



Neutral Citation Number: [2021] EWHC 1364 (Comm)

Case No: CL-2019-000414

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2021

Before :

MRS JUSTICE COCKERILL DBE

Between :

BP OIL INTERNATIONAL LIMITED
- and -
(1) VEGA PETROLEUM LIMITED
(2) DOVER INVESTMENTS LIMITED

Claimant

Defendants

Michael Ashcroft QC and Oliver Caplin (instructed by HFW LLP) for the Claimant
Edward Cumming QC and Ben Waistell (instructed by Bird and Bird LLP) for the
Defendants

Hearing dates: 23, 24, 29 and 30 March 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MRS JUSTICE COCKERILL

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 May 2021 at 10:00 am.

Mrs Justice Cockerill :

Introduction

1. This is a case which combines elements of the usual and the unusual. The starting point is fairly orthodox. BP Oil International Limited (“**BPOI**”) entered into a series of contracts which on their face provided for sale of 211,387 barrels of Gulf of Suez Mix crude oil (“**GOSM**”) “FOB Ras Shukheir Terminal”. Pursuant to those contracts between June 2013 and February 2015 BPOI paid a total of US\$17,235,448 to the First Defendant, Vega Petroleum Limited (“**Vega**”) and the Second Defendant, Dover Investments Limited (“**Dover**”), together the “**Defendants**”.
2. To date BPOI has not received the crude oil in question. It claims in unjust enrichment for the return of the purchase price sums that it has paid over in relation to the GOSM, on the basis that it has received no consideration at all.
3. The question at the heart of the dispute between the parties is fairly simply stated: whether (as the contracts might on their face suggest) the payments BPOI made entitled it to delivery of the 211,387 barrels of GOSM such that if that oil were not delivered it was entitled to its money back; or whether those payments were rather to acquire a right to lift quantities of oil (to be determined on a monthly basis in accordance with the Contracts) and were, accordingly, unconditional payments, such that BPOI was to have no recourse against the Defendants to recover them subsequently if BPOI simply chose never to lift the quantity of oil that it was entitled to lift. BPOI predictably contends for the former, the Defendants for the latter.
4. The Defendants say that their construction is consistent with the unusual facts surrounding the contract and with facts that the terms of the Contracts:
 - a. Expressly contemplated that BPOI may choose never to lift all or some of the oil which it would become entitled to lift, and provided no mechanism for BPOI to recover any sums paid to the Defendants in such circumstances; and
 - b. The amount of the monthly payments was to be determined by BPOI itself, unilaterally, after applying a substantial discount to the Platts Dated Brent assessments of the price of the oil each month. The Defendants say that this “discount factor” reflected the allocation to BPOI of the risk that it may subsequently choose not to uplift any particular quantity of oil.
5. This is the centre of gravity of the dispute. But there are a variety of other points.

The trial

6. The case has been tried remotely over the course of a four day hearing. It has been conducted with great skill, politeness and professionalism on both sides.
7. BPOI did not call Mr Jonathan Lunn, the trader responsible for BPOI's relationship with the Defendants prior to and at the time of each of the Contracts and who was also the relevant decisionmaker in respect of the Contracts. Mr Lunn left BPOI's employ several years ago.

8. BPOI relied instead on the evidence of four witnesses, three of whom attended the trial to give oral evidence (Messrs Al-Ruhaimi, Gimenez, and Finlinson). Mr Williams was not able to attend the trial on health grounds, and a hearsay notice in respect of his statements was served.
9. Mr Al-Ruhaimi is (as of January 2021) the Crude Technical Lead at BPOI, but from March 2014 until January 2019 he was a crude oil trading operator for BPOI. His role as an operator was to execute the physical trades concluded by BPOI's traders, with whom he worked. Amongst others, he worked with BPOI traders Mr Jonathan Lunn (who left BPOI several years ago) and Mr Finlinson. He was responsible for the scheduling, logistical, and operational roles in relation to the Contracts – taking over that role from Mr Williams. Mr Al-Ruhaimi had obviously been quite junior at the time, but I found him to be a frank and clear witness whose evidence I found to be convincing and helpful. Mr Cumming QC for the Defendants rightly accepted that Mr Al-Ruhaimi was seeking to assist the Court.
10. Mr Gimenez was a crude oil originator for BPOI until 2017. Between 2013 and 2017 he took on the management of BPOI's trading relationship with Egypt and its Egyptian counterparties. As part of that role he was required to liaise with EGPC and manage that relationship. He was a careful and straightforward witness.
11. Mr Finlinson is a crude oil trader at BPOI. He was the most senior of BPOI's witnesses, but had little involvement in any matters of relevance. He technically took over Mr Lunn's role but the impression was that he was not a like for like replacement, with less involvement on the ground. His principal involvement concerned an ultimately failed attempt by BPOI from 2017 to assign its rights to delivery of the GOSM under the Contracts to EGPC, and the Defendants' nascent assistance in enabling the contemplated assignment.
12. Mr Williams was until recently a demurrage negotiator at BPOI. On 18 December 2020 he left BPOI's employment. From 2008 to 2019 he worked in BPOI's crude oil operations team as an operator. From 2012 to around May 2014 he was responsible for operations matters under the Contracts.
13. The Defendants relied on evidence from two witnesses. Mr Haytham Ataya is the COO of Vega, and has held that role in the company since it was founded in 2011. His evidence explained that he oversees "*all operations and technical functions of the company*": including the holding of various concessions in Egypt.
14. Mr Ataya was a combative witness who often did not appear to have listened to the questions he was being asked, though I bear in mind that his failure to engage with questions may have been in part due to the fact that he was giving evidence in a language which was not his first language. I did not find his evidence particularly helpful. In listening to Mr Ataya give evidence it was quite apparent how the case which the Defendants ran had emerged. He emerged as a dogmatic rather than reflective person, not terribly interested in listening to what was said to him.
15. Mr Robert Salna is the President and CEO of Dover. Dover appears to be a private investment vehicle set up by Mr Salna in 1999 to enable him to invest his private wealth in the oil production business. Mr Salna was not a particularly clear or helpful witness.

