as follows (so far as material):

Q. We don't know where it was taken, do we?

A. I don't know where sample 702 was taken, no.

Q. Or in accordance with which procedure it was taken, do we?

A. Well, no, but you -- on the basis that we don't know exactly what procedure was used to draw up the sample, but it would be presumed from the fact that it was classed in accordance with the GOST 51858 requirements that the sample would have been taken in line with the requirements therein.

Q. So it would have been taken according to the GOST regulation; is that right?

A. That would be the implication from that classification, yes, but that doesn't tell you exactly where or when the sample was taken.

Q. We don't know if this was taken in relation to shore tanks 1, 4, 6 or some other tank, do we?

A. It's not clear from the certificates, no.

Q. And it's not possible to tell what practice, if any, was followed when preparing the sample, is it?

A. No, we can't tell that from the test certificate. (Day 5, 73:4-73:24)

"*Q. There's an obvious disparity between the two, isn't there?*

A. Well, there's more -- yes, there's more than two samples to be compared, but, yes, I mean, this is -- this is obviously much lower than samples taken later in the cargo movement.

Q. Do you agree that one explanation of that is because the certificate was prepared erroneously or incorrectly?

A. I would agree that that is a potential explanation, but I don't think there's any way of confirming whether that is indeed the right explanation.

Q. And there's no other source for the organic chlorides other than the loading terminal cargo being loaded, is there?

A. No, the Alexia, as we've agreed, as I've said earlier in the experts' reports, could not have been the source of the organic chlorides. (Day 5 74:11-75:2) [emphasis added]

204. Mr Jones' opinion (as expressed in his report at paragraph 2.2.8) was that:

"*Overall, however, the above comparison [of the quality parameters that coincide in both CoQ92 and the above NWO Analysis Report on the average sample of REBCO received at NWO] supports the view that the test samples used to derive load port and discharge port quality certificates were taken from the same body of crude oil. The obvious disparity in organic chlorine content suggests to me that the Ust-Luga determination was either not performed, or was erroneously performed and incorrectly reported, as being not detected*." [Emphasis added]

205. In cross examination Mr Jones confirmed that he formed the view that the determination at Ust-Luga was not performed or was erroneously performed having regard to the evidence from Intertek and NWO:

Q. Paragraph 2.2.8 you refer to comparisons and then in the second sentence say: "The obvious disparity in organic chlorine content suggests to me that the Ust-Luga determination was either not performed, or was erroneously performed and incorrectly reported ..." That view was reached based upon your detailed consideration of all the evidence you've seen, was it?

A. Yes, it's in -- there's the obvious disparity, which of course is common ground between Mr Minton and I, and I took into account the NWO and Intertek results which show that the REBCO on the Alexia more or less contained 15, 16 parts per million of organochlorine in the shipment.

Q. So the particular basis for that view was the lack of correlation between CoQ92 and the other test reports as to organic chlorides; correct?

A. Yes, the CoQ92 is incorrect in its value."

206. Glencore submitted that both expert witnesses were honest witnesses trying to assist the Court. I accept that submission.

207. Ms Pelyak gave evidence as to her "*general understanding of the standard sampling and testing procedure at Ust-Luga*". It was submitted for Glencore that she "*was plainly an honest witness, doing her best to assist the Court…has extensive knowledge and experience of standard practice at Ust Luga insofar as it concerns the shipment of oil, and was able to assist the Court in that regard*."

208. Whilst I accept that Ms Pelyak was doing her best to assist the Court, her evidence was shown to be based (in part) on conversations with a third person who did not give evidence to the court and for which Ms Pelyak was relying on her recollection. She changed her original evidence about testing of oil in shore tanks (in a second witness statement in January 2022) on the basis that her "*understanding had developed*" following a conversation in July 2021 with that third party. This inevitably cast doubts on the accuracy of her overall "*understanding*" which (at least in part) was reliant on statements by the third party which were not tested in Court. In any event her evidence was extremely general in nature and did not assist in resolving the question of whether the standard practice was followed in this case.

Conclusion on quality

209. Glencore's defence was that CoQ 92 was the only evidence which complied with the contractual requirement and that without the later tests there was nothing to say the oil was abnormal.

210. It is however important not to lose sight of the elevated levels of organic chlorides which were indicated by the later tests. This is not a case where the levels were close to the permitted parameters. The experts, despite their detailed analysis of samples and tests and the reservations as to the manner of recording samples and testing, were nevertheless clear that the Alexia Cargo was contaminated by organic chlorine compounds: Mr Jones' evidence in his report (paragraph 3.1.2) was that:

"*The ALEXIA cargo of REBCO was contaminated by organic chlorine compounds subsequently identified by Intertek-Sunbury to be principally carbon tetrachloride and chloroform…"*

211. Mr Minton's in cross examination agreed:

A. The Alexia cargo of REBCO, yes, I agree that the Alexia cargo was -- contained carbon tetrachloride and chloroform and was contaminated by this." (Day 5, 75:15-75:17)

212. According to the samples tested by both Intertek and NWO, the Cargo was outside the parameters allowed for organic chlorides by the standard test and for this purpose it is immaterial whether GOST or ASTM is used.

213. Whilst the precise testing method used by Intertek is not known, it should not in my view be disregarded entirely (nor was this the evidence of Mr Minton who merely referred to caution). Even, however, if the results from Intertek are disregarded, the NWO tests of in-line samples, that is in the line going from the ship to the shore tank, are consistently around 15 parts per million.

214. The experts were also agreed that the contamination did not come from the vessel itself.

215. Whatever practice was followed at the loading terminal, in light of the body of evidence concerning the contamination of the Cargo, CoQ 92 was incorrect as to the parameters of organic chlorides in the Cargo and I infer that the sampling and testing cannot have been in accordance with good standard practice. However even if good practice had been followed, under the terms of the contract CoQ92 is not binding for the purposes of

determining quality and in the light of the evidence of the later tests CoQ92 is rightly referred to by BPOI as an "outlier".

216. For these reasons I find that:

i) the oil delivered was contaminated (by organic chlorides) and as such cannot be said to be of the quality usually delivered at Ust-Luga within the meaning of Section 59.1.1 of the GTCs; and

ii) there was a breach of the Recap quality clause and Section 59.1.1 of the GTCs.

Quantum

217. BPOI's primary claim is for the Cargo's diminution in value as a result of the organic chlorides contamination. BPOI's case is that this amounts to US$5,960,095 as the difference between the market value of sound crude oil of about "Dated Brent + $0.53" and the value of contaminated crude oil of about "Dated Brent -$8.00".

What is appropriate measure of damages?

218. The delivery of a contaminated cargo in breach of contract amounts to a breach of warranty of quality. The measure of damages for such a breach is set out at sections 53(2) and 53(3) of the Sale of Goods Act 1979:

"(2) The measure of damages for breach of warranty is the estimated loss directly and naturally arising, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of a warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty of quality."

219. The issue between the parties in this case is whether the prima facie measure in section 53(3) applies or whether if section 53(2) applies, BPOI's loss is (i) its liability to BPESE; or (ii) the cost of cure; or (iii) a "quasi" s53(3) measure (Issue 5.1).

Section 53(3) measure

220. Glencore raises 2 main objections to the application of the prima facie rule in section 53(3) in this case:

i) that there was no available market in which the buyer could sell the defective goods; and

ii) the existence of the Sub-Sale to BPESE.

Available market

221. Glencore submitted that there was no available market for the contaminated crude at the time of delivery: that it was common ground between the experts that 'initially' there was no market at all for cargoes with elevated levels of organic chlorides (Joint Memorandum at paragraph 4) and at the very most, any "market" for a specific cargo only started to develop during the course of May and over the summer of 2019. It follows that there was

no relevant "*available*" market, as the market must be available within a reasonable time of the breach: *Benjamin* at [16-068], [16-069].

222. The evidence of BPOI's expert in the joint memorandum was that:

"Initially there was no established market price for contaminated oil. However, once the problem became more widespread in the market, there were good indications that contaminated oil was trading at discounts as low as $15 to $25 a barrel, indicating deep discounts for such cargoes…"

223. Ms Bossley's evidence was:

"I agree that the value of the Cargo delivered is difficult to establish because there was initially no market for cargoes with elevated OC levels, as stated…"

224. In her second report Ms Bossley said:

"*5. There was initially no market for REBCO with elevated OC levels in the second half of April 2019 and at the start of May 2019. Throughout the course of May and over the summer of 2019, a market began to emerge as more information became available about the actual OC levels of specific cargoes on offer, the capacity available in the market to store and remediate these cargoes and the extent of disruption that each such cargo would cause to individual putative buyers."*

225. The views of the experts are consistent with the factual evidence including that of Mr Haines.

226. I accept the evidence that initially there was no market for the contaminated oil.

227. However in my view this does not mean that the prima facie measure is necessarily displaced. *Chitty on Contracts (34th edition)* states at [46-419]:

"*Where there is a market price for goods of the contractual description and quality, this will fix their "value"; in the absence of an available market, any relevant evidence should be admitted, e.g. the price at which a sub-buyer had agreed to buy the goods from the buyer before the defect was discovered may be some evidence of their value, as may the price at which an offer for the goods was made by a third person. The value of the defective goods actually delivered by the seller may be fixed by any relevant evidence, e.g. the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition."* [emphasis added]

228. *Benjamin* at [17-52] states:

"*The second value to be ascertained is that of the defective goods which were actually delivered by the seller. Normally, there is no market in the ordinary sense for damaged or defective goods, and thus other evidence is frequently needed to fix the value of the goods at the time and place of delivery.*" [emphasis added]

229. I do not see that the sections of *Benjamin* relied upon by Glencore ([16-068], [16-069]) have any relevance as these relate to the measure of a seller's damages rather than the buyer's.

230. It is to be noted that *Benjamin* continues at [17-054] to consider the "cost of cure" as an appropriate measure:

"*Where the market value of the defective goods cannot be ascertained, because there was no market in which they could be disposed of, damages may be awarded on the basis of the cost of bringing the goods up to the contractual standard which would make them saleable*."

231. *Chitty* also states at [46-421] that:

"If there is no market, damages may be awarded on the basis of the cost of bringing the defective goods up to the contractual standard which would make them saleable."

232. In the footnotes to [17-054] *Benjamin* refers to *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711 (Comm) at [116]– [122]:

"it was said that s.53(3) rests on an assumption that there is an available market. In the absence of a market it was unrealistic to assess damages on a difference in value basis rather than the reasonable cost of repairing to warranted condition."

233. However that particular case concerned a defective luxury yacht. Leggatt J found that:

"[the] assumptions, which underpin the prima facie difference in value measure of damages in an action for breach of warranty, have no application in the present case."

234. Leggatt J found that:

i) there was no market to value the goods if they had complied with the undertaking (measured at the time and place of delivery) as there was no market of the relevant kind for second-hand yachts as they were not fungible like commodities or even cars; and

ii) it was "*unreasonable to assess damages on the assumption that the defective yacht will immediately be sold*" as the only likely buyer would have been looking to repair the yacht and would not have been sold immediately but within 18 months.

235. Unlike the position in *Hirtenstein*, in this case the Court is dealing with a commodity, there is a market price for goods of the contractual description and quality of the Cargo, and there is evidence by which the market value of the defective goods can be ascertained. In the circumstances it is in my view neither unreasonable nor unrealistic to assess damages on the assumption that the Cargo will be sold. Further, in my view the cost of cure is not a reasonable measure of loss in circumstances where the buyer (BPOI) is a trading company with no ability to "cure" the defect (other than by resale) and even if the sub sale is relevant, the sub buyer (BPESE) was not able to process the contaminated oil and itself "cure" the defect. Whilst ultimately the contaminated oil was treated by BPOESA in a way which rendered it useable in a refinery, BPOESA was neither the buyer nor the sub buyer. This is not a case therefore where it can be said that the only likely buyer would have been looking to cure the defect. It was equally possible that another trading company could have bought the oil and sold it on to a refinery (as in effect happened by BPOI buying back the Cargo from BPESE). It was submitted for Glencore that where a trader can, and in the event does, remediate by the assistance of an

affiliate, the cost of cure is appropriate. This seems to me to disregard the separate legal personality of the BP entities and the fact that (as set out in the Agreed List of Common Ground) BPOI is an oil trading company carrying on business in the sale and purchase of crude oil and petroleum products and not a refinery.

236. On the facts of this case I therefore find that damages should be assessed by reference to the difference in value rather than the reasonable cost of cure.

237. Glencore accepted (paragraph 161 of its Opening Submissions) that even where s.53(3) does not strictly apply, nevertheless it may still be appropriate to assess the buyer's loss by reference to the difference in value but excluding the temporal element: *Choil Trading v. Sahara Energy* [2010] EWHC 374 at [123] per Christopher Clarke J:

"*123. Both parties thus contend for the application of section 53 (3), although the measure for which Choil contends is not an exact application of section 53 (3) since it does not involve taking the market value of the contaminated naphtha at the place and time of delivery under the contract*."

Existence of Sub-Sale

238. It was submitted for Glencore that even where there is an available market, the *prima facie* measure in s.53(3) – and *a fortiori* the "quasi" s.53(3) measure recognised in cases like *Choil Trading* – may be displaced where it is appropriate to take into account the position on the buyer's sub-sale.

239. It was submitted for Glencore that:

    i) The '*prima facie'* measure should not be used to give a buyer more than its "true loss": *Bence Graphics International Ltd v. Fasson UK Ltd* [1988] QB 87 (CA); *Kramer on the Law of Contract Damages* (2nd edn) at 4.2.

    ii) BPOI's reliance on *Slater v. Hoyle & Smith Ltd* [1920] 2 KB 11 (CA) was misplaced.

240. Glencore submitted that there were two critical points of distinction from *Slater v Hoyle*:

    i) whether the defect was latent or patent; and

    ii) what was within the reasonable contemplation of the parties.

241. It was submitted for Glencore that in *Slater*, the defect was patent at the time of delivery, such that the claimant buyer had a choice as to whether to supply the oil under the sub-sale or instead acquire a substitute to deliver, but that the facts of this case are closer to *Bence Graphics*, in that the defect was latent and not discovered until after BPOI had already delivered to BPESE, such that BPOI never had any such choice to acquire a substitute (for supply to BPESE).

242. It was further submitted for Glencore that in the present case, like in *Bence Graphics*, the sub-sale was within the reasonable contemplation of the parties.

243. It was submitted for BPOI that the approach in *Slater v. Hoyle* applies and that its Sub-Sale to BPESE is legally irrelevant to its claim for damages. This is because the factual

position in this case is analogous to that in *Slater* and distinguishable from the situation in *Bence Graphics*.

The relevant authorities

244. In *Slater v. Hoyle* Scrutton LJ held (at p.22-23) that subcontracts were left out of account in determining the loss for damaged goods:

> *"... If the goods are delivered damaged, and [the buyer] has got goods and has paid the contract price; what he has not got is sound goods, and his loss is therefore the difference between the market value of sound goods and the market value of these damaged goods. Again, sub-contracts do not come into account, for the buyer is under no obligation to use these goods for his sub-contract; he may buy in the market, and he will then be left with goods damaged to a certain extent at the then market price of such goods instead of sound goods at the then market price of sound goods. The difference between the two market prices should be the measure of damages. If the buyer delivers under the sub-contract the damaged goods and has to pay damages, these damages will not be the measure of damages.*
>
> *As Lord Dunedin says (1): "How can it ever be known that the damages recoverable under that contract will be calculable in precisely the same way as in the original contract?" If these damages are greater than the difference in market price of sound and damaged goods, they will clearly not be recoverable. The result seems the same if they are less; it is res inter alios acta: "circumstances peculiar to the plaintiff," which cannot affect his claim one way or the other. If the buyer is lucky enough, for reasons with which the seller has nothing to do, to get his goods through on the sub- contract without a claim against him, this on principle cannot affect his claim against the seller any more than the fact that he had to pay very large damages on his sub-contract would affect his original seller*." [emphasis added]

245. In *Bence Graphics* the Court of Appeal took a different view on the relevance of the sub-sale. The majority view is set out in the judgments of Otton LJ and Auld LJ. However the reasoning for reaching a contrary view was different in the two judgments.