Factual Background

Context

16. This case concerns the arrangements by which BPOI agreed to purchase, and have delivered to it, quantities of GOSM produced from, amongst other things, petroleum fluids sourced from the Ras El Ush Field in the Gebel El Zeit Concession in Egypt (the “**REU Field**” and the “**Concession**”).
17. In common with many locations around the world from which the global supply of what becomes crude oil is drawn, the oil industry in Egypt operates by way of a complex interaction between state owned and private corporate entities – often via joint venture companies. The first is the Egyptian General Petroleum Company (the “**EGPC**”). EGPC is a state-owned oil company and operates under the guidance of the Egyptian Ministry of Petroleum. It is responsible for all sectors of the Egyptian petroleum industry. If a private commercial entity wishes to carry out commercial oil exploration/production operations in Egypt, it must do so in participation with EGPC via a joint venture. Because of its responsibility for the Egyptian petroleum industry, before any person can lift oil from Ras Shukheir Terminal (whether domestically or for export) the lifting party needs to obtain EGPC’s approval.
18. Gulf of Suez Petroleum Company (“**GUPCO**”), was one such joint venture. GUPCO has been in existence since 31 July 1965. GUPCO is the operator of the Merged Area Concession in Egypt. At all material times in this case EGPC’s JV partner within GUPCO was BP Egypt (a different company within the BP group to BPOI). Prior to this, EGPC’s JV partner in GUPCO was Amoco Egypt Oil Company (“**Amoco**”) – which BP Egypt replaced in 1999.
19. Another JV entity including EGPC is the Gebel El Zeit Petroleum Company (“**Petrozeit**”). EGPC’s original JV partner within Petrozeit was Marathon Petroleum Gebel El Zeit (“**Marathon**”). Petrozeit is the operator of the Gebel El Zeit Concession in Egypt (the “**Concession**”). By the time events in this case came to pass, EGPC’s JV partner within Petrozeit was first Dover, and then Dover and Vega together.

The GUPCO/Petrozeit Processing Agreement

20. On 13 July 1997 GUPCO and Petrozeit concluded a Processing and Handling Agreement concerning petroleum fluids realised from the Ras El Ush (“**REU**”) field in Egypt, and to be processed at two of GUPCO’s facilities – REU Facility and Ras Shukheir Facility (the “**Processing Agreement**”).
21. The agreement contemplates that the petroleum fluids produced from the REU Field are brought onshore to an initial processing facility and then delivered to facilities owned and operated by GUPCO. They are then co-mingled with fluids from other fields before GOSM crude oil is produced at GUPCO’s processing facility at Ras Shukheir Terminal. There is no GOSM crude oil before this point.
22. The Processing Agreement gave each of GUPCO and Petrozeit a fiscalised entitlement, on a monthly basis, to GOSM which ultimately results from the production of petroleum fluids at the REU Field.