246. Otton LJ distinguished *Slater* on the basis that in *Slater* (i) the seller in that case did not know of the sub-sale; and (ii) the same goods were sold, i.e. they had not been processed by the buyer:

> "*In my judgment the decision in Slater's case can be narrowly distinguished from the instant case. In Slater's case the sub-sale was of the same goods albeit after bleaching; the seller did not know of the contemplated sub-sale. In the instant case the goods were substantially converted or processed by the buyer and the sellers were aware of the precise use to which the film was to be put at the time the contract was made. I recognise Auld L.J.'s reservations."* (at p.99C) [emphasis added]
>
> *"In my judgment, once the goods had been converted in a manner which was contemplated by the parties, Slater v. Hoyle & Smith Ltd [1920] 2 KB 11 has no application, the damages must be assessed by reference to the sub-sale "whether the plaintiff likes it or not." Thus the plaintiff does not have the option to choose which outcome is most favourable to him. It is for the court to determine the correct measure of damage, not the aggrieved party. Where the court determines the proper measure the*

effect of the choice may reduce the amount of damages claimed or increase it." (at p.100B) [emphasis added]

247. Auld LJ stated that *Slater* should be "*reconsidered*" and the critical matter was the contemplation of the parties and whether the sub-sale was within the contemplation of the parties:

"…The starting point in a claim for breach of a warranty of quality is not to determine whether one or other party has "displaced" the prima facie test in that subsection. The starting point is the Hadley v. Baxendale principle reproduced in section 53(2) applicable to a breach of any warranty, namely an estimation on the evidence, of "the... loss directly and naturally resulting in the ordinary course of events from the breach of warranty." The evidence may be such that the prima facie test in section 53(3) never comes into play at all.

The Hadley v. Baxendale principle is recovery of true loss and no more (or less), namely to put the complaining party, so far as money can do it, in the position he would have been if the contract been performed. Where there is evidence showing the nature of the loss that the parties must be taken to have contemplated in the event of breach, it is not to be set aside by applying the prima facie test in section 53(3) simply because calculation of such contemplated loss would be difficult. Equally, it should not be set aside in that way so as to produce a result where the claimant will clearly recover more than his true loss…" (p.102B-C)

"…In my view, the time has come for [Slater] to be reconsidered at least in the context of claims by a buyer for damages for breach of warranty where he has successfully sold on the subject matter of the contract in its original or modified form without claims from his buyers. With respect to Otton L.J., I do not think that the case is materially distinguishable from the present on the two bases that he suggests." (p.102H) [emphasis added]

248. Auld LJ held that the knowledge of the specific sub-sale was not critical:

"As to the first, the seller's knowledge of the buyer's intended use of the goods, the report in Slater v. Hoyle & Smith Ltd. [1920] 2 KB 11 states that the seller did not know of the buyer's onward sale contracts. However, that must simply mean that he did not know of the specific contracts; for there can be no doubt that, in contracting to sell 3,000 pieces of unbleached cloth of a certain quality, the seller knew that he was dealing with a commercial buyer who would sell them on either unprocessed or processed to some degree and must be taken to have contemplated that loss could result from such onward sales if the cloth was not of the required quality. The fact that the seller in this case had more detailed knowledge of the use to which the buyer would put the film is not a material distinction in determining the measure of damages as distinct from their precise calculation." (p.103A-B) [emphasis added]

249. Contrary to Otton LJ, Auld LJ said that conversion of the goods was also not a critical distinction:

"Second, as to what happened to the goods, the buyer in Slater's case did in fact process them before selling them on; he bleached the unbleached pieces of cloth. That does not

seem to me to be materially different for this purpose from incorporating the goods in a manufactured product for onward sale." (p.103C)

"…As Devlin J. made plain in his consideration in Biggin & Co. Ltd. v. Permanite Ltd. [1951] 1 KB 422, 436 of the supposed two rules in Hadley v. Baxendale, 9 Exch. 341, the critical matter in determining the earlier question as to the applicability or not of the prima facie rule in section 53(3) is the contemplation of the parties:

"there is only one area of indemnity to be explored, and that is what is within the prevision of the defendant as a reasonable man in the light of the knowledge, actual or implied, which he has at the time of the contract. It has often been held... that the profit actually made on a sub-sale which is outside the contemplation of the parties cannot be used to reduce the damages measured by a notional loss in market value. If, however, a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not.... if it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damage and if in fact it is used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value, and say that the subsale must be disregarded." (at p.105G) [emphasis added]

"…[This case] was eminently a case in which they would have contemplated that, in the event of a breach by the seller discovered only after the decals had been in use, the buyer might wish to pass on to it claims for damages from dissatisfied customers…" (at p.106D)

"… I therefore conclude, as Otton L.J. has done, that this is plainly a case in which the parties must be taken as having contemplated that any latent defect in the vinyl film at the time of delivery or at the time of conversion by the buyer into the decals might when later discovered render the buyer vulnerable to claims for damages which it would wish to pass back to the seller." (at p.107E) [emphasis added]

250. The decision in *Bence* has been strongly criticised by *Treitel* on the grounds that remoteness is relevant only to claims for consequential loss, not to the difference in value between the goods delivered and the goods as they should have been; the question is simply how to measure the buyer's loss.

251. *Benjamin* states at [17-057] that:

"The authority of Slater's case has thus been seriously undermined, and there is uncertainty as to the current law where the sub-buyer makes no claim against the buyer, despite the fact that the seller delivered defective goods to the buyer".

252. BPOI take support from the first instance decision in *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778 where the Court of Appeal stated that:

"45. If the present case were brought in contract I would be inclined to agree with the judge that any sub-contract would be res inter alios acta for the reasons identified by Scrutton LJ in Slater v Hoyle & Smith [1920] 2 KB 11 , as cited in [196] of Flaux J's judgment, especially because Rafirom was not the refiner nor was there evidence as to (a) the basis and terms upon which Rafirom supplied crude oil to the refineries; (b) that it was ever obliged to supply crude oil under any particular contract with Glencore to any particular refinery as opposed to selling it for profit; or (c) that it had any liability

to the refineries if the crude oil supplied was not what it appeared to be or shared in any profit from the refining of it. The decision of this court in Bence Graphics v Fasson [1998] QB 87 may render that debatable; but the consistency between the latter and the former case is, itself, in doubt, especially given the reliance by Auld LJ in Bence on the Privy Council decision in Wertheim v Chicoutimi Pulp Co [1911] AC 301 which Scrutton LJ thought was erroneous." [emphasis added]

253. BPOI also refer to the dictum in *Choil Trading SA v. Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm):

128. The fundamental reason why the sub-sale measure is not appropriate in the present case is that such a measure is usually applicable when the parties contemplate that the particular goods supplied to the buyer will be used by the buyer for the purposes of satisfying a particular sub-contract or sub-contracts; or when goods are purchased for the purpose of being used to make a particular product.

129. As Devlin J said in Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 QB 459 ,489:

"It is perfectly true that the defendants knew that the plaintiffs were merchants who had bought for re-sale, but everybody who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for re-sale, but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has suffered no damage; if the market has risen the measure of damages is the difference in the market price. If, for example, a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damage. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for re-sale generally, but upon a string contract where he will re-sell those specific goods and where he could only honour his contract by delivering those goods and not others, the measure of loss of profit on re-sale is the right measure." Slater v Hoyle & Smith [1920] 2 KB 11 ,20; Wertheim v Chicoutini Pulping Co [1911] AC 301 ,489; Bence Graphics v Fasson Ltd; Louis Dreyfus Trading Ltd v Reliance Trading Ltd [2004] EWHC 525, where the parties had in contemplation that the very sugar that was agreed to be sold would be sold pursuant to a particular sub-sale.

130. In the present case Choil was buying for re-sale generally, such that prima facie its damages are not to be measured by reference to any particular sub-sale." [emphasis added]

Discussion

254. In my view, the authorities referred to above establish that:

i) The prima facie rule does not depend on the existence of an available market for the defective goods.

ii) Section 53(3) lays down only a "prima facie" rule, from which the court may depart in appropriate circumstances.

255. The decision in *Choil* would suggest that the measure is not an exact application of section 53(3) where the value of the defective goods is not determined at the time of delivery under the contract although this is not spelt out in section 53(3).

256. However, whether this case is viewed as an application of the *prima facie* method or as the "*quasi*" measure, the real issue is whether it is appropriate to take into account the position on the buyer's sub-sale.

257. The reasoning of Auld LJ in *Bence* suggests that (unlike the finding in *Slater*) the sub-sale should be taken into account where a sub-sale (but not necessarily the specific sub-sale) was within the contemplation of the parties. By contrast the reasoning of Otton LJ in *Bence* suggests that the distinction lies in whether (as in Bence):

"*the goods were substantially converted or processed by the buyer and the sellers were aware of the precise use to which the film was to be put at the time the contract was made*".

258. Glencore submitted (opening skeleton paragraph 168.2) that the parties contemplated that the Cargo would be re-sold to Gelsenkirchen; alternatively, the parties contemplated that the Cargo would be re-sold to a BP refinery. Either way, the parties contemplated that the loss from any breach of the contractual quality requirements by Glencore would be suffered by the refinery. Glencore relied on evidence of the exchange between the traders which indicates that the oil was destined for a BP refinery.

259. The documentary evidence makes no reference to the particular refinery (Gelsenkirchen) or to the particular BP entity. Mr Wawrzyniuk's evidence in his witness statement is that he understood the references in the exchanges with Ms Behtash to be to a refinery within the BP Group and that he understood from those references that the Cargo was intended for a refinery within the BP Group.

260. The relevant extracts from the traders' discussions on 1 April 2019 were as follows:

"*mwawrzyniukl®yj.com (11:53:30): so, what is the number azizam?*

Behtash, Tara (11:54:08): <u>asset are in a morning meeting</u>

Behtash, Tara (11:54:12): ill have a counter for sure

Behtash, Tara (11:54:16): so reverting

mwawrzyniukl®yj.com (11:55:20): ok thanks

….

Behtash, Tara (14:31:42): ok done

Behtash, Tara (14:31:46): cheers

mwawrzyniukl@yj.com (14:31:59): thank you for the deal

…

mwawrzyniukl®yicom (15:14:00): you think in case we load a bit earlier you could discharge a slightly earlier stem with dem savings 50/50?

Behtash, Tara (15:14:25): hmm not sure will ask the refinery

Behtash, Tara (15:14:34): but dont see why not

mwawrzyniukl®yicom (15:15:17): cool. if they could I would keep that in mind in case I would need to reshuffle stuff" [emphasis added] [F/13/2]

261. Whilst I accept the evidence that Mr Wawrzyniuk understood that the Cargo was intended for a refinery within the BP Group there was no mention of a sub-sale or its terms in the traders' discussions.

262. As set out above there was no contractual requirement in the Sub-Sale contract for BPOI to supply that particular cargo of oil to BPESE (and I do not accept therefore the submissions for Glencore that the evidence as to the subsequent availability (or lack thereof) of alternative cargo at the time of delivery is relevant).

263. In cross examination it was put to Mr Haines that:

"So once [the Sub-Sale] is in the system, BPOI is obliged to deliver the cargo to BPESE."

Mr Haines' evidence was:

"A. BPOI are obliged to deliver a cargo under those terms, so it doesn't -- it could be another cargo they could deliver if they choose to, but it would have to be on the same basis… sometimes what would happen is you could do this deal, and then actually it may be that BPOI could buy another cargo and deliver that into this one and sell out the original from Glencore. So there is -- we have obviously there is a commitment to deliver a Urals cargo and the expectation is it's this one, but it doesn't have to be this one." [emphasis added]

It was put to Mr Haines that such a switch would be unusual. Mr Haines' evidence was that they would do so on occasions:

"*A. Yes. What we did do sometimes was that between BPOI and BP Gelsenkirchen, if we could re-optimise and add extra value then we would look to do that. So, for example, if -- you know, if there was someone that wanted slightly earlier loading dates or later, or we could do something, we would look to re-optimise. That's that scenario where I say well actually if we could add value by re-optimising, then we would do. I would say "we" as in the BPOI or, you know, which, if it's inconveniencing or, you know, it's Gelsenkirchen are adding -- helping with that, then, you know, they would also seek some upside to that*." (Day 2, 88:15-90:1) [emphasis added]

264. On this evidence, applying the approach in *Choil* (quoted above), the sub-sale measure is not appropriate in the present case since the parties did not contemplate that the particular goods supplied to the buyer will be used by the buyer for the purposes of satisfying a particular sub-contract nor were the goods purchased for the purpose of being used to make a particular product.

265. Further even if the parties "expected" that the oil would be resold to a BP refinery, it does not follow that the parties contemplated at the time of entering into the contract that the loss from any breach of the contractual quality requirements by Glencore would be suffered by the refinery.

266. Following the reasoning of Auld LJ, in my view, this was not analogous to a case where the parties "*would have contemplated that, in the event of a breach by the seller discovered only after the decals had been in use, the buyer might wish to pass on to it claims for damages from dissatisfied customers*". This was not a case of a latent defect as that term would normally be understood merely because the contamination was not apparent from the certificates of quality delivered with the shipping documents. Even if it were a "*latent*" defect in the sense that BPOI had already delivered the Cargo to BPESE before the elevated levels of organic chlorides were discovered, and thus it would have been impossible for BPOI to re-sell it rather than deliver it to BPESE under the subcontract, it cannot be said that the parties contemplated that the BP sub-buyer might wish to pass on a claim for damages to BPOI: I accept the submission for BPOI that it is within the contemplation of the parties that a sub-buyer given contaminated oil would refuse the Cargo and send it back, as in fact occurred.

267. If the approach of Otton LJ in Bence is adopted, this was not a case where there was any "*conversion*" of the product prior to delivery under the sub-contract and thus the approach in *Slater* should be followed and the sub-sale ignored.

268. It was submitted for Glencore that:

    i) BPOI's difference in value claim is, in reality, premised on its sub-sale to BPOESA and it would be unprincipled to ignore the rest of the sub-sale arrangements (paragraph 168.5 of its opening skeleton).

    ii) Ignoring the Sub-Sale with BPESE would risk giving BPOI a windfall and be inconsistent with the compensatory principle (paragraph 168 of its opening skeleton).

269. It is important to note that Glencore refer to different sub-sales in those submissions. In my view the question of whether the loss should be measured by reference to the loss on the Sub-Sale to BPESE is determined by the application of the principles set out in the authorities discussed above. The sub-sale to BPOESA is relevant evidence as to the value of the contaminated Cargo but in my view is not relevant to the measure of loss as even if the Sub-Sale to BPESE could be said to be within the contemplation of the parties, the subsequent sale to BPOESA once the contaminated oil had been bought back could not be said to have been contemplated.