23. The first recital to the Processing Agreement explains that GUPCO was formed to act on behalf of EGPC and Amoco in relation to the “Merged Area Concession Agreement” (defined in Article 1). Petrozeit on the other hand was an operating company formed to act on behalf of EGPC and Marathon in relation to the “Gebel El Zeit Concession Agreement” (also defined in Article 1).
24. The Processing Agreement essentially obliges GUPCO to assist Petrozeit by processing “petroleum fluids” originating from the Petrozeit operated Gebel El Zeit Concession at its (GUPCO’s) REU or Ras Shukheir Facilities.
25. The agreement reflects the difference between unprocessed “petroleum fluids” coming out the ground, and the processed end-product of “GOSM”; it being the latter which was being purchased by BPOI. The two have separate definitions in the Processing Agreement:
- ““Crude Oil” shall mean stabilized, treated and desalted crude oil that is generally equivalent in specification to the Gulf of Suez Mix as set out in Appendix 1 hereto....
- “Petroleum Fluids” shall mean well effluent from the Ras El Ush Field containing hydrocarbon liquids and gases, water, salts, solids, and other non-hydrocarbon substances....”
26. Recital 4 of the Processing Agreement explains:
- “PetroZeit wishes to continue to have the Petroleum Fluids from the Ras El Ush Field received in the Ras El Ush Facility for initial processing and onward transportation by the Pipeline to the Ras Shukheir Facilities for further processing, treating, handling, storage and offloading on the terms and conditions hereinafter specified.”
27. Petrozeit (and ultimately those parties which make up the JV at any point in time) pays GUPCO a fee in part covering a share of GUPCO’s operating costs “*for those parts of the REU and Ras Shukheir facilities and their interconnecting pipelines actually used for receipt, processing, measurement, transport, treating, desalting and handling of Petroleum Fluids and storage and offloading of Crude Oil*” (Article VI).
28. The Processing Agreement envisages two regimes – one that applies before Petrozeit installs its own “Processing Facilities” (defined in Article 2), and one that applies afterwards. Before “Petrozeit’s Processing Facilities” are installed, the Agreement provides that Petrozeit will deliver “Petroleum Fluids” to GUPCO at the “Delivery Point” – defined as “*the receiving tie-in (flange/valve) within Gupco’s Ras El Ush facilities*” where the “*Ras El Ush Field pipeline terminates*”. At that point GUPCO will sample the Petroleum Fluids and analyse them for bs&w (sediment and water) content, before “initial processing” takes place at GUPCO’s REU Facility. At this stage the petroleum fluids from Petrozeit’s REU Field are “comingled” with other fluids.
29. In contrast, after Petrozeit has installed its own Processing Facilities, this first stage separation and processing is envisaged to take place at Petrozeit’s own facilities.

30. Wherever initial processing takes place, GUPCO is to transport “*the residual portion of the Petroleum Fluids comingled with the petroleum fluids from other reservoirs in the Ras El Ush area to the Ras Shukheir facility. At Ras Shukheir, GUPCO shall remove water and solids and shall treat, desalt, and stabilize Petroleum fluids as required to produce Crude Oil*”. It is at this stage, after the processing of the Petroleum Fluids at Ras Shukheir is complete, that “*the fiscalised volume of Marathon [later the Defendants] and EGPC’s entitlement to Crude Oil to be lifted or sold as Ras Shukheir shall be determined.*”
31. The process by which the accrual of Petrozeit’s “fiscalised entitlement” to Crude Oil “*that Petrozeit is entitled to lift at Ras Shukheir*” is managed is explained in Appendix 6 to the Processing Agreement. Once again it is split into pre- and post- the installation of Petrozeit’s own Processing Facilities. The Appendix explains in part:
- “This Appendix 6 sets out the main principles by which PetroZeit’s deliveries of Petroleum Fluids to the Ras El Ush facility will be converted into a fiscalised entitlement of stock tank barrels of Crude Oil at Ras Shukheir...
- Gupco shall flow the PetroZeit production from the Ras El Ush Field through its test separator...The Ras El Ush Field oil is comingled with oils from other South Gulf of Suez fields to be processed at the Ras El Ush facility. These comingled oils are then transported to Ras Shukheir where they are again comingled with other Gulf of Suez oils for further processing, treatment, stabilization and transportation”.
32. In essence what is done to calculate this entitlement is to (i) measure the barrels of throughput of the Petroleum Fluids from the REU Field to the REU Facility on a daily basis, (ii) measure the basic sediment and water (“BS&W”) percentage in the Petroleum Fluids, (iii) reduce the throughput volume by the BS&W percentage to determine the barrels of unshrunk oil brought to the REU Facility, and (iv) apply an appropriate shrinkage factor relevant to the REU Field to take into account temperature and pressure differentials between different fields (given the co-mingling between the Petroleum Fluids and those from other fields).
33. In around 1999, Marathon was looking to sell, by assignment, its stake in the Concession, including its interest in the REU Field, and its shares in Petrozeit. In 2000 Marathon assigned its rights in relation to the Concession to Dover, and also transferred its shares in Petrozeit to Dover. Mr Salna recounts how at this stage Dover became the “*de facto operator of the REU Field*”. Mr Salna explains the flow of petroleum fluids from the REU Field through to the Ras Shukheir Facility. His explanation is consistent with what is envisaged in the Processing Agreement, in which Dover, taking Marathon’s place in the Petrozeit JV, obtained an interest.
34. Through the effect of the Processing Agreement and its supply of petroleum fluids from its REU Field into the GUPCO pipework and facility system, Dover ultimately earned an entitlement to 43.3% of the GOSM produced at the end of the process.

35. The wider BP group entered the Egyptian oil market, insofar as relevant to this case, through a deal with Amoco in 1999. As part of that deal BP Egypt ultimately became a party to GUPCO joint venture with EGPC. BP Egypt is a different corporate entity to the claimant, BPOI. The extent to which this was known to the Defendants was in issue.
36. BPOI is an English company and a subsidiary of the wider BP Group. It appears to operate as a trading entity within the BP Group.
37. It is not clear from the evidence when BPOI first began to trade in Egyptian crude oil, but when Dover took over Marathon's rights under the Concession, it also took over a sales agreement Marathon had with BPOI through which Marathon (and now Dover) agreed to sell 100% of its entitlement under the Processing Agreement to BPOI.
38. An early example of the contractual arrangements between BPOI and Dover is the 2005 Crude Purchasing Agreement (the "**2005 Contract**"). The 2005 Contract shares many similarities with the later iterations that are in dispute in this case. It provided:

“...we are pleased to confirm details of the purchase by us from you of GULF OF SUEZ MIX crude oil as follows...

5. QUANTITY

A. VOLUME SETTING

The quantity of Oil to be delivered FOB to BUYER under this Agreement is 100 percent of SELLER'S entitled share...as mutually agreed monthly volumes, corrected for temperature and pressure, net of BS&W, between GUPCO and Seller and reported to BP Egypt Oil Company...of Gulf of Suez Mix Oil at Ras Shukheir by GUPCO, under the terms of the Processing Agreement...

6. DELIVERY

Delivery shall be given and taken FOB RAS SHUKHEIR TERMINAL.”

39. The 2005 Contract was replaced with further annual iterations until 2009. These were largely in the same terms as the 2005 Contract, but the occasional term was amended. So in the 2010 year version (the "**2010 Contract**") the "Delivery" clause was amended (with the amendment in emphasis):

“6. DELIVERY

Delivery shall be given and taken FOB RAS SHUKHEIR TERMINAL or in tank In Situ (stock transfer) at Buyer's option”

40. From 2010 onwards the Contracts incorporated BPs General Terms and Conditions ("**GTCs**").

41. In the 2011 year iteration of the agreement (the “**2011 Contract**”), Clause 6 was amended once more:

“6. DELIVERY

Delivery shall be given and taken FOB RAS SHUKHEIR TERMINAL.

At the Buyer’s option delivery can be given and taken FIP at the inlet flange of the SUMED system in AIN SUKHNA REGION EGYPT. However such option shall be mutually agreed between Buyer and the Seller, provided that such option shall not result in any additional expense or delay in payment to the Seller”

42. That delivery clause therefore offered BPOI two options: classic FOB delivery at Ras Shukheir, or an option to take delivery FIP into the SUMED pipe system at Ain Sukhna.
43. The 2011 Contract was renewed between Dover and BPOI on materially the same terms, forming the 2012 Contract.
44. Because of the way in which the Processing Agreement operated a notification of the amount which formed the Defendants' entitlement was provided by GUPCO.

Dealings between the parties prior to the Dover Contract

45. Mr Salna's evidence was that his recollection was that very few actual liftings of cargo were made, with the remainder of the GOSM being dealt with without lifting or referring to the Defendants.
46. The documents from this 2011-2012 period however do show BPOI dealing with EGPC when seeking to lift GOSM under the then current contract from Ras Shukheir. For example in 2012 one can see that BPOI sought EGPC consent for a lifting. It is evident that BPOI was encountering some difficulties in persuading EGPC to allow the GOSM to be released to it by GUPCO – of which Mr Amerine of Dover, was aware, with Mr Lunn of BPOI informing him that “*EGPC don't want this to happen at the moment*”. In May EGPC granted permission and then confirmed the requested lifting would be permitted in June 2012. BPOI informed Dover, albeit that June lifting was then deferred to July at BPOI’s request.
47. One point should be noted here; it was apparent that the amounts involved in this contract were small, and more than one monthly entitlement of oil had to be accumulated to result in a cargo which was worth lifting. Mr Ataya recalled Mr Lunn saying (in the context of the discount factor) that given the relatively small volumes of oil Vega and Dover delivered on a monthly basis, it would not have been economical for BPOI to lift the GOSM crude oil unless and until a sufficiently large quantity of oil was available or there was an opportunity to co-load it with other GOSM crude oil. There are thus repeated references to GUPCO “accumulating” oil for a cargo.
48. On 27 June 2012 BPOI enquired with EGPC about exercising its relatively new Clause 6 option to take delivery FIP into the SUMED system instead of FOB at Ras Shukheir. EGPC indicated that this was not practically possible as there was said to be no pipeline

connection between Ras Shukheir and Ain Sukhna. This created some confusion on BPOI's part as what it had asked for had been done before.