Conclusion on the appropriate measure of damages

270. For the reasons discussed above, I find that the appropriate measure of damages is not BPOI's liability to BPESE or the cost of cure but is the difference between the market value of sound crude oil and the value of the contaminated crude oil at the date of delivery, but that to the extent that the value of the contaminated oil cannot be determined at the date of delivery such that its value is ascertained at a later date (by reference to the price at which BPOI repurchased the oil from BPESA and sold it to BPOESA), it is the "quasi" s53(3) measure recognised in *Choil.*

Alternative measure based on sub sale to BPESE

271. Given the uncertainty surrounding the ratio in *Bence*, I propose to deal briefly with the alternative measure of loss advanced for BPOI (paragraph 186 of its opening skeleton), which is that BPOI's liability to BPESE under the sub-sale amounted to the s53(3) measure of loss. It was submitted that by delivering the contaminated cargo to BPESE, BPOI breached the terms of the sub-sale and incurred a liability to pay damages, quantified pursuant to s53(3) of the Act.

272. Glencore submitted that although BPESE might have had a claim against BPOI, the claim was not notified in accordance with the terms of the sub-sale and is time barred. Glencore thus submitted (paragraph 107 of its Closing Submissions) that given the lack of a valid claim by, or liability on the part of, BPOI to BPESE, BPOI has suffered no loss. (If and to the extent Glencore sought to make a broader submission that BPOI's liability to BPESE did not amount to a loss, this submission is answered by the decision in *Total Liban SA v Vitol Energy SA* [2001] QB 643 at 651-653, where the court held that the existence of a liability even without prior payment may constitute an actionable head of damages).

273. I understand it to be common ground that the Sub-Sale incorporated the BP GT&Cs which provided in section 59.2.1 and 67, respectively, a time limit for complaints about quality and for legal proceedings to be brought.

274. Section 59.2.1 provided (so far as material):

> *"Any complaint of deficiency of quantity or of variation of quality shall be admissible only if notified in writing to the Seller within 45 days of the completion of discharge date and accompanied by evidence fully supporting the complaint…"*

275. Section 67 provided (so far as material):

> *"Without derogating from Section 62.6 (claims relating to taxes) or the specific time limits set out in Sections 7.1.4, 16.2.4 or 23.2.5 (submission of demurrage claims), Section 59.2.1 (complaint of deficiency of quantity or of variation of quality), and any other provisions requiring compliance within a given period, all of which shall remain in full force and effect, legal proceedings in respect of any claim or dispute arising under the Agreement in accordance with Section 73 shall be commenced within 1 year of the date on which the Crude Oil or Product was delivered … If legal proceedings are not commenced within the time limits specified the claim shall be time barred and any liability or alleged liability of the other Party shall be finally extinguished."*

276. BPOI submitted that:

    i) BPESE complied with the requirement to notify complaints as to quality when it gave notice on 23 April 2019 by an email from Mr Rohmann, read with the test results which were sent.

    ii) The time bar was waived by an amendment to the sub sale agreement dated 25 February 2021 (the "Amendment Agreement").

iii) The assertion of a time bar would be irrational, commercially absurd and harmful to its reputation: *Finlay v Kwik Hoo Tong James Finlay & Co Ltd v. NV Kwik Hoo Tong HM* [1929] 1 KB 400 (CA) (paragraphs 230-231 of its Opening Submissions).

277. Glencore submitted that:

i) The notice (purportedly) given by Mr Rohmann did not give notice of a claim and was not "accompanied by evidence".

ii) On 22 April 2020, the time bar expired and liability was extinguished. The operation of the time bar is automatic and does not depend on BPOI's discretion: *The Aries* [1977] 1 WLR 185.

iii) The Amendment Agreement entered into in February 2021 to delete the time bar was too late and assuming liability would amount to a voluntary act.

iv) It would not be unreasonable for BPOI to rely on the time bar defence.

Discussion

Section 59.2.1

278. The email from Mr Rohmann on 23 April 2019 (at 14.22) to (amongst others) Mr Haines read (so far as material):

"*Because of the contamination of our Urals cargo with much too high organic Chlorides content, for the moment we have to reject processing of this Urals until we have a clearer view on the impact of this.*

In order to stay feasible with our next batches and to avoid a shutdown of our crude units we will take 27,000 m³ of Alvheim from Lingen…

Maybe we can catch up tomorrow to discuss how to resupply the crude…" [emphasis added] [F/104/1]

279. In my view, whilst it was not written as a "formal complaint", by the email BPOI were left in no doubt that BPESE were complaining about the quality of the Cargo and rejecting it due to the contamination. Contrary to the submissions for Glencore, there was no requirement for it to be a "notice of claim" or for it to set out any legal basis for the claim. I find on the evidence that BPOI did give notice of a "complaint" in relation to quality for the purposes of Section 59.2.1.

280. The issue of whether the complaint was "*accompanied by evidence*" as required by Section 59.2.1 has to be considered in the light of the exchanges that took place on the same day and a few days later. Earlier that same day (23 April 2019) Mr Haines had sent an email to various people including Mr Rohmann referring to the measurement of 15 PPM organic chlorides in the Cargo:

"*We have had a measurement of 15ppm Organic Chlorides in an Ust Luga Urals cargo that discharged in Wilhelmshaven at the weekend. We are re -testing to ensure it is correct*."

281. As part of that email exchange Mr Rohmann had responded clarifying that the 15 ppm was on the whole crude and that he would "*share*" the NWO reports once he had them available. In a separate email that day copied to various people including Mr Haines, Mr Rohmann set out the preliminary results from the in-line sampler during discharge showing levels above 15 ppm in the entire oil. (Glencore make reference in its Closing Submissions to the fact that one of the emails relied upon by BPOI is in German. In my view nothing turns on this in light of Mr Haines' evidence in cross examination (Day 2 p.94) that he would ask a colleague to translate if necessary (or use Google Translate).

282. There is no express requirement in section 59.2.1 for the evidence to be in the same email or attached to it and I see no basis on which such a requirement should be implied. I find that evidence was supplied to BPOI and the requirements of section 59.2.1 were satisfied in the circumstances.

Was there an agreement to waive the time bar?

283. As to the Amendment Agreement in 2021, the relevant provision of the BP GT&Cs (which applied to the Sub-Sale) stated:

> "*74 5 Modification*
>
> *The terms of the Agreement as agreed between the parties shall not be modified unless mutually agreed by the parties, which agreement must be evidenced in writing*."

284. BPOI relied on the evidence of Mr Sieder in his witness statement concerning his telephone call with Ms Spier on 9 January 2020:

> "*30… Ms Spier explained that, with regard to keeping the liability of BPOI to BPESE under their contract on the supply of that cargo alive… BPOI and BPESE agreed to extend the time bar under the contract, which would otherwise start in April 2020 and would at some point need to formalise their agreement. Ms Spier mentioned that she would prepare a document on the extension to be countersigned by BPESE but that she would not do so immediately but "in the next few weeks or so" with the exact time remaining open.*
>
> *31… I did not give [the presence of a contractual time bar] any further thought after the call until I was approached with regard to the preparation of this witness statement. To me, the conclusion of the proposed extension agreement was a formality…"*

285. The evidence of Ms Spier in her witness statement (paragraph 20) was that:

> "*We were in agreement that BPOI would not rely on that limitation period. I told Mr Sieder that I would prepare an extension agreement to formalise this, to be signed by BPOI and BPESE…"*
>
> Ms Spier left BP in October 2020 and stated in her witness statement that the extension agreement had not been finalised and sent to BPESE by the time she left.

286. Neither witness was cross examined on their witness statements. However, Glencore submitted that the relevant question of whether an agreement was concluded, and, if so, on what terms, is an objective question of law for the court and the witness' subjective opinion that something was agreed is irrelevant (Day 7 p138).

287. The relevant exchange recorded in the transcript is as follows:

> "*Ms Spier: So what we will need to do Ronald at some point and this goes on the point of keeping that liability alive is actually enter into an extension agreement i.e. BP Europa and BPOI agree to extend the time bar under their contract because otherwise time bars are going to start to happen in April and to the extent that we do not extend the time between BP Europa and BPOI, BPOI would no longer be able to say it was liable to BP Europa because it...*
>
> *Mr Sieder: If you don't have a damage you cannot claim it from BP Europa but yeah…*
>
> *Ms Spier: Exactly. So what I will do is I will prepare something and I'll send it to you and you'll just have it countersigned for BP Europa. It won't be immediately, it'll be in the next you know few weeks or so but it's just so that it's in respect of those kind of things where from time to time I will be probably coming to you but in the rest it's going to be BPOI commencing court proceedings…"* [emphasis added]

288. It was submitted for Glencore that the transcript of the phone call viewed objectively does not equal an agreement. It was a "heads-up" that there should be in the future some possible agreement. (Day 7 138:1-138:6)

289. However in my view the evidence is clear that an agreement had been reached within the meaning of Section 74.5 in January 2020. The terms of the agreement are clear- there is to be a waiver of the time bar. There is no suggestion that further discussion or negotiation of the terms of the waiver are required on either side – there is merely a need for the formality of a written record:

> *"I will prepare something and I'll send it to you and you'll just have it countersigned for BP Europa."* [emphasis added]

290. Mr Sieder did not contradict Ms Spier on the call when she said this, nor did he indicate that further terms needed to be agreed. His evidence in his witness statement that the conclusion of the proposed agreement was "*a formality*" was unchallenged.

291. It was submitted for Glencore that:

    i) an oral agreement is unenforceable as section 74.5 amounted to a "no oral modification" clause: *Kabab-Ji v Kout Food* [2021] UKSC 48; and

    ii) the evidence in writing must be "reasonably contemporaneous".

292. I accept the submission for BPOI that the clause in this agreement can be distinguished from the type of clause considered in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2019] AC 119 (SC) and *Kabab-Ji*. In *Rock Advertising* the relevant clause provided that:

> "*all variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect*".

293. In *Kabab-Ji* Lord Hamblen and Lord Leggatt in their judgment described the "*no oral modification clauses*" as "*a number of provisions which prescribe that [the contract] may not be amended save in writing signed on behalf of the parties*".

294. Whilst it is clear on the evidence that the parties contemplated that the agreement would need to be recorded in writing, there is no evidence which would tend to contradict the natural meaning of the words that, as a matter of construction, Section 74.5 allows for amendments to be agreed orally. If the evidence in writing is an implied condition precedent to the oral agreement, then that condition is satisfied by the Amendment Agreement.

295. Glencore submitted that "*the authorities show and it would follow as a matter of first principles*" that it is too late to evidence the oral agreement in writing after the commencement of proceedings "*which concern that agreement*".

296. Both parties sought to draw an analogy with the requirement in relation to guarantees and the Statute of Frauds that the memorandum has to be in existence prior to the commencement of the action in which the creditor seeks to enforce the guarantee: *Andrews and Millett on the Law of Guarantees* at [3-021].

297. Even if such an analogy with guarantees is apposite (as to which I have doubts given that guarantees are regarded as a "special class of contract"- see the rationale in *Andrews and Millett* at [3-002]) and a memorandum must be in existence prior to the commencement of the action in which the creditor seeks to enforce the contract, I do not accept that the commencement of the action by BPOI against Glencore amounts to an action to enforce liability under the sub-contract.

298. I further note that *Andrews and Millett* are of the view (at [3-021]) that, for the purposes of section 4 of the Statute of Frauds:

> "*If the agreement was not made in writing, the note or memorandum of it need not be made contemporaneously with it, as the contract exists independently of the memorandum*."

299. No authority has therefore been provided which establishes Glencore's submission that the evidence in writing under Section 74.5 must be "*reasonably contemporaneous"*.

300. In my view there is no requirement that pursuant to Section 74.5 the evidence in writing has to be effected "*within a reasonable period*" and the Amendment Agreement was not "*too late*" to be effective to prevent the operation of the time bar.

Conclusion on alternative measure

301. For the reasons set out above, I find that, if I were wrong on the primary measure of loss:

    i) the alternative measure of loss is that BPOI's liability to BPESE under the Sub-Sale amounted to the s53(3) measure of loss; and

    ii) liability to BPESE was not time barred.

302. Given that this was the alternative measure advanced and my findings above, it is not necessary to consider the submissions advanced by BPOI relying on the principles in *James Finlay* (and *The Lily Prima* [1976] 2 Lloyds Rep 487).

What is the difference in value of the Cargo (Issue 5)?

303. It was common ground between the quantum experts and accepted for Glencore that the sound value of the Cargo (adjusted for delivery at Wilhelmshaven) is Dated Brent plus $0.35. (Joint memorandum and "*Glencore's Revised Calculations on Value*")

304. However, the contaminated value is in issue (Issue 5.4).

BPOI submissions

305. It was submitted for BPOI (paragraph 112 of its Closing Note) that:

    i) the sale to BPOESA at Dated Brent -$8/bbl is the best evidence of value unless impugned as an unreasonable failure to mitigate; and

    ii) this was accepted by Ms Bossley in cross examination.

Glencore submissions

306. It was submitted in summary for Glencore that:

    i) value is a question of objective fact; BPOI's submission that, unless the Castellon sale is shown to be unreasonable it sets conclusively the value, is inconsistent with value being an objective question of fact;

    ii) the offer to Glencore is not a freestanding data point at all, alternatively should be given very limited weight;

    iii) its primary position is that the Cargo is worth minus $3 per barrel against Dated Brent based on the remedial cost;

    iv) alternatively the Tupras offer sets the value;

    v) alternatively that the Cargo was worth minus $5 per barrel against Dated Brent because that is about the mid-point in the range between the offer and the bid prices with MOH; and

    vi) BPOI's "*minus 8 arrangement*" cannot be viewed as a reliable or independent data point. It was not arm's length; it was not willing buyer and willing seller: it was instead willing buyer and disengaged seller, because nobody recognised the conflict of interest, so nobody acted for Gelsenkirchen. The optionality cannot be marginalised but has an obvious value, and there is no evidence that MOH would have expected optionality in the way that happens intra-group.

Approach to value

307. As to the approach to be taken to determine the value of the contaminated Cargo, Glencore referred the Court to *Benjamin* at [17-052] and the cross-reference (in the footnote) to *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm) at [167].

308. Relying on these authorities, it was submitted for Glencore that value is determined by reference to all of the relevant evidence and not simply the price in the available market;

and where there is no available market, the Court must take into account all relevant evidence bearing on value (paragraph 98.2 of Glencore's Closing Submissions).

309. [17-052] of *Benjamin* states (so far as material):

"…Normally, there is no market in the ordinary sense for damaged or defective goods, and thus other evidence is frequently needed to fix the value of the goods at the time and place of delivery. This value may be evidenced by the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition…"

310. The relevant quotation from *Total Global Steel* (as set out in the footnote) was that:

"*where there is no ready market in the assets involved … the Court must do its best, using whatever material is available to it to … compute what the claimant has lost*".

311. It is not clear to me that BPOI disagreed with these propositions as set out in *Benjamin* and *Total Global Steel* but as I understand its submissions, it advanced the proposition that the sale to BP Castellon should be treated as the "*best evidence*" of the value of the contaminated oil.

312. I proceed on the basis that there was no market "*in the ordinary sense*" but there was evidence as to the market for the Cargo and the Court should consider all evidence which in its view has a material bearing on value in order to determine the value of the contaminated Cargo, and in so doing will form a conclusion as to whether in fact the sale to BP Castellon should be regarded as the best evidence of the value of the Cargo.