49. In the event, plans reverted to lifting the GOSM from Ras Shukheir itself. BPOI sent documentary instructions to EGPC and GUPCO on 16 July 2012, later that day slightly revised. Amongst other things the instructions referred to "*Purchase of Gulf of Suez Mix (GOSM) Crude Oil FOB Ras Shukheir (Supplier Dover Investments Ltd)*", and required Dover to be named as the "consignor" on the bills of lading. They also asked that the GOSM to be lifted be accumulated in the necessary tanks 10 days before the lifting date. They were copied to Dale Amerine of Dover.
50. On 30 July 2012 a bill of lading was issued stating that 198,418 bbls of GOSM were shipped aboard the mv TRUE at "Ras Shukheir, Egypt". The bill lists Dover as the shipper and was made out to the order of BPOI. The rest of the cargo documents include the "Cargo Manifest" which also names Dover as the "Consignor" of the GOSM.

Vega's entry into the structure and the 2013 Contract

51. Mr Salna reports that in 2011 he was looking to ease back on his workload, and thus wished to sell a proportion of Dover's interest in the Concession. Mr Salna explains that after a period of discussion, Dover and Vega concluded a Joint Operating Agreement on 12 December 2011 in respect of the REU Field, under which Dover appointed Vega as its agent for carrying out the Processing Agreement. As a result of some regulatory delays, approval for the sale of the Concession was not obtained until 31 October 2012, at which point Vega acquired 82% of Dover's interest in the Concession.
52. Meanwhile, Dover and BPOI renewed the 2012 Contract for the 2013 calendar year in the normal way in late December 2012, forming the first iteration of the 2013 Contract.
53. Subsequent to Vega's purchase of part of the Concession, the existing 2013 Contract between just Dover and BPOI was reissued, with retrospective effect (Clause 3), between Dover and Vega (as Sellers) and BP (as Buyer) (the "**2013 Contract**"). It replaced the contract that had been concluded at the end of December 2012 by Dover and BPOI.
54. From this point onwards BPOI dealt with Vega, and thus Mr Haytham Ataya and Mr Wael Attia, instead of primarily with Dover (as had been the case beforehand).

Events under the 2013 Contract

55. On 19 March 2013 BPOI contacted EGPC by letter and email to request the lifting across 30 April / 1 May of its outstanding entitlement to GOSM purchased from Dover/Vega – to the tune of some 100,000bbls. The Dover/Vega GOSM was to be co-loaded with another cargo BPOI had purchased from EGPC. BPOI chased EGPC for a response on 25 March 2013.
56. Meanwhile, whilst waiting for a response from EGPC, on 27 March 2013 Jonathan Lunn of BPOI contacted Mr Ataya and informed him that BPOI would be asking EGPC to lift "stocks" in April or May 2013 and to "*see if they allow export*".