Factual Evidence

313. Before setting out the factual evidence as to the offers/tenders made at the relevant time which are primarily relied upon by the parties, it is helpful to set out the evidence of Ms Bossley in cross examination as to how to approach the various "data points" proposed by the parties:

"Q. … The best evidence is an actual deal.

A. Yes.

…

Q. …Is the second-best item of evidence a buyer's bid that is refused by the seller?

A. It's part of the database in as much as someone out there is prepared to buy it at that price, but if the seller is not prepared to accept that price and expect something higher, then it's part of the database but it's not the final price of the cargo.

Q. Does a buyer's bid which is rejected by the seller suggest a floor for the true value?

A. No, it reflects a difference of opinion between the buyer and the seller.

Q. If the buyer says, "I'll pay $100", and the seller says, "No", does that suggest that the $100 is the lowest value which is what I mean by "floor"?

A. The lowest value that the seller will accept? The lowest value -

Q. No, the lowest value of the cargo.

A. No, no, because I could equally say, "I'll buy it at 50", and if the market is at 100, is that the lowest value of the cargo? No, that's just a mistaken understanding of what the market value is on the part of the buyer who's bidding 50.

...

Q. And do you agree that the third best evidence is an offer by a seller that is rejected by the buyer?

A. Well, a corollary of what I just said: that's what the seller believes it's worth. If the buyer rejects it, it's a part of the market database, but all it's saying is the seller thinks this and the buyer thinks that." [emphasis added] *(Day 6, 83:16-83:21)*

314. It is also relevant to note that (in addition to the offers/tender discussed below) there was evidence before the Court of other exchanges in the period April-June 2019 between BPOI and other participants in the market (both directly and through other BP entities) of which I summarise the relevant exchanges below. Although I take them into account as part of the evidence as to the market for the contaminated oil, I do not set them out in detail as although in some of those exchanges prices were mentioned, they were in my view too vague to provide any significant assistance in determining the value of the Cargo, although they do provide useful background.

Unipec

315. On 1 May 2019 Mr Hague contacted Unipec, the trading arm of Sinopec, to gauge any interest and the response was noncommittal:

"*we studying for the moment …dilution is a tough one*".

PCK/ PKN/ Holt

316. On 2 May 2019 Mr Hague contacted PCK, a German refinery and on 7 May 2019 PKN a Polish refinery. Neither of these were interested.

317. Holt Global, a Swiss trading company was equally noncommittal when contacted by Mr Hague on 8 May 2019 but on 10 May 2019 came back with "*a definite no"* and the observation:

"they just not keen on taking the risk and they dont have the storage to hold and blend it down".

Neste

318. Neste, a Finnish refining company responded to Mr Hague on 8 May 2019:

"The jury is still out for us at what level our appetite starts …Engineers having a long think on it".

319. Follow-up emails/chats from Mr Hague on 20, 21 and 22 May 2019 to Neste still resulted in a noncommittal response even when Mr Hague suggested that the oil "*would come with an appropriate discount*".

Valero

320. In discussions between Mr Hague and one of the BP traders in the US on 28 May 2019 there is a statement that "*Valero is interested but not in a hurry*" and then the US trader told Mr Hague on 29 May 2019 that Valero "*said they would "need double digit discount" to take the risk on Urals*". A further exchange on 4 June 2019 referred to Valero "*looking for something in the -10 range*". It is unclear whether these exchanges referred to another cargo which was more heavily contaminated but since it did not lead to any firm bid/offer I accord it no weight other than as general market background.

321. Taking what I regard to be the material offers/tenders in chronological order, they were as follows:

API

322. On 30 April 2019 Mr Hague contacted API, a Sicilian refinery and offered the oil at a price which equated to Dated Brent minus $0.20/0.40. API did not accept the "offer" and responded with a noncommittal

"*thank you for your indication, we are working on it*".

323. The "offer" or "indication" was not accepted by API. As Ms Bossley said:

"…that's what the seller believes it's worth. If the buyer rejects it, it's a part of the market database, but all it's saying is the seller thinks this and the buyer thinks that."

324. Further although the offer was considered at the time to be a reasonable price by BPOI (according to the evidence of Mr Earl) I accept the evidence of Dr Imsirovic that this was at a very early stage when the market was "*in a bit of a shock*" and "*didn't know what the values were*":

"*A. … this is very early days of -- we're still talking about April, end of April, so this is very early days when most of the traders are doing price discovery. It was just most people -- as both Ms Bossley and myself said, the market was in a bit of a shock, we just didn't know what the values were. So in trading it's perfectly natural to start from high prices and the buyers would come from low prices until sort of information trickles into the market, but I would agree that this is a very high price -- with hindsight unreasonable price*." (Day 6, 38:24-39:9)

325. This evidence is consistent with the evidence of Mr Hague:

"…We had no idea what organic chloride Urals was -- contaminated Urals was worth at that point. We were simply trying to find a market and trying to find where value was by testing various [levels]" (Day 3, 15:10-15:14)

MOH offer

326. The initial contact was likely to have been a phone call on 7 May 2019 according to Mr Hague and this was followed by an email on 8 May 2019 between Mr Hague and MOH and gave an "*indication*" of Minus $0.60. It was followed by a WhatsApp chat on 14 May 2019 in which MOH told BPOI that:

"on the Urals price consideration is nowhere near the dollar or so discount… Would need to see $5 -6 to consider it."

327. On 21 May 2019 Mr Hague emailed MOH:

"Would you be able to would you be able to [sic] refresh at what level and what arrival you might be able to look at this cargo. With this measured level of contamination it could represent a lucrative opportunity for you if you can cope with the quality."

328. In a WhatsApp exchange on 23 May 2019 when Mr Hague asked whether the MOH trader had "*anything back*" on the contaminated crude, MOH responded:

"we discussed it but was hesitant to write something… I am to propose 150,000 - 300,000 BBLs at a level of DTD -$8"

Mr Hague responded:

"*Ah, no whole cargo possibility?"*

The MOH trader replied, "*may be up to half*".

Tupras tender

329. On 28 May 2019 BPOI responded to a tender from Tupras, a Turkish refinery, with an offer at Dated Brent minus $4 which was rejected by Tupras as "*not competitive"*.

Sale to Castellon

330. There are emails before the court of the discussions that were taking place between BPOI and BPOESA at the end of May 2019 concerning the possible solution of processing all or part of the Cargo at the Castellon refinery.

331. On 14 May 2019 Mr Williams wrote:

"*Gelks have two 100kT cargos of Urals Ust Luga with Organic Chlorides. One cargo has 12-15ppm, the other has 30ppm.*

We currently have no firm plan for these but expect to sell out the cargo at a significant discount. It would be good to keep this value within BP and explore Castellon's capability to run this…".

332. Mr Earl's evidence in cross examination was that at this point they did not know whether Castellon could process the oil. The relevant exchange was as follows:

"*Q. From this point on, the preferred option was keeping the value and so the oil within BP, wasn't it?*

A. No, I don't think we had made that decision at that point in the middle of May, because we did not know at that point whether Castellon could actually process it, if I recall, by the middle of May.

Q. But if they could, that was the preference, wasn't it?

A. I don't think they'd made that decision by the middle of May."

333. On 29 May 2019 BPOI (Mr Williams) wrote to Mr Earl and other individuals at BPOI and BPOESA:

"While Miguel works with Technical Services to establish a safe processing limit for this cargo, here are possible economics

Currently our best bid from the market is -$8/bbl delivered for a half cargo (into another Med refiner). Our breakeven at Castellon is -$1/bbl so there is good margin for us to process this barrel.

Suggestion is that if we do go ahead, we would discharge around 200kb as an initial test. This would take around 1 month to process."

334. The email then set out 2 options: to take half the Cargo and to take the whole Cargo. The first option stated:

"Value for Castellon is $2.8M minus demurrage (worst case 1 month = $750k). Total benefit = >$2M."

335. The second option stated:

"Value for Castellon is $5.5M minus demurrage (3 month = $2.3M). Total benefit = $3.5M".

336. It appears from the evidence of the contemporaneous emails that by 10 June 2019 the "*technical cover*" was in place and BP then needed to agree "*the commercial boundaries*" as to the identity of the cargo (the Alexia), the processing rate, and the timetable for delivery of the tranches of oil.

337. The relevant email from Ms Giner to Mr Earl and to Mr Williams read (so far as material):

"As the technical cover for organic chloride contaminated URLs is in place, we now need to agree the commercial boundaries. Let's go one by one and check your agreement or whether we are missing something.

- The cargo to be processed is the one with less organic chlorides owned by BP, the one originally discharged from the Alexia

- The maximum processing rate will be set by the maximum organic chlorides to be fed to LVN (4ppm wt), as far as we maintain pH>5.5 and Fe <2ppm wt in the condensed water draw in D-104 (downstream LVN).

- Processing rate will move between 2-8kbbls/d, depending on above operating limits. Min rate is set by dosifying pump. Below 2kbbls/d, feed rate cannot be controlled. If we cannot cope with 2kbbls/d, that's equivalent to not being able to run the crude

- With the above constraints we could feed approx. 180kbbls/month of this URL cargo, but we cannot guarantee it at this stage.

- To start with, we can take 200kbbls parcel in TK-755, keeping it segregated and connected to dosifying pump.

Discharge laycan for the 200kB trial parcel will be 27 -30th June…"

338. On 20 June 2019 BPOI entered into a contract with BPOESA to sell 400,000 barrels of the Cargo (BPOI having agreed to repurchase that quantity of the Cargo from BPESE by a contract of the same date). Thereafter the contracts were amended to increase the quantity of oil such that the entire Cargo was resold to BPOESA in tranches at Dated Brent -$8.

Offer to Glencore

339. On 14 June 2019 BPOI sent an email to Glencore inviting Glencore to purchase the Cargo at a price higher than the Dated Brent minus $8. The relevant passages read:

"In mitigation of our losses, we have been seeking a buyer for this cargo. As you may be aware, there are very few buyers available for oil which is contaminated by organic chlorides. At present we do not have any firm offers from third parties and costs continue to escalate.

…

We have ascertained that one of the BP refineries in the Mediterranean may be able to process a part of the contaminated cargo by blending small quantities of it into their other feedstocks. We propose to sell up to 400,000bbls of the cargo to that refinery at a delivered price of Dated Brent minus US$8/bbl, with delivery to take place in two parcels of 200,000bbls. Based on the indications we have seen from counterparties and media reports, we believe that this is a reasonable estimation of the market value for this cargo in the Mediterranean.

We are writing to give you an opportunity to make an offer to purchase part or all of the cargo at a higher price if you consider that the above mitigation strategy is unreasonable. We believe that it reflects the best value that can be achieved for this oil." [emphasis added]

340. Glencore responded by email of 17 June 2019 in which it denied that it was in breach of the quality provisions of the contract and in relation to the invitation to purchase the Cargo responded as follows:

"However, as you correctly point out, to the extent that we are wrong in what we say above (which, for the avoidance of any doubt we deny), you are under a duty to mitigate your loss. We understand that you presently consider your best option to be selling part of the Cargo to your refinery in the Mediterranean - that is for you to evaluate and determine and we have no comments in that regard. To the extent it helps you to

determine your next steps, we can confirm that we are not presently inclined to purchase part or all of the Cargo." [emphasis added] [F/477/1]

The expert evidence

Dr Imsirovic

341. Dr Imsirovic's evidence in the Joint Memorandum in response to the question whether the price at which the Cargo was sold to BP Castellon was reasonable was that it was "*the best bid BPOI had in the market*".

342. His evidence was that:

"Glencore's refusal to buy it at that price indicates to me that Glencore viewed the market value of the cargo was less than -$8 discount to Dated Brent."

Ms Bossley's evidence

343. Ms Bossley's evidence in the Joint Memorandum was that:

"*A reasonable price would be somewhere above Dated Brent minus $8/bbl and below Dated Brent minus $0.47/bbl."*

344. In her report (paragraph 79) she said:

"It is not possible for me to say with any degree of certainty what the correct price of a cargo with an OC level of that claimed for the Alexia cargo ought to have been. I can only say that it is likely to have been greater than Dated Brent minus $8/bbl and less than Dated Brent minus $0.47/bbl, i.e. the price of a sound cargo, Dated Brent plus $0.53/bbl, less the cost of remediation of $1/bbl. A buyer of an atypical cargo with elevated OCs would also wish to negotiate a further discount to compensate it for the risk and inconvenience of dealing with the quality problem."

345. Ms Bossley was cross examined on the issue of the significance of the price at which the oil was sold to BP Castellon to which she responded:

"... I note that that cargo was bought and sold at that price, and if you're asking me was that a fair and reasonable price, I don't know, I wasn't there."

346. The full exchange on this issue was as follows:

"Q. Now, we have an actual sale between a willing buyer and a willing seller in this case, don't we, the sale by BPOI to BP España?

A. It happened, yes, uh-huh.

Q. And unless that can be impugned as unreasonable, do you agree that that is the best evidence of the value of this cargo?

A. That is taking me into territory where I don't believe I should be. I note that that cargo was bought and sold at that price, and if you're asking me was that a fair and reasonable price, I don't know, I wasn't there. What I do know is that there are other things that might have been explored and appear not to have been, but I'm not going to

be a backseat trader and say BP should have done this or anybody else should have done something else. I'm just looking at the evidence I've got in front of me, and I see that BPOI sold to BP España at Dated Brent minus 8 and that there were other possibilities around that may or may not have been better, and I've tried to evaluate those and question: might one have looked at other possibilities? But the only people who know the right terms of a deal are the two parties to that deal, and I'm not a backseat trader.

...

Q. Unless that sale can be impugned as unreasonable, do you agree that it is the best evidence of the value of the cargo?

A. It is a compelling piece of evidence, yes.

Q. And you do not impugn it as unreasonable, do you, because you've just said it's not for you to retrade?

A. That's right. I'm not saying it's unreasonable. I'm not saying it's reasonable. I just merely acknowledge it as a fact of life that it happened." [emphasis added]

347. Ms Bossley was giving evidence as an expert to assist the court on resolving the issues of quantum. In my view her reluctance to give a view on whether the price paid by BPOESA was "*fair and reasonable*" was therefore surprising and of little, if any, assistance to the Court in determining the weight to be given to that price as evidence of the value of the Cargo.

Discussion

Remedial cost

348. Glencore's primary position is that the Cargo should be valued based on the "remedial cost". In my view this seemed in effect to be an attempt to get the "*cost of cure*" which the Court has already rejected above as the appropriate measure of damages.

349. Glencore submitted that:

i) the Court should take into account all "*available evidence bearing on arriving at an objective value*" (paragraph 124 of its Closing Submissions);

ii) the value should be the value "*as it should have been agreed with Castellon*" (paragraph 125 of its Closing Submissions); and

iii) this in turn is a "*proxy*" for the value of the Cargo to any potential refinery buyer.

350. I reject this position for the following reasons:

i) If there is no market "*in the ordinary sense*" the court takes into account all relevant evidence to compute what the claimant has lost (see *Benjamin* above). However here there is evidence of "*the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition"* and the Court may take that into account.

ii) Where there is such evidence, there is no authority cited to the Court that the price is not the actual price at which the goods have been resold but instead is an objective price which "*should have been agreed*" and thus has to be capable of being objectively tested or verified; the price agreed between the parties is their subjective analysis of value and as Ms Bossley stated in her evidence: "*the only people who know the right terms of a deal are the two parties to that deal*".

iii) The court may have regard to the remedial cost but the evidence of Ms Bossley in cross examination was that:

"The cost of remediation is an element of that valuation [i.e. difference in value], but it's not the whole story."

Thus in my view the remedial cost is merely an element to which the buyer may have had regard in agreeing a price at which to buy the goods.

351. Glencore sought to take its argument in favour of an objective price yet further by submitting that the value of defective goods should be assessed by reference to some hypothetical level of acceptable profit on the part of the (ultimate) buyer as the "*incentive reasonably required*" or the price at which it "*ought to have done the deal*".

352. There is no authority cited for the proposition thus advanced by Glencore; in my view the profit made by Castellon is an internal matter for its business and is irrelevant to the weight to be given to the evidence of the price agreed between the parties.

353. The value to Castellon is not a "*proxy*" for other buyers: the Cargo might have a different value to a buyer who was a trader proposing to sell it on; and it is not even a "*proxy*" for other potential refinery buyers as it is clear on the evidence that the willingness/technical ability of other refineries to take the contaminated Cargo affected their perception of value. It is clear on the evidence that refineries cannot be treated as interchangeable - for example Gelsenkirchen was unwilling/unable to process the contaminated Cargo.

354. Mr Earl's evidence in cross examination (referred to by Glencore in its Closing Submissions at paragraph 126) was that although other refineries would be expected to be doing "*similar calculations*" on the benefit to accrue, such calculations were only done once a refinery had concluded whether it had the technical ability to process the contaminated Cargo:

"Q. Presumably any refinery considering a purchase from BP of the Alexia cargo, or by now the Nordic Breeze cargo, would have been expected to be doing similar calculations to this; do you agree?

A. Yes, I think this is probably one step further down the line of making these calculations. I think when we had looked at other -- talked to our other refineries, we had not got this far because I don't think, if I recall, they would have considered the technical ability to process them.

Q. Okay.

A. So I cannot point to another example like this, I don't think, for, say, Rotterdam refinery.

Q. No, and my question was more general still, which is that any refinery in the market, whether it be a Greek refinery that has nothing to do with BP -

A. Oh, yes, sorry, I misunderstood, yes.

Q. -- or a US refinery, you would have expected them broadly to be doing similar calculations to this once they had awareness of the quality characteristics of the Nordic Breeze cargo; agreed?

A. I would imagine so, if, as I mentioned previously, they considered it something that they would like to take on, from a technical perspective." [emphasis added] (Day 1122:19-123:17)

355. Further, in my view:

i) even if other refinery buyers were looking to buy and did the calculations, there is no evidence that the level of profits which are (actually) anticipated at Castellon would be the same for other refinery buyers; and

ii) even if the "*reasonable incentive*" were adopted, there is no evidence that this would be the same for other refineries and it is inconceivable and uncommercial (and not evidenced) to suggest that the same level of actual or hypothetical profit would exist or be acceptable amongst all refineries.

356. Ms Bossley was clear:

"The fact that a refiner in one location will bid 100 and a refiner in a different location will bid 90, neither of them are wrong. That's what it's worth to them…".

357. In my view the value of the Cargo to Castellon is evidenced by the price which BPOI and BPOESA agreed to pay and it would be wholly wrong in principle (and without authority) to seek to treat as "evidence" bearing on value, a hypothetical value calculated by Glencore which "*Castellon would have paid for the Cargo had BPOI …done a proper analysis of the price including by reference to Castellon's anticipated profits".*

358. In agreeing a price, there is no obligation or limitation on BPOESA to earn only a "*reasonable incentive*" and there is no basis for the evidence of the actual price agreed and paid (based on its own calculations and assessment of the market) to be disregarded in favour of an abstract hypothetical "objective" alternative.

359. In the light of these conclusions, it is not necessary in my view to consider further the detailed submissions about the level of profits (and "value" to Castellon and the ESA business) referred to in Glencore's Annex to its Closing Submissions.

Tupras tender

360. Glencore's first alternative is that the Tupras offer sets the value.

361. It was submitted for Glencore (paragraph 21.2 of its Annex to its Closing Submissions) that the Tupras tender is particularly important because it shows BPOI's "*own assessment*" of the value of the Cargo at the end of May 2019.

362. Mr Earl was asked in cross examination about the level of that bid. His evidence was as follows:

"*Q. What analysis had informed that level of discount?*

A. I don't recall. I think at the time we were obviously -- it was the end of May, and there were multiple cargoes of this contaminated oil on the market, including ourselves having two of them as I've laid out. We hadn't had any success in mitigating it in the market as yet, and we didn't know where to start with the value, so we, I suspect, chose a number." (Day 1, 127:12-127:19)

363. Mr Hague's evidence in relation to the level of the offer to Tupras was that having got the indication from MOH at minus $8, BPOI was testing the market to try and find out where the best bid might be:

"A. I mean, we were still looking for value at that point, we were trying to find out what the market would pay for this material. None of it had traded, as far as we were aware, so we were ratcheting down the price. Clearly the offer of telegraphic transfer 60 days after COD, particularly with a credit risk like, Tupras is probably another dollar or so, I would imagine, in terms of value from their side. So that's equivalent to a minus 5 offer, I'd expect.

Q. The discussion had entailed that from BP's perspective BP could do better than minus $4.5 even though MOH had indication minus $8, didn't it?

A. I don't think there was an expectation we could do better, we were hoping we might be able to do better. We had one indication at minus 8, an indication lower. We were bringing down our offers to the market in an attempt to find out where the best bid might be." (Day 3, 51:23-52:14) [emphasis added]

364. The offer to Tupras was not directly comparable to a sale to BP Castellon given the credit risk on Tupras and the credit terms: as set out above, Mr Hague's evidence was that as a result the offer was "*equivalent to a minus 5 offer*". He also told the Court that:

"... Turkish credit was quite expensive. As a buyer, their creditworthiness wasn't very good at that point." (Day 3, 47:24-48:1)

365. Although Glencore submitted (paragraph 125.2 of its Closing Submissions) that when compared with the Castellon sale, any negative price adjustments are counterbalanced by the positives (e.g. demurrage savings) it seems to me that on the evidence, the price offered by BPOI to Tupras as its estimate of the value of the Cargo was in substance lower than the minus $4 given the location and the credit risk.

366. Mr Earl agreed in cross examination that the offer to Tupras did not seem unreasonable at the time:

"Q. Presumably you or colleagues would have felt it was a competitive offer?

A. Given the situation at the end of May, where there were multiple contaminated Urals cargoes on the market, none of which we had heard had been sold or been moved on, then, yes, that didn't seem unreasonable." (Day 1, 128:5-128:10)

367. Even if it was viewed by BPOI as a not unreasonable offer, the (limited) significance of the offer lies in the fact that it was rejected by Tupras. I accept the evidence of Ms Bossley that in effect the rejection of BPOI's offer just reflects a "*difference of opinion*" between the buyer and the seller and does not set the parameters for the value:

"*A. The buyer that refused it at that point in time, that was its particular ceiling. It says nothing about what other buyers in other locations would or would not be prepared to pay either that day or the next day or the next week*." (Day 6, 84:5-84:9)

MOH offer

368. The second alternative advanced for Glencore is that the value lay in the mid-point between the offer and bid prices with MOH of minus $5 (paragraph 125.3 of its Closing Submissions).

369. MOH offered to buy the Cargo but the offer was only for part of the Cargo, and according to Mr Hague, would have incurred further costs given its location:

"A. ... [the MOH offer] was for a small piece of the cargo at the other end of the Mediterranean on Greek out-turn which would have required a ship-to-ship and a further vessel. So in equivalent to the whole cargo that would have been $1, or probably $1 or $2 cheaper than that equivalent effectively. So that's on their terms for that 150-300, that's -- you know, that's a double-digit discount, that's minus 10 or worse." (Day 3, 36:11-36:19)

370. Unlike the terms agreed with BPOESA, MOH did not have an option to return the Cargo if it was impossible to refine. In cross examination, Mr Earl's evidence was that MOH could have been given such optionality, and as to additional cost, it was a buyers' market for the contaminated oil. His evidence (so far as material) was as follows:

"Q. Would you have given them an option to take 200,000 barrels now, see if they like it and then take a further parcel later at a fixed price?

A. Quite possibly." (Day 1, 145:9-145:12)

"Q. If MOH had asked for that optionality, either process or return on the first 200,000 or a complete option on the second parcel, you would have said that comes at a cost, that flexibility, wouldn't you?

A. That conversation didn't occur, I don't recall, but I can speak in a -- speaking as a kind of hypothetical case, you know, this was not in a market -- this was not a seller's market, if you like, for selling contaminated organic chloride Urals, so we had had limited success over time. I think at this period of time at the end of May there were as many cargoes, as I had reported in a previous email, of oil on the water or oil looking for homes and if a seller -- sorry, a buyer, had made a request for an alternative way in which we could have mitigated the oil then we would I have no doubt have considered it in the same light that we have -

Q. And if it had built in optionality for them, then that would have been costed; agreed?

A. I think where I'm alluding in as a possibility is that that may not -- that may have been a thought process, but this market was not one for -- did not have seller's strength on its side." [Emphasis added] (Day 1145:21-146:17)

371. Glencore submitted (paragraph 125.3 of its Closing Submissions) that given the bid/offer range and the "*significant profits*" which Castellon would have made in processing the Cargo it can be inferred that MOH ultimately would have agreed to pay Minus $5/bbl for the Cargo.

372. In my view the evidence does not support the inferences for which Glencore contends:

i) In my view the evidence of the exchanges does not support the submission for Glencore that the "mid-point" is the value of the Cargo-in the email of 14 May MOH stated:

"on the Urals price consideration is nowhere near the dollar or so discount… Would need to see $5 -6 to consider it" [emphasis added]

ii) Glencore then seek to construct an argument based on that reference to $5-6 as reflecting MOH's profit calculations when no offer was made at that level and there is no real evidence as to the return which MOH would have been prepared to accept. As stated above, refineries cannot be treated as interchangeable and in particular there is no evidence as to what level of profit MOH would have made or would have been looking to make; there is no evidence on which to infer that a "*reasonable incentive*" for Castellon would also have been either acceptable to or reasonable for MOH, and there is no basis for an inference that MOH would have been prepared to take the oil provided it earned what was objectively a "*reasonable incentive*" (assuming there was evidence to support this theoretical calculation).

iii) MOH expressed no indication in the exchanges before the Court that it would be prepared to pay a higher amount and any submission in this regard is merely speculation: Glencore submitted (paragraphs 19.9-19.12 of the Annex to its Closing Submissions) that the offer from MOH could have been improved if MOH had been "*pushed*" and BPOI had "*countered*" MOH. This is pure speculation on the part of Glencore (and to the extent Glencore rely on Ms Bossley (paragraph 19.11) on the part of Ms Bossley) and is not supported by any actual evidence. The evidence of Mr Earl was as follows:

"*Q. Did you tell Matthew Hague not to pursue MOH's interest once you had the minus $8 indication in hand?*

A. I don't recall doing that, no. I don't think so.

Q. Is it possible you did that?

A. I'm trying to recollect when 29 May was relative to when we agreed -- we had not agreed the first cargoes by this point, so we did not have a solution yet, I don't believe. Miguel was still working with technical services to establish it. So at this point in time I don't think I would have asked him to stop looking, no." [emphasis added] (Day 1, 117:6-117:16)

373. Further, in my view, having regard to the other indications within the market and the lack of other interest, the evidence does not support that MOH would have been prepared to pay a higher amount than its bid. In the exchange on 23 May 2019 when Mr Hague asked whether the MOH trader had "*anything back*" on the contaminated crude, MOH responded:

"we discussed it but was hesitant to write something… I am to propose 150,000 - 300,000 BBLs at a level of DTD -$8"

Mr Hague responded:

"Ah, no whole cargo possibility?"

The MOH trader replied, "*may be up to half*".

374. This "*hesitant*" offer does not suggest that the mid-price of the MOH bid and offer should be taken as representing the value of the Cargo nor does the evidence suggest that MOH could be expected to improve its offer from the offer of Minus $8. (Mr Hague was invited to speculate as to the meaning of the phrase "*hesitant to write something*". His response in cross examination speculating on what MOH may have meant was not in my view evidence to which the Court should or does give any weight.)

Glencore refusal

375. The starting point it seems to me is the principle as expressed by Ms Bossley in cross examination:

"Q. If a seller says, "I offer this cargo to you at 100", and the buyer says, "No", does it follow that that indicates that the value is lower than 100?

A. In the bidder's -- the buyer's opinion, it's worth less than 100, that particular buyer at that point in time."

376. Glencore has not advanced any evidence as to why it refused to offer to buy the Cargo at a level above minus $8 although in submissions counsel for Glencore disputed the view expressed by Dr Imsirovic that one could infer Glencore's view of the market value from its lack of interest.

377. In my view the Court is entitled to infer that had the value of the Cargo been significantly higher than the price at which BPOI invited Glencore to purchase the Cargo (as Glencore now submit) it is to be inferred that Glencore as a commodity trader would have been interested in buying all or part of the Cargo and reselling it to another refinery. BPOI made it clear in its email to Glencore that it had concluded that one of its refineries could process the contaminated Cargo by blending and given the submissions for Glencore that the value to Castellon is a "*proxy*" for the value to any potential refinery one might have expected Glencore to have an incentive to purchase the Cargo at around that price and resell it to a refinery.

378. Accordingly it seems to me that Glencore's refusal to buy the Cargo is relevant evidence that the price of Minus $8/bbl reflected its value.

Sale to BPOESA

379. The starting point is the evidence of Ms Bossley:

> *"Q. Would you agree with me that the best indication or evidence of the value of a particular cargo is the price actually agreed for that cargo with knowledge of its characteristics?*
>
> *A. If you've got complete knowledge of its characteristics, yes. Whatever price you agree is the value at that point in time between that willing buyer and that willing seller*." (Day 6, 78:19-79:1)

380. Glencore submitted in summary that:

i) The sale was not arm's length; this was an "*intra-group construct*" to maximise value for the ESA business of BP (Annex 1 para A to its Closing Submissions). (The refineries at Castellon and Gelsenkirchen are both within BP's ESA business.)

ii) It was not willing buyer and willing seller; it was willing buyer and disengaged seller, because nobody recognised the conflict of interest, so nobody acted for Gelsenkirchen.

iii) The optionality cannot be marginalised but has an obvious value, and there is no evidence that MOH would have expected optionality in the way that happens intra-group.

381. In my view on the evidence of Mr Hague (referred to above), the optionality on the part of BP Castellon does not impact in any significant respect the value to be attributed to the Cargo.

382. The mere fact that the sale was between two BP companies this does not establish that this was not an arm's length transaction. The highest that Glencore can put its case is that Gelsenkirchen was "*disengaged"* and its interests not properly represented. This does not establish that BPOI and BPOESA did not negotiate an arm's length transaction.

383. I reject the submission for Glencore (paragraph 7A of Annex 1) that BPOI is to be regarded as acting "*on behalf of*" Gelsenkirchen, if by this it is intended to imply that BPOI was acting as agent of Gelsenkirchen in a legal sense and thus the issue of whether the sale was arm's length should be assessed as between Gelsenkirchen and BPOESA such that BPESE needed to be separately represented in the negotiations. Whilst I accept that BPOI could be said to have been "*interposed as an intermediary*" (the evidence of Mr Earl), BPOI was acting as principal not as an agent in entering into the sale contract with BPOESA.

384. As the seller, BPOI was on the evidence exploring and considering other options for the Cargo – as reflected in the exchanges referred to above – and reached a conclusion on the best deal for it. Mr Hague rejected the proposition that BPOI was merely creating a paper trail in its exchanges with MOH and I have accepted his evidence as discussed above.