57. On 28 March 2013 EGPC confirmed that BPOI could lift the requested 100,000bbls in the second half of June, which BPOI accepted, requesting that they be permitted to lift 115,000bbls if loading was to take place then (to account for the two further months of allocations).
58. On 18 April 2013 EGPC contacted BPOI to inform it the laycan for its lifting would be 26 to 28 June 2013, and reminded it that the lifting would be “FOB ‘Ras Shukheir’ Port”. BPOI wrote back asking to move up the laycan to 1-5 June 2013. On 25 April 2013 it nominated the MT Guanabara to perform the lifting, and again asked for the laycan to be moved up. After a chaser from Khaled Youssry, EGPC confirmed the nomination of the Guanabara on 3 May 2013.
59. On 23 May 2013 BPOI asked for the lifting of the GOSM to be deferred from June to July 2013. BPOI’s message copied in both Messrs Ataya and Attia of Vega and Mr Salna of Dover. EGPC agreed to the deferral on 3 June 2013, offering a new laycan of 26 to 28 July 2013 “FOB Ras Shukheir”.
60. On 16 July 2013 BPOI sent documentary instructions to EGPC and GUPCO for the July lifting. The instructions were in relation to “Purchase of Gulf of Suez Mix Crude Oil, 100KB, FOB Ras Shukheir (“Supplier: Vega Petroleum Limited and Dover Investments Limited”), to be shipped aboard the MT Afra Willow or a substitute”. The consignor on the bills of lading was to be the “Supplier”. Messrs Attaya and Attia were copied into the instructions, as was “Dover Investments” (Mr Salna).
61. The instructions were clarified on 25 July 2013 to expressly provide that Vega and Dover were to be the consignor under the bills of lading, once again copied to Dover and Vega. The same documentary instructions were also directly then passed on to Dover and Vega by BPOI.
62. The bill of lading for the lifting was issued on 29 July 2013 at “Ras Shokheir, Egypt”. The bill names Vega and Dover as the shippers of 98,608 gross, 98,559 net, bbls aboard the Afra Willow to the order of BPOI. The other shipment documents, the cargo manifest, also name Vega as agent for Vega and Dover as the consignor of the cargo.
63. This was the last delivery of crude oil onboard any vessel pursuant to these contracts. The claim concerns what the parties variously consider entitlements to and attempts to obtain delivery of crude oil between that date and January 2015.
64. On 15 October 2013 BPOI contacted EGPC to arrange the lifting of another parcel of GOSM – of 60,000bbls in December 2013. BPOI chased for a response from EGPC on 29 October and 8 November 2013. BPOI then requested on 6 December 2013 to delay the laycan to January 2014 to which EGPC agreed.

The 2014 Contract

65. Towards the end of December 2013 the parties agreed to roll over the terms of the 2013 Contract into 2014 with some very minor amendments. The 2014 Contract was concluded.
66. On 24 January 2014 BPOI approached EGPC to investigate the prospect of lifting the deferred 60,000bbls from December 2013 in February 2014 instead. BPOI’s enquiries

suggested there would not be sufficient notice for this to happen. By March 2014, the lifting still had not happened, and Mr Williams of BPOI was seeking to enlist the help of Mr Gimenez to move matters forward. The same day (4 March 2014) BPOI updated its lifting request to EGPC to now be for 100,000bbls. On 8 April 2014 Mr Gimenez emailed EGPC directly to try and get some movement on the requested lifting at Ras Shukheir, and also floating the alternative (Clause 6) option of taking delivery via the SUMED pipeline at Ain Sukhna.

67. One can therefore see that in the early part of the year BPOI had sought the necessary information from EGPC to enable it to make a vessel nomination, but EGPC had not provided this information.
68. On 15 May 2014 BPOI wrote to EGPC revising its lifting request to be for the 100,000bbls of GOSM along with a co-load, across 10-12 June 2014. On 18 May 2014 EGPC approved the uplift to take place in the window of 20-30 June 2014, telling BPOI to “*pls arrange accordingly and confirm*”.
69. BPOI subsequently asked if the dates could be altered to 10-12 June 2014, and, when EGPC did not agree, on 9 June 2014 asked EGPC to defer the uplift window until August 2014.
70. On 4 August 2014 BPOI made a request to EGPC to lift 150,000bbls in September 2014. BPOI heard nothing back for over a month.
71. An email from Mr Al-Ruhaimi of BPOI on 17 September 2014 intimated a change of approach with EGPC – leaning towards a perhaps firmer stance on the liftings that were required. To that end Mr Al-Ruhaimi sent a request to lift 160,000bbls the same day to the EGPC, which Mr Gimenez followed up on the very next day. Again BPOI did not hear back, and chased for an answer from EGPC on 3 October 2014, by which time its request to lift had become 175,000bbls in December 2014. BPOI continued to press for progress in October 2014. Mr Al-Ruhaimi enlisted the help of Ms Sherine Omar from BP Egypt in sending a letter to EGPC on 4 November 2014 seeking the lifting of 185,000bbls.
72. On 13 November 2014 EGPC finally confirmed BPOI could lift 185,000bbls of GOSM across 23-25 December 2014. BPOI nominated the MT Mariner for the lifting on 11 December 2014 and sought clearance, which they received tentatively (with some suggestions/caveats) on 17 December 2014.
73. This lifting however did not proceed. Mr Al-Ruhaimi explained that when BPOI received that clearance it had not yet decided that it would, in fact, proceed with this uplift; BPOI’s Mr Lunn was exploring other options; and as matters turned out, BPOI went on to choose to pursue those. Mr Al-Ruhaimi was exploring with Ms Omar the possibility of pumping the GOSM from Ras Shukheir to Ain Sukhna (i.e. the Clause 6 option). As a result the Mariner nomination was lost. So on 18 December 2014 BPOI floated with EGPC the possibility of effecting a grade swap with it – the GOSM being exchanged for Qarun crude.