385. It was submitted for Glencore that the price at which BPOI sold the Cargo to BPOESA adds no additional weight to the MOH bid "*in circumstances where BPOI witnesses are clear that the sole basis for the price was the MOH indicative bid*".

386. I do not accept this submission which relied on the evidence of Mr Earl. In cross examination Mr Earl was being asked about specifically the email of 29 May 2019 and his response in relation to that email was as follows:

Q. Was the $8 based solely on the MOH indication?

A. Yes, I think it was in this context, yes." [emphasis added] (Day 1, 116:23-116:24)

387. In my view the evidence shows that detailed work was done to establish the economics for BPOESA of taking the Cargo (as well as the technical feasibility) and I do not accept therefore the submission from Glencore that the price ultimately arrived at was solely based on the MOH bid such that the sale price adds "*no additional weight to the MOH bid*".

388. I also reject Glencore's interpretation of the evidence that BPOI was responsible for coordination of the purchase of oil for use in refineries and the economic aspects for the oil to be processed by the refineries and as a result the sub-sale to BPOESA was not an arm's length sale. Although BPOI did act in a coordinating role, Mr Earl's evidence (relied on by Glencore in paragraph 1 of the Annex to its Closing Submissions) did not support a conclusion that as a result of BPOI's "*lead*", the sub-sale was not arm's length.

389. Mr Earl was asked in cross examination about the email of 10 June 2019 from Ms Giner to Mr Earl and Mr Williams (and others) and the evaluation of the economics of the proposed sale to BPOESA, and he made it clear that BP Castellon had to be satisfied that "*this is worth doing and that includes the economics*".

390. The relevant exchange was as follows:

"Q. Okay. And it's in construct from Ms Giner because in principle it's still for BPOI to take the lead on the economics; correct?

A. I think from Oliver Williams and from the LP analyst who's running the economics for the refinery, they are within London, working the economics, and Ana is working within the team and production planning at the site to ensure that she can convince her leadership team, including Paco, the refinery manager, that this is worth doing, and that includes the economics." [emphasis added] (Day 1, 142:12-142:21)

391. The unchallenged evidence of Mr Earl in his witness statement was that Ms Giner (together with Miguel Molto Roca, copied on many of the relevant emails) worked in production planning at the Castellon refinery, i.e. she was not representing BPOI but BPOESA.

392. The location of Mr Williams in London and the LP analyst is irrelevant to their roles and the issue of whether the sale to BPOESA was arm's length: I note Mr Earl's evidence earlier in his cross examination that the role of Mr Williams for Castellon role was "*to get the best possible deal on a particular crude for Castellon*" (a point which appeared

to be acknowledged by Glencore at paragraphs 2.2 and 3 of Annex 1 to its Closing Submissions).

393. The relevant exchange was as follows:

"Q. By contrast, Oliver Williams coordinated for Castellon; correct?

A. That's right, he coordinated for Castellon and one of our other refineries, Lingen, which is a refinery also in Germany.

Q. And part of their role is to try and get the right price on crude they source for their respective refineries.

A. Correct, yes, their intention is that they, with the myriad of crudes that are available on the market to make sure that they put together with the refinery teams a suitable crude slate that works and is feasible in the refinery at an appropriate price.

Q. And you say appropriate price, but Duncan Haines' role would be to get the best possible deal for Gelsenkirchen on a particular crude oil.

A. Yes, yes.

Q. And Oliver Williams' role to get the best possible deal on a particular crude for Castellon.

A. Correct, yes." [emphasis added] (Day 1 84:15-85:8)

394. On the evidence the price agreed with BP Castellon reflected both the seller's (that is BPOI's) assessment of the market (which included the offer from MOH) but also the buyer's (that is BPOESA's) assessment of value which included an evaluation of the economics of processing the Cargo from the perspective of the refinery, BP Castellon.

395. It was a sale between two separate corporate entities. BPOI had a choice where to sell the Cargo. Glencore's submissions that the offer from MOH was somehow not a genuine reflection of the value because BPOI did not pursue MOH further, is in my view not made out on the evidence for the reasons set out above.

396. In so far as Glencore seek to place any weight on the fact that BPOI did not accept the bid from MOH at the end of May and only concluded the sale to BPOESA on 20 June, that has no relevance to the issue of value in the circumstances: firstly at the time of the bid from MOH, BPOI was exploring the alternatives with BPOESA; secondly there is no evidence to establish any particular change in the value for the contaminated Cargo during that period of a few weeks.

397. For the reasons discussed above, I reject the proposition that this was not an arm's length transaction or between willing seller and buyer.

398. Accordingly, I find that the sale price from BPOI to BPOESA was an independent data point and a "*compelling piece of evidence*".

General

399. It was submitted for Glencore that in relation to Tupras and MOH, BPOI was "*seeking to have it both ways*" in submitting that the Tupras offer did not equal market value because Tupras did not accept it, but that the MOH bid does equal market value even though BPOI did not accept it.

400. I do not accept this submission. The fact that an independent third party, Tupras, refused the price offered by BPOI of minus $4 is some evidence in that a buyer refused to purchase at that price, but does not provide evidence as to what the actual value is. It is of greater significance in my view that another third party, MOH, offered to buy at minus $8. It is irrelevant in my view to the question of value that BPOI did not accept the bid from MOH given that it was a bid that was open to BPOI to accept. There is nothing in the contemporaneous evidence which leads me to a conclusion that the price offered by MOH did not reflect a genuine view of the market and what MOH was prepared to pay BPOI. (As stated above, I reject the submission that this was artificial on the part of BPOI to create a paper trail). I also reject the submission that the MOH bid should be treated as an outlier - it was the only firm bid.

Conclusion on the value of the contaminated Cargo

401. In reaching a conclusion on the value of the contaminated Cargo I have regard to the price at which the buyer has been able to resell the goods to a sub-buyer who has knowledge of their defective condition and have considered that price against the other evidence of value referred to above.

402. In my view for the reasons discussed above, I find that the value of the contaminated oil was Dated Brent minus $8/bbl.

Mitigation

403. The starting point is that Glencore has to establish that BPOI has "unreasonably" failed to mitigate its loss and damage.

BPOI submissions

404. It was submitted for BPOI that:

    i) The experts agree that "*dilution of high organic chloride content crude oil with a crude oil containing negligible concentrations of organic chlorides would be a reasonable practical solution to reduce the level of organic chloride to an acceptable concentration for refining*": Joint Memorandum paragraph 19.

    ii) This was, in fact, the approach taken by BPOESA at the Castellon refinery. The process was technically complex, required considerable planning, and resulted in three tranches of oil being delivered to Castellon between June and August 2019. The oil was processed at a low rate of around 6,000 barrels a day (for the first two tranches) or around 8,000 barrels a day (for the third tranche).

    iii) This blending operation could not be carried out by BPESE at the Gelsenkirchen refinery. Among other reasons: (i) the risks to the equipment at that refinery were considered to be too high: 1 Haines paragraphs 34-40; and (ii) there was inadequate

tank space at the NWO facility to store and blend the oil over a considerable period of time: 1 Haines paragraphs 41-43. BPOI, as an oil trading company with no refinery of its own, could not conduct the blending or processing itself.

405. It is submitted for BPOI (paragraph 223 of its opening skeleton) that the most that could possibly be said is that BPOI had more than one reasonable response open to it but that does not constitute a failure to mitigate: *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) at [38]:

"... As stated by Potter LJ in Wilding v British Telecommunications plc [2002] EWCA Civ 349; [2002] ICR 1079 at para 55:

'If there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.'"

Glencore submissions

406. It was submitted for Glencore that it was unreasonable of BPOI not to pursue MOH in tandem with Castellon when each was interested in approximately half the Cargo. Had they done so, they could have cleared the vessel by about one month earlier and saved $1.1 million.

Evidence

407. The evidence of Ms Bossley in cross examination was as follows:

"Q. And would you agree that a bid of that size [i.e. the MOH bid for less than half, with a possibility of going up to half] would be less attractive than a bid for half the cargo with a possibility of buying the whole?

A. Well, again, it depends on timing and location and the whole backdrop to the market, but taken in isolation, if you had nothing else happening and you had a bid for somewhat less than half a cargo in one location and a bid for half a cargo, with the possibility of a whole cargo in a different location, yes, I think you'd probably go for the latter one.

Q. The half with the possibility of whole rather than the quarter with the possibility of half?

A. Yes, if those were your choices and there was nothing -- no other information available, then, yes.

Q. Is that a significant factor, that is to say that you've got a chance of getting rid of the whole cargo to one location, a major plus?

A. Yes and no is the answer to that because it depends when they're going to take it. If you've got a chance of getting rid of the whole cargo, then that's better, obviously, but under the circumstances where you're not sure they're going to take the whole cargo and they're going to keep you hanging around for an unspecified period of time before you know whether they're taking the whole cargo or not, then that would be a whole different decision-making process." (Day 6, 94:4-95:4)

408. Ms Bossley also accepted that the freight would have been higher to MOH as it was based in Greece so was an extra one or two days' sailing:

"Q. And that makes Castellon more valuable than MOH to be measured by the amount of the freight for that extra distance.

A. The freight would have been higher to go to an extra distance, yes."

409. Mr Hague's evidence as to the value of the offer from MOH was as follows:

"Q. BPOI never countered this minus $8 indication, did it?

A. I don't recall. I mean, most of my conversations with Alex were over the phone, but I don't recall making a counter, no.

Q. Is that because there was no real intention of selling to MOH by 23 May?

A. No, I don't think so. I think it's because it was for a small piece of the cargo at the other end of the Mediterranean on Greek out-turn which would have required a ship-to-ship and a further vessel. So in equivalent to the whole cargo that would have been $1, or probably $1 or $2 cheaper than that equivalent effectively. So that's on their terms for that 150-300, that's -- you know, that's a double-digit discount, that's minus 10 or worse." [emphasis added] (Day 3, 36:5-36:19)

Conclusion

410. In my view Glencore has failed to show that BPOI acted unreasonably in relation to its duty to mitigate. The offer at minus 8 from MOH was for less than half the Cargo and had an additional cost in terms of transportation. Even if BPOI had pursued the offer from MOH, Glencore have not established that it is likely that an improved offer would have been forthcoming for the reasons discussed above.

411. Ms Bossley, the expert called by Glencore, was not apparently prepared to give evidence that the sale was unreasonable (or reasonable).

412. In any event as noted above, there is no failure to mitigate where there is more than one reasonable response open to the wronged party. Even if the MOH offer is regarded as comparable, this can only be said to be an alternative and not the only reasonable response in the circumstances.

Other heads of damage (Issues 6-10)

413. There are two preliminary issues to address:

i) Glencore submitted (paragraph 101 of its Closing Submissions) that if BPOI succeeds on its primary case under s.53(3), it must necessarily be precluded from claiming any of its other heads of loss because those other heads of loss all arise out of BPOI's decision to keep the Cargo, rather than to sell it on the date of delivery as assumed by s.53(3). It was submitted that BPOI cannot properly claim, on the one hand, a head of loss premised on the immediate sale of the Cargo in mitigation of its loss, and on the other hand, further heads of loss arising out of the expense of keeping the Cargo.

ii) Glencore submitted in relation to the other heads of loss that the loss was not suffered by BPOI but by BPESE.

414. As to the first issue, in my view BPOI is entitled to recover the difference in value between the sound and the defective goods pursuant to s.53(3) but I have been taken to no authority to support the proposition that additional losses incurred by the buyer cannot be claimed (subject to causation and remoteness).

415. As to the second issue given my findings above in the alternative on the measure of loss and the finding that the liability to BPESE was not time barred, it follows that it is not necessary to determine whether the loss was that of BPOI or BPESE in order for the loss to be recoverable.

Is BPOI entitled to recover the storage and transportation costs and, if so, in what amount? (Issue 6)

416. BPOI claims US$3,682,713 in respect of storage and transportation costs of the contaminated oil between the date it was discharged at Wilhelmshaven and the date it was discharged at Castellon.

417. The claim is quantified by Mr Earl at Appendix 1 to his first statement subject to a reduction of US$101,790 to account for the reduced freight rate on "NORDIC BREEZE" accepted by Mr Earl in cross-examination.

418. The costs are principally freight and demurrage for the vessels Navion Anglia and Nordic Breeze but also include STS transfer costs and other charges associated with moving the Cargo.

419. BPOI has claimed these costs on two alternative bases:

i) BPOI claims these losses as a separate head of loss, or reasonable cost of mitigation, in addition to the 'Dated Brent -$8.35' assessment of the difference in value: APOC §22(b).

ii) Alternatively, BPOI claims these losses as a constituent part of the 'difference in value' calculation; being necessary costs that were incurred on top of, and in addition to, the 'Dated Brent -$8.35' price differential that would not have been incurred on a sound cargo: Reply §36.8

420. It was submitted for Glencore (paragraph 129 of its Closing Submissions) that it is for BPOI to prove the quantum of its claim against Glencore, by reference to the quantum of (i) the shipping costs incurred; and (ii) BPOI's liability to BPESE, but that there are a number of "*shortcomings*" with the evidence being led (or not led) by BPOI.

421. These "*shortcomings*" were originally set out in Glencore's opening skeleton, but since then certain arguments (in respect of blending and the calculation of freight for Nordic Breeze) are no longer pursued by Glencore in light of the evidence, or have been resolved by agreement.

422. The outstanding issues regarding these costs therefore seem to be:

i) firstly, the claim for bunker costs which Glencore says has not been proved: it submitted that under the relevant charterparty the charterer is not liable for these costs in the circumstances and Mr Earl had not seen the calculations; and

ii) secondly, whether the oil loaded on board the Navion Anglia was connected to the Cargo discharged from the Alexia.

423. Glencore in its oral closing submitted that

"*There's a new explanation of the minor bunker charges in BP closing 208. For the first time here in closing the claim is this is a liability under clause 25.2(c) of the charter. It's too late for us to be able to challenge that. There are still insufficient documents. It's a bare assertion as to the fact and extent of this liability*." (Day 7, 151:18-151:24)

424. Mr Earl's evidence in cross examination was as follows:

"Q…. Do you know what the basis for those bunker charges was?

A. I have subsequently gone to find out what those charges are for, and they are for moving the vessel into the harbour.

Q. Which harbour?

A. Into Castellon." (Day 2, 44:8-44:14)

425. Prior to trial Glencore had seen the relevant charterparty and BPOI has provided a copy of the relevant invoice (both documents were referred to in Glencore's opening skeleton at paragraph 204). In my view these bunker charges have been proved on the evidence and there is nothing unfair in the way in which the evidence was presented or emerged.

426. As to the second issue, whether the oil loaded on board the Navion Anglia was connected to the Cargo discharged from the Alexia, the experts agreed that further documentation was required.

427. In his second report Mr Minton stated:

"*As was reported in my first expert report, there is a significant difference in the density of the material reported to be in shore tank 112 after discharge of the MT "Alexia" and that reported for shore tank 94 before loading of the MT "Navion Anglia". This suggests that a potentially significant portion of the material loaded from shore tank 94 to the MT "Navion Anglia" was not crude oil originating from the MT "Alexia"/shore tank 112, dependent upon the density of the material in shore tank 94 prior to the transfer. However, again, <u>further documentation would be required to allow me to understand the extent to which shore tank 94 contained REBCO that had been discharged from the MT "Alexia".</u>"* [emphasis added]

428. However, BPOI rely on Mr Jones' second report (paragraph 205 of its Closing Note) in which he stated:

"Lastly, <u>as the NAVION ANGLIA is a larger vessel than the ALEXIA</u> (126,749 dwt vs 107,574 dwt respectively) <u>it is unsurprising to me that some degree of admixture of the ALEXIA cargo of REBCO occurred given normal commercial practices to minimise</u>

dead-freight. In this regard it is noted that 122,524 m 3 of cargo 3 was loaded to the NAVION ANGLIA by NWO and 114,194 m 3 received 4 from ALEXIA at NWO. The difference of 8,330 m 3 is largely accounted for by the known 7,229 m3 of Mellitah crude oil (see paragraph 2.10 above). Whilst it is accepted that not all of the ALEXIA oil is traceable it appears to me that the NAVION ANGLIA shipment represents the major bulk of the original ALEXIA shipment." [emphasis added]

429. In the light of this evidence from Mr Jones, it seems to me that sufficient explanation has been provided to establish the connection between the oil loaded on board the Navion Anglia and the Cargo discharged from the Alexia and I find that BPOI is entitled to recover the full costs of the Navion Anglia and Nordic Breeze.

430. As to storage, Ms Bossley's evidence is that other storage options might have been pursued. However, in the circumstances I find that storage on board a vessel was reasonable.

431. As to transportation I accept the evidence of Dr Imsirovic that BPOI acted reasonably in lifting the Cargo on the Navion Anglia and then transferring it to the Nordic Breeze and interposing a voyage to load a cargo between discharge of the second and third tranche.

Working capital losses (Issue 7)

432. BPOI claims US$157,745 for working capital losses.

433. In his witness statement Mr Earl explained this head of loss as follows:

"40. In this case, BPOI was obliged to pay Glencore for the cargo 30 days after the bill of lading date (i.e. 16 May 2019), and BPESE to pay BPOI on the same terms. Ultimately BPESE (via BPOI) was not paid by BPOESA for the cargo until 8 July 2019 (the payment date for the first parcel into Castellon), 26 July 2019 (the second parcel) and 6 September 2019 (the third parcel).

41. This means the business had tied up an amount of hydrocarbon (without it being processed into product) for a period of time (53 days in the case of the first parcel, 78 days for the second parcel and 113 days for the third parcel).

42. We assess that cost based on a suitable interest rate and premium of LIBOR +3%. I used this rate in my calculations because I estimated that the actual loss would be at least that rate."

434. In his witness statement the amount claimed was stated to be $456,576.

435. However at the start of his oral evidence Mr Earl amended this claim to the lesser amount of some $157,000. No explanation was provided as to the reason for the error; at the start of his oral evidence, Mr Earl merely corrected the amount claimed in his witness statement under this head:

"*A. I would like to put forward a change to that number.*

Q. And what is that change?

A. The number I would like to put forward is 157,745 with a minus.

Q. So the loss is reduced to 157,745?

A. Yes."

436. In cross examination Mr Earl was asked:

"*Q. What is the new basis of calculation for the figure you've just given of 157,000-odd?*

A. So in line 42 I said I had used this rate in my calculations because I estimated that was the loss. When I went back to make a confirmation of that loss I discovered I had made an error in the calculation and the figures used. So I have amended that in the new number.

Q. But the error is in an unseen calculation. You continued to apply LIBOR plus 3%?

A. The actual number I used which was 3.72%."

437. I accept the submission for Glencore that this loss has not been sufficiently proved: no proper explanation has been provided for the considerable reduction in the head of loss which itself casts significant doubt on the validity of Mr Earl's calculation in this regard. Further I also accept the submission for Glencore that it seems likely that it is duplicative (at least in part) of the claim for interest.

Hedging losses (Issue 8)

438. In the particulars of claim the hedging losses are said to be costs incurred hedging the Claimant's exposure to Brent crude prices between the date of delivery of the contaminated Cargo and its final disposal, of US$ 357,474.

BPOI submissions

439. It was submitted for BPOI that:

i) The claim is BPOI's loss which reflects the fall in value of the physical Cargo caused by delayed disposal and fall in Dated Brent over that period (paragraph 215 of Closing Note).

ii) The Court should accept the evidence of Dr Imsirovic at paragraph 14 of his second report that:

"BPOI's "hedging costs" refer to the difference in value of physical oil relative to futures contracts, at the time of purchase and the time of sale (which, because of contamination, occurred much later than originally intended)." (paragraph 230 of BPOI's Closing Note)

iii) The loss is calculated with allowance for a credit for hedging gains attributable to mitigation (paragraph 215 of BPOI's Closing Note).

440. I accept the evidence of Ms Bossley in cross examination that:

i) If the contamination caused a BP company to in effect be long in physical cargo over the period May through June, July and later, that exposed that party to a price risk on Dated Brent.

ii) In this case Dated Brent fell between the date the Cargo would normally have cleared the refinery and the date it was sold.

iii) That would cause a real dollar loss to the party holding the Cargo unless they had hedged it.

441. However whilst the loss claimed is intended to "*reflect*" the underlying fall in value in Dated Brent, the issue is whether BPOI have proved that they suffered a loss given that the loss is not the fall in value of the physical cargo by reference to the fall in the benchmark but has to take into account the fact that BPOI was already hedged against the fall in value up to the end date of the existing hedges and thus the loss (if any) was the loss arising out of additional hedges (i) put on once BPOI decided it was exposed to a potential loss by reason of the delayed delivery; and (ii) rolled forward as BPOI decided to extend the hedges by reason of the delayed delivery. Those additional hedges may have resulted in a loss or gain.

442. The evidence of Ms Bossley was as follows:

"168 BPOI states that its deal with BPESE fell apart on or about 24th April 2019. At that point, BPOI would have been in the position of having bought the cargo at a price that was now fixed under the Contract at $73.263/bbl…

169. Leaving aside the Brent/REBCO quality differential, the BP group's second issue would have been that it was now long of a cargo which had the Dated Brent portion of the price fixed at $72.784/bbl (see Table Three) and at that time BPOI says it had no outlet for it. Typically, a trader would have considered hedging the Dated Brent portion…

173 In the face of uncertainty and in the light of the backwardation apparent in the market at the time BPESE is claimed to have rejected the cargo, it would have made sense to sell forward about 700 ICE June or July or August delivery month Brent futures contracts, each of 1,000 bbls per contract, for delivery in June, July or August. (But see also paragraphs 189 to 192 below). To "sell forward" means to enter into a contract today to supply oil during the course of some future delivery month. The act of hedging by selling forward means that the hedger now has a short position in the hedge contract, i.e. it has made a commitment to supply the commodity that is the subject of the hedge instrument, probably Brent, without having first purchased Brent to supply in that future month."

443. Mr Earl has put forward his calculation of the loss but in my view, there are three principal difficulties with accepting his calculation:

i) there is no evidence to support his method of calculation as to when the additional hedges were put on or rolled or for what period;

ii) it is unclear why in his calculations Mr Earl has taken the particular starting dates; and

iii) Mr Earl has done his calculation retrospectively, which does not accord with the rolling forward which would actually have taken place.

When the hedges were put on

444. The evidence of Mr Earl was that the management of risk, i.e. hedging, was done centrally:

"*Q. Does BP have a central risk management implementation team?*

A. We have a process by where the futures orders, if you like, so on any one day, Gelsenkirchen would have a requirement to either buy or sell futures to manage its portfolio. So would the other refineries that we hedge, so would some of the other trading books that I alluded to when I was sitting in a different seat, and those -- all of those positions would be -- would come together to provide a net number, if you like, that we would execute." (Day 2, 50:16-51:1)

445. The evidence of Ms Bossley was that someone would have had to inform the hedging team of when physical risks were opened and either deferred or closed.

446. In her first report Ms Bossley said:

178 But, it should be possible to identify when the hedging team was informed that BPOI was long of a Urals cargo that had to be included in the melting pot of BP's overall net price risk position, as discussed below.

180 In reality, someone in the BP group will have taken the decision when and how to open up short hedges to protect the Alexia oil against a fall in price. As developments with the physical cargo unfolded, someone in the BP group will have been reviewing those open short hedges and deciding when to roll them forward or to close them in the light of developments in the handling of the physical cargo of Urals…

181. While it is very likely that the specific transactions cannot now be isolated from the composite BP hedging book, as Mr Earl states, it should be possible to identify when such decisions were taken and to consider the sales price of the short hedges within the market price range for each relevant day…"

447. In her second report Ms Bossley stated:

"68 I accept that it would be difficult to extract individual hedges from the consolidated BP Group risk management book. However, I do not accept that the personnel tasked with handling the Alexia cargo abdicated all responsibility for the hedging of the cargo. Those individuals would have to inform the hedging team of when physical risks were opened and either deferred or closed.

70. BP should be able use whichever variation of such software it employs to identify when changes in price risk on physical cargoes occurred and consequently adjustments to hedges should be made in the case of the Alexia cargo. This would permit the identification of the days when hedges were opened, closed or rolled. Hedge gains and losses can be assessed in the context of market prices on those particular days once BPOI identifies them." [emphasis added]

448. Mr Earl's evidence in cross examination was:

> "*Q. You would expect it to include a deal tracking and risk management system, wouldn't you?*
>
> *A. Well, that is as I've just described, so the deal management is done in the operator system whose name -- I don't usually use this system, so I forget what it is called. That would feed through to our commodity risk team, which would help -- who would help generate the hedges that we need to put on in that date, which would be subsequently agreed by Duncan on the day*." (Day 2, 53:17-53:25) [emphasis added]

449. Whilst I accept the evidence that the hedging was done centrally by BPOI and not by reference to individual exposure, and that usually the system could be updated to take account of the bills of lading dates, it seems to me that once there was an issue with the contaminated Cargo, it is unlikely to have been wholly automatic and that seems to accord with the evidence of Mr Earl and of Ms Bossley. However, there is no evidence of this nature before the Court to verify the approach of Mr Earl.

The dates of the hedges

450. Although the absence of this evidence may not have been fatal to establishing the loss (it appeared to be accepted for Glencore in oral closing that there is authority which allows the Court to take account of hypothetical evidence where the Court is satisfied that a loss has been suffered, but it is difficult to quantify), there is a further difficulty in that Mr Earl assumed that the hedges were opened on 17-25 April – that is, before BPOI were aware of the issue with the contaminated Cargo.

451. In her first report Ms Bossley said:

> "*182 Whatever else it did, BPOI could not have opened hedges on the five days that Mr Earl has chosen for his calculations (17th -25th April 2019). The issue of the OC content did not arise until 23rd April 2019, two days after the cargo discharged at Wilhelmshaven. Before that point BPOI was back-to-back with the Dated Brent portion of its purchase and sales prices with Glencore and BPESE. Hence, no hedging was necessary from the 17th April 2019 up until the date when BPOI accepted that its customer had rejected the cargo and it now had a price exposure, whenever that realisation actually occurred. It is not apparent to me when the decision to hedge was taken, but the outcome of the hedge strategy would have been very different as illustrated in Table Twelve below, depending on the timing of that decision*." [emphasis added]

452. In her second report, Ms Bossley said:

> *"62. However, in the case of the Alexia cargo, because of the rejection of the cargo by Gelsenkirchen, the fact that an exposure to the price had opened up on the 5 days after the B/L date in Ust Luga, did not and could not possibly have been apparent until after the cargo had arrived and discharged at Wilhelmshaven.*
>
> *63. Hence, it would have been impossible for BPOI to have hedged the purchase price exposure on the 5 days after the B/L date at Ust Luga, as claimed by Mr Robert Earl.*

65. Dr Imsirovic goes on to say that "whatever approach is used will make little difference to the calculation of costs of hedging" 33. In my opinion, this is not accurate. It makes a considerable difference not only when hedges were opened, but also in which forward month they were opened, as shown in Table One in Schedule 3." [emphasis added]

453. Mr Earl in cross examination sought to explain the starting date for his calculations on the basis that BP hedged for the period for the oil to pass through the refinery.

"A. BPESE would have put the hedges in place on the basis of procuring the crude on a five after BL basis. For the five days after BL it would have routinely, through our broadly automated system, been a part of the cumulative net result of sales for the -- sale or the purchases of the day for risk management purposes, and the throughput would have dictated how we would have unwound that hedge as it processes the crude through the refinery in the subsequent period." (Day 2, 47:17-47:25)

454. This does not appear to accord with the opinion of Dr Imsirovic (paragraph 14 of his second report referred to above) which BPOI invited the Court to accept: "*the difference in value of physical oil relative to futures contracts, at the time of purchase and the time of sale*".

455. Further, the explanation now provided by Mr Earl does not explain how that existing hedge which he says was unwound as the crude was processed accords with the new (theoretical) hedge (the costs of which are now claimed) which was calculated by reference to when the three parcels of oil were delivered to Castellon (not when it was processed).

456. This explanation was challenged by Ms Bossley in her oral evidence:

A. ... My problem with Mr Earl's opening of his hedge -- was with the opening of his hedges, not with the rolling of his hedges, which is a separate point. My first point is don't think you would have opened on those days, he's now co-opting in part of a crack spread hedge from Gelsenkirchen to say that he did. Okay, fair enough, maybe he can account for it that way, but then -

Q. Pause there. Do you agree that's a reasonable thing to do, to account for it?

A. Is it a reasonable thing to do? Not necessarily because it was opened as part of a crack spread. How was that crack spread hedged? Sorry, just to be clear, a crack spread is the difference between the price at which you purchase crude oil and sell refined products and you can hedge that difference, so hedge your refinery profit. That's hedging the crack spread. He's sliced off half of that crack spread hedge and rolled it into this hedge between the price -- hedging the price of purchase from Glencore and the sale to someone at some point down the road."* (Day 6, 125:17-126:12)

*Defined by Ms Bossley as: *"a pre-existing hedge of a difference between crude input and products output*." (Day 6, 127:18-127:19)

457. BPOI in its Closing Submissions (paragraph 234) criticised Ms Bossley on this point and submitted that Mr Earl referred to hedges of the Dated Brent benchmark. However, the criticism does not address the point that Mr Earl said in oral evidence that the original

hedges were priced according to refinery throughput, but his calculations for the loss were on delivery of the three tranches to Castellon.

Rolling of hedges

458. The evidence of Ms Bossley was that the hedges would have been rolled and the precise dates on which the hedges were rolled would affect the costs of rolling the positions.

459. In her first report her evidence was as follows (so far as material):

"175 The June, July and August 2019 ICE futures contracts expired on 30th April 2019, 31st May 2019 and 28th June 2019 respectively. So, depending on which contract month a hedger in this position chose on 23rd April 2019, it would be required to "roll those short hedges forward" before they expired. Rolling short hedges forward means that, if the hedger had chosen to hedge by selling the June contract, it would be required to buy those June hedges back on or before 30th April 2019 and to sell a new short position in the July contract. Depending on whether the market was in contango or backwardation at the time the hedger chose to roll the hedges forward it would make a gain or a loss, solely attributable to the roll. If the market was in contango it would make a windfall gain; if it was in backwardation, it would make a loss from the roll.