The 2015 Contract (i.e. the 2014 Contract Amendment)

74. In late December 2014 BPOI and Vega began discussing the future of the sales contract between them. Vega had become increasingly unhappy about the pricing being offered by BPOI for the GOSM – and in particular the discount factor. In the end, the parties decided to roll over the 2014 Contract and an agreed price to January 2015 whilst they looked for a more long-term solution.
75. The 2015 Contract, effectively a one-month rollover of the 2014 Contract, was agreed to come into force on 1 January 2015 until 31 January 2015. The 2015 Contract added in various practical requirements concerning bills of lading and demurrage claims.
76. In early 2015 BPOI continued to investigate the crude swap that it had proposed to EGPC on 18 December 2014. EGPC communicated its consent to the request on 6 January 2015.
77. Meanwhile, the disagreement between BPOI and Vega over how the discount factor part of the purchase price was to be calculated, or the purchase of the GOSM otherwise remunerated, intensified. Ultimately a resolution could not be found, and so the 2015 Contract was not extended into February 2015 or beyond.

After the 2015 Contract's term expired: April 2015 to 2016

78. On 7 April 2015 Mr Al-Ruhaimi wrote to Mr Attia at Vega and asked that Vega provide ongoing monthly confirmations / reconciliation statements of BP's GOSM "closing stocks" until BPOI lifted the bbls.
79. Meanwhile, on 12 May 2015 Mr Al Ruhaimi of BPOI sent a request to EGPC to lift 211,384bbls of GOSM across 20-22 June 2015, whilst making clear the GOSM/Qarun swap was still under consideration (it was awaiting internal approval from BPOI's tax and legal teams). Some confusion developed about what BPOI had actually asked to lift. BPOI clarified on 18 May 2015 that the request was to lift the bbls "*FOB Ras Shukheir 20-22 June 2015*".
80. This was a clear request for a specific laycan. There was no response, though Ms Omar reported on 18 May 2015:

"I have been contacted by EGPC on this as they interpreted the request that you want to lift Qarun not GOSM if Qarun they could consider but GOSM is not acceptable as they cannot give more than 500kb in the month."
81. BPOI then sent an unequivocal lifting request to EGPC. There was no response. It then appears that BPOI did not follow up on the lifting request.
82. From May 2015 BPOI's focus was on pursuing the GOSM/Qarun swap and not on loading GOSM crude oil FOB Ras Shukheir Terminal. It seems that BPOI made no further reference to uplifting its entitlement, though it kept confirming what the accumulated amount was, without expressing any dissatisfaction.
83. What is apparent is that there had been difficulties getting responses from EGPC for some time, but by 2015 EGPC was not engaging with BPOI's lifting requests. The reason for this is not clear. One issue mentioned is a concern as to Dover's solvency.

Another factor mentioned in the evidence is a perception that EGPC had an intention not to allow GOSM to be exported from Egypt given domestic supply needs. It has also recently transpired that there was a separate dispute between Vega and EGPC.

The attempted assignment to EGPC: 2017-2019

84. In light of the difficulties in lifting the GOSM, BPOI explored concluding the nascent crude swap idea that had been proposed some years before. By March 2017, it envisaged the swap being effected by way of an assignment of its rights to take delivery of 211,384bbls of GOSM to EGPC.
85. On 20 March 2017, BPOI wrote to Vega seeking its agreement on proposed wording concerning the assignment under consideration (the “**Acknowledgment**”). That draft wording was addressed to Vega, headed “Form of Acknowledgment of Assignment” and included the following material aspects (emphasis added):

“We hereby give you notice that by an assignment dated [...] (the “Assignment”) made between BP Oil International Limited as assignor (the “Assignor”) and Egyptian General Petroleum Company as assignee (the “Assignee”), Assignor has assigned to the Assignee 100% of its rights, title, interest and benefit in the 211,384 barrels of Gulf of Suez Mix Crude which reflects the balance of our entitlement which has been paid for but not delivered under the contract dated 1 January 2014 between Assignor and you (the “**Contract**”) (the “**Assigned Rights**”)....

Please acknowledge receipt and acknowledge by signing below that: ...

(i) you consent to the Assignment and to the terms thereof and that this Notice is adequate notice of the Assignment;

(ii) you shall perform your obligations in respect of the Assigned Rights in accordance with the Assignee’s directions; ...

We acknowledge receipt of the notice of assignment of which this is a copy and confirm our agreement to each of the matters referred to in items (i) to (iv) above.

For and on behalf of Vega Petroleum Limited, acting on its own behalf and on behalf of Dover Investments Limited”

86. On 22 March 2017, Mr Gimenez contacted EGPC to propose the contractual framework by which the swap could take place (the “**EGPC Agreement**”). The following points from the draft are pertinent:
- a. Recital B of the draft provided: “*The Contract ended on 31 January 2015, at which point BP had paid for, but not received, an outstanding entitlement of 211,384 bbls of GOSM Crude*”.