176 Throughout the period relevant to this dispute the ICE Brent futures market remained solidly in backwardation, i.e. the price of the first month contract was greater than the price of the second month contract. But, depending on when BPOI chose to roll its hedges, if it had any, the backwardation loss could have been anything from $56,000 to $1.75 million…

184 It is reasonable to assume, as Mr Earl has, that, irrespective of when the short hedges were opened, they would have been closed by buying back the short ICE hedge positions over the three sets of five-day pricing averages relevant to the sales of the three tranches of oil to BPOESA at Castellon on 28th June 2019, 16th July 2019 and 28th August 2019…

186 As illustrated in Chart Four above, there would have been substantial variation in the backwardation cost of rolling positions forward depending on in which contract month the short hedges were opened and the dates on which they were rolled forward to continue to protect the Dated Brent portion of the REBCO cargo. It is possible, but unlikely that the BP group would have rolled its positions on each expiry date, because the market tends to be particularly volatile at expiry. The extreme spikes in Chart Four demonstrate this point. It is more likely that any rolling that had to be done would have been completed comfortably in advance of expiry, but it is impossible for me to say when that would have been." [emphasis added]

460. However, Mr Earl has taken dates and periods with the benefit of hindsight rather than reflecting what actually occurred. Mr Earl's evidence was:

"Q. You mentioned a few moments ago that the hedges opened on a next month basis, so why have you used month 2 rather than month 1 there?

A. What I was trying to do here is to recognise that again I cannot point to a specific trade for these deals, so what I have done is to made the assumption that when we started the -- when we look at this in its totality at the end is that we knew when -- we knew the

pricing periods of the final deals, and they were, they were as I've described here in the tables below…" (Day 2, 62:4-62:13) [emphasis added]

461. Ms Bossley also criticised Mr Earl for using Platts Brent rather than the ICE Futures price. Her evidence was as follows:

"When he decided to hedge, he would have been hedging about 700,000 barrels. When he's closing those hedges, I agree those are the dates on which he would have closed them in three lots of five-day averages. On each of those days he would have been closing a small quantity, about 100 and something thousand barrels. The Platts Brent first month relates to cargoes which are indivisible in lots of 600,000 barrels. He would not have been using that contract, he would have been using the futures contract. He might have been tailoring something in the OTC swaps market, but he would not have been doing it in Platts Brent, so we don't need to mess about with EFPs, we don't need to mess about with one minute markers, we can just simply look at the ICE futures price and say: what was the price on the day when he opened the hedges, what was the price on the day when he closed the hedges, and they are five day averages. They are not in great one-off, indivisible lumps of 600,000 barrels." (Day 6, 126:16-127:9) [emphasis added]

Conclusion on hedging losses

462. I accept there was a delayed disposal of the Cargo and a fall in Dated Brent over the period.

463. In my view:

i) BP was hedged against a movement in the Dated Brent market but once the dates for delivery of the Cargo changed the hedges no longer provided protection so BP was exposed to a risk of loss.

ii) BP therefore took action to mitigate such loss by putting on new hedges and Ms Bossley accepted that this was what she would have expected:

"A. In the situation in which we have to try and go back and reconstruct the hedges that would have actually have taken place, when it became apparent that BP was not back-to-back between Glencore and Gelsenkirchen, that's when it knew it had a risk, and I would expect it to enter into some sort of hedge at that point." (Day 6, 123:7-123:12)

iii) On the evidence that was a reasonable step to take and BP is entitled to the costs of mitigation.

iv) The defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened.

464. The real issue here is therefore what is the amount of the loss as adjusted for the costs of mitigation.

465. Glencore submitted that the loss is entirely theoretical and BPOI has failed to prove its loss (paragraph 141 of its Closing Submissions). Glencore submitted orally in closing that BPOI must prove the mitigation expenses, rather than that there were mitigation gains, and in that context Mr Earl's calculations were fundamentally flawed.

466. I note that Dr Imsirovic said (paragraph 16 of his second report) that:

> *"I find that the resulting "hedge loss" calculations are reasonable and in line with standard market practice."*

467. Dr Imsirovic does not however address the detailed points raised above and I prefer the evidence of Ms Bossley which was detailed and reasoned.

468. If and to the extent that BPOI say that its loss is the fall in the benchmark and that this is reflected by the (net) hedging gains and losses, I find that BPOI have not established that the theoretical calculation of Mr Earl is in fact a proper reflection or estimate of the losses suffered by BPOI for the reasons set out above.

469. In the alternative, if and so far as these losses are said to result from action taken to mitigate its losses, and thus the legal burden of establishing a failure to mitigate lies with Glencore, I accept that in principle it was reasonable for BPOI to mitigate its loss by putting on new hedges, however BPOI bears an evidential burden to establish the losses which it claims by reason of that mitigation. The amount claimed for hedging losses by way of mitigation are theoretical and they do not reflect the actual costs which can be said to have resulted from the mitigation actually taken by way of hedging.

470. For these reasons I find that the claim for hedging losses should be rejected.

Cargo volume losses (Issue 9)

471. BPOI originally claimed US$414,653 in respect of loss of cargo volume. BPOI submitted (paragraph 209 of its Closing Note) that this loss occurred during successive transfers of the Cargo from Wilhelmshaven to Navion Anglia from Navion Anglia to Nordic Breeze and from Nordic Breeze to Castellon storage tanks.

472. The bills of lading specified a net 719,573 barrels and the quantity discharged at Castellon was 713,876 barrels.

473. BPOI therefore claimed for 5,697 barrels at a price of Dated Brent plus 0.53.

474. Mr Earl agreed that the movement of oil from Ust-Luga to NWO in the first instance, had there been no organic chlorides losses, would have naturally incurred losses, and there was evidence by reference to an Intertek report of a loss of 2,470 barrels.

475. I understand BPOI to have agreed that the claim should be reduced accordingly (paragraph 148.3 of Glencore's Closing Submissions).

476. I accept that the loss now claimed was incurred directly as a result of Glencore's breach of contract as this loss would not have been incurred if the Cargo had been on specification and processed by Gelsenkirchen.

477. I find that BPOI is entitled to recover the adjusted figure of US$234,861.06.

Demurrage (Issue 10)

478. This is a claim for US$303,180 as demurrage paid on other vessels delayed at Wilhelmshaven by the re-loading of REBCO onto the Nordic Breeze.

479. There are three vessels:

i) Vinland – carrying a cargo purchased to replace the contaminated Cargo and delayed;

ii) Navion Oceania – diverted to cover the shortfall of crude and delayed until the contaminated crude was removed from the tanks; and

iii) Delta Sailor – delayed awaiting tank space.

480. It was submitted for BPOI that:

i) these losses arose naturally from the breach of contract;

ii) they are not "consequential losses" within the meaning of section 66.1 of the GT&Cs (which excludes liability for consequential losses); and

iii) the Vinland and Navion Oceania were carrying replacement cargoes of crude oil for Gelsenkirchen (necessary as a result of the Cargo being contaminated), and all three were delayed by port congestion as the direct result of the breach of contract.

481. It was submitted for Glencore that:

i) there was insufficient documentation to establish causation, having regard to the proof the parties have agreed is required for a demurrage claim in respect of the very vessel carrying the cargo under the contract of sale (section 30.3 of the GT&Cs); Glencore has no insight into the movements of these three vessels, but none of the usual documents for a demurrage claim that would have been required to be presented to BPOI by the other shipowners have been given. Instead, BPOI relies upon one or two assertions in emails from individuals who have not been tendered to try and establish causation.

ii) The loss is too remote.

iii) The loss is excluded under section 66 of the GT&Cs.

Relevant legal principles

482. Insofar as Glencore resists this claim on the basis that the liability is precluded by section 66.1 of the GT&Cs, Section 66.1 provides:

> *"Except as specifically provided in the Agreement, in no event, including the negligent act or omission on its part, shall either party be liable to the other, whether under the Agreement or otherwise in connection with it, in contract, tort, breach of statutory duty or otherwise, in respect of any indirect or consequential losses or expenses including if and to the extent that they might otherwise not constitute indirect or consequential losses or expenses, loss of anticipated profits, plant shut -down or reduced production, loss of power generation, blackouts or electrical shut -down or reduction, goodwill, use, market reputation, business receipts or contracts or commercial opportunities, whether or not foreseeable."*

483. The court was referred to *2 Entertain Video Limited v Sony DADC Europe Limited* [2020] EWHC 972 (TCC) at [218]-[238].

484. I note that in her judgment O'Farrell J stated that the starting point is that of construction of the relevant clause. She then reviewed the authorities on the issue of consequential loss, and I have regard to the principles set out in those authorities.

485. Starting with the construction of the clause in accordance with the principles referred to earlier in this judgment, in this case the losses now claimed do not appear under the list of expressly identified losses. One must therefore fall back on the general principles and ask whether the losses claimed are the natural result of the breaches complained of, or put another way, according to the usual course of things, from such breach of contract itself.

486. Insofar as Glencore submitted that the loss is too remote as not within the parties' reasonable contemplation, I note that BPOI submit that these losses fall within the first limb of *Hadley v Baxendale* (1854) 9 Ex 341 and not the second:

> "*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*." [emphasis added]

487. I note the following in the judgment of O'Farrell J at [231]:

> *231. In Hotel Services Ltd v Hilton International Hotels (UK) Ltd [2007] BLR 235 (CA), the Court of Appeal considered whether a clause excluding liability for "indirect or consequential loss" excluded liability for loss of profits and additional costs. It concluded that, on its facts, the lost profits and additional costs were direct or natural consequences of the breach and did not fall within the exclusion clause. Having considered the above authorities, Sedley LJ stated:*
>
> *[19]. ... That the issue is still not problem-free is illustrated by the subsequent decision of Rix J (who had been overset in Deepak Fertilisers) in BHP Petroleum Ltd v British Steel plc [1999] Ll.L.R. 583, an incisive judgment which merits close reading, especially (for present purposes) in relation to the need for special knowledge (at 600-602). For the present it is sufficient to record his conclusion, in the light of the same authorities as we have been considering, that:*
>
> *"...the parties are correct to agree that authority dictates that the line between direct and indirect or consequential losses is drawn along the boundary between the first and second limbs of Hadley v Baxendale."*
>
> *[20]. This conclusion has the virtue of practicality; but - as Rix J's judgment itself illustrates - it does not automatically tell one on which side the line a case falls. Although we would if necessary adopt Waller LJ's position in relation to decided cases on similar words (not forgetting the cautionary remarks of Sir George Jessel MR in Aspden v Seddon (1875) 10 Ch.App. 394, 397 about the risks of this mode of construction), one has to be continuously alive to differences of surrounding fact. We prefer therefore to*

decide this case, much as Victoria Laundry was decided, on the direct ground that if equipment rented out for selling drinks without defalcations turns out to be unusable and possibly dangerous, it requires no special mutually known fact to establish the immediacy both of the consequent cost of putting it where it can do no harm and - if when in use it was showing a direct profit - of the consequent loss of profit. Such losses are not embraced by the exclusion clause, read in its documentary and commercial context."

488. Having regard to the authorities, it seems to me that if the losses are a direct or natural consequence of the breach, it requires no "*specially mutually known fact*" for these losses not to be excluded as consequential loss under section 66 or general principles as to the remoteness of damages.

Vinland

489. I reject the submission for Glencore that the evidence required to establish this head of loss is equivalent to that under section 30.3 of the GT&Cs which is of limited application as section 30.1 makes clear.

490. A contemporaneous internal BP document gave the following reason for the demurrage:

"STF Vinland: No ullage available due to off -spec Urals was still in tank farm blocking ullage. Vessel had to discharge twice, because we only had one tank available for the Statfjord. Therefore we would expect demurrage for 3,92days @ 70.500 USD/day. 276.360,00".

491. Mr Haines in an email dated 19 May 2019 referred to the shifting costs:

"...I notice the Statfjord cargo below had to discharge twice so will include two lots of port fees/shifting costs as well as nearly 4 days demurrage..."

492. The court then has evidence of the invoices supporting the amounts actually claimed of demurrage of US$186,433 and shifting costs of US$55,084.

493. Although Mr Earl was challenged about the demurrage claims no question was put to Mr Haines in relation to his email above.

494. I do not accept the submission for Glencore that the loss is indirect or consequential or the relevance that the ships would have been discharging cargo at Wilhelmshaven in any event (paragraph 225 of its Closing Submissions): the loss was caused by the delay to the unloading as a result of the contaminated Cargo not the mere fact of having cargo to discharge.

495. I find that this loss has been proved in relation to the Vinland on the evidence before the Court and it is a loss which flows directly from the breach of contract as the vessel was delayed because the "*off spec Urals was still in tank blocking ullage".*

Navion Oceania

496. An invoice for the demurrage claimed of US$49,500 is before the court. The reason for the demurrage is evidence by the email from Mr Rohmann to Mr Haines on 20 May 2019:

"*I think we will also have a bit demurrage on our Alvheim cargo (Navion Oceania), also referred to the off -spec Urals still in tank to that time*."

497. Glencore relied on the evidence of Mr Earl in cross examination:

Q. Let's take the Navion Oceania. Do you know when it arrived at the NWO tank farm?

A. I don't recall off the top of my head, no.

Q. [email of 26 April 2019 from Mr Rohmann] please. This is not a document that you will have seen before. If we look down to "Cargoes" at the bottom, this is as at 26 April, and Jonas Rohmann says in the second line: "630kb Alvheim (NAVION OCEANIA - arrival [approximately] 5 May) ..." Any reason to believe she arrived earlier than 5 May?

A. I don't believe so, no.

Q. The Urals cargo had already left by then, hadn't it?

A. I think it had, yes, I believe so, yes, on 3 May." (Day 2, 75:8-75:21)

498. Mr Earl had no independent knowledge of the date at which the vessel actually arrived. He had already given evidence that he did not personally deal with the demurrage claims or investigate them. The document to which he was taken in cross examination dated 26 April 2019 was sent before the actual arrival and was stated to be an estimate. The court has the later email (when the actual arrival would have been known) and the invoice which confirms that demurrage was incurred. Mr Haines, who was the recipient of the email of 20 May 2019 (also from Mr Rohmann), was not cross-examined on this.

499. I find on the evidence that this loss has been proved in relation to the Navion Oceania on the evidence before the Court and it is a loss which flows directly from the breach of contract as the vessel was delayed as a direct result of the "*off -spec Urals still [being] in tank*".

Delta Sailor

500. An internal BP document dated 9 May 2019 recorded:

"*No ullage available. Vessel had to wait until off -spec Urals has finished loading on vessel Navion Anglia to free up ullage. Therefore we expect demurrage for 1,7days @ 21.000 USD/day 35.910,00"*

501. The court has before it the invoice for US$12,163.

502. I find that this loss has been proved in relation to the Delta Sailor on the evidence before the Court and it is a loss which flows directly from the breach of contract as the vessel was delayed because the "*vessel had to wait until off -spec Urals has finished loading on vessel Navion Anglia to free up ullage*".

Summary of conclusions

503. For the reasons set out above, I find that:

i) There was a contract formed on 2 April 2019 by the exchanges of 1 and 2 April 2019 between Mr Wawrzyniuk and Ms Behtash on the terms of the Recap including the GT&Cs.

ii) The oil delivered was contaminated by organic chlorides in breach of the Recap quality clause and Section 59.1.1 of the GT&Cs.

504. I further find, for the reasons set out above, that BPOI is entitled to damages as follows:

i) The Cargo's diminution in value as a result of the organic chlorides contamination amounting to US$5,960,095 as the difference between the market value of sound crude oil of about "Dated Brent + $0.53" and the value of contaminated crude oil of "Dated Brent -$8.00".

ii) US$3,682,713 in respect of storage and transportation costs of the contaminated oil between the date it was discharged at Wilhelmshaven and the date it was discharged at Castellon.

iii) Cargo volume losses of US$234,861.06.

iv) US$303,180 as demurrage paid on other vessels.