- b. Clause 3.1 provided that in return for assigning its rights in the GOSM, it would get by way of exchange the Qarun Entitlement, which “*shall be delivered on a FOB basis or as in in-tank transfer at Sidi Kirir*”.
87. On 23 March 2017 Mr Gimenez chased Vega for a response to BPOI’s message sending the Acknowledgment, and for confirmation Vega would be “*ok to execute the proposed assignment*”. He chased again on 31 March 2017, at which point Mr Ataya responded indicating he would review the document.
88. On 2 April 2017 Mr Attia of Vega sent back a signed copy of the Acknowledgment to BPOI; acknowledging on behalf of both Vega and Dover that “*211,384 barrels of Gulf of Suez Mix Crude...reflects the balance of [BPOI’s] entitlement which has been paid for but not delivered under the contract dated 1 January 2014*” between BPOI and the Defendants.
89. On 29 May 2017 BP Egypt updated EGPC on the EGPC Agreement, explaining in an attached letter from BPOI to EGPC once again the background to the swap. This included explaining that BPOI’s sale/purchase agreement with the Defendants “*expired in February 2015 with BPOI having an outstanding entitlement of 211,384 barrels of crude*”. The swap would allow EGPC to “*take the GOSM Entitlement from Dover and Vega in order to fulfil refinery needs, and BPOI would acquire an equivalent quantity of Qarun Crude Oil from EGPC*”.
90. Matters appeared to be proceeding positively with the swap plan at the end of May 2017 with Ms Omar of BP Egypt reporting that EGPC was content with the plan, and simply had to plan out how things would work operationally. On 6 June 2017 Mr Attia of Vega contacted BPOI to ask for a copy of the executed Acknowledgment by all parties.
91. Between 12 June and 7 July 2017 Mr Al-Ruhaimi exchanged messages with Ms Omar concerning the progress of the EGPC Agreement. It seems that EGPC introduced during this period a requirement that the draft contract be in dual language form. On 21 August 2017 BP Egypt provided a dual language version of the contract to EGPC. In September EGPC wanted to verify Dover's percentage.
92. Thus matters dragged on. On 12 October 2017 EGPC requested a copy of the purchase contract between BPOI and the Defendants, alongside a signed version of the Acknowledgment. Ms Omar provided the sales contract and indicated she would revert on the Acknowledgment. Further attempts to move matters forward were made in the following months, but by January 2018 it appeared to BPOI and BP Egypt employees that the EGPC were dragging their feet as they did not have sufficient Qarun to supply to BPOI under the putative agreement.

2018

93. Things went quiet until Mr Al-Ruhaimi checked in for a progress update with Ms Omar again in May 2018, and the matter was escalated to Ms Omar’s line manager at BP Egypt. Meanwhile, internally, BPOI’s senior management exchanged emails which spoke of the possibility of writing off the GOSM it had purchased, noting on that basis the cost to it would be around US\$15,000,000.

94. On 20 June 2018 Ms Omar once again chased EGPC directly for an update on the swap/assignment. BPOI then had a meeting with EGPC in late July/early August 2018. The impression BPOI came away with from that meeting was positive, with the conclusion of the EGPC Agreement seeming close – with perhaps the result being a cash payment from EGPC rather than the Qarun crude. Mr Finlinson of BPOI followed up with several individuals from EGPC on 9 August 2018. One of those individuals, Abeer Megwer, commented the same day that the outstanding GOSM entitlement was 211,000bbls not 213,000.
95. On 15 August 2018 Andrew Finlinson contacted Mr Ataya of Vega. He explained to Mr Ataya that BPOI and EGPC were still working on the EGPC Agreement, and asked him for confirmation that the JOA between Vega and Dover remained in place during the course of the 2014 Contract. Mr Al-Ruhaimi chased for a reply on 26 September 2018, which finally came when Vega confirmed the JOA had been in effect, and sent a link to it over on 5 October 2018.
96. Meanwhile discussions continued between BPOI and BP Egypt between 16 and 30 August 2018, including about the pricing mechanism for the EGPC Agreement – in other words what amount EGPC would need to pay BPOI for the right to delivery of the GOSM. By 4 September 2018 BPOI was able to send a further draft of the Agreement to EGPC, and there were some further exchanges between BPOI and EGPC on various points of detail, including pricing the swap/assignment, culminating in BPOI sending a dual-language updated version of the Agreement on 3 October 2018 concerning only Vega’s share of the GOSM entitlement.
97. In the course of these exchanges, EGPC offered to pay BPOI US\$69.193/bbl for at least Vega’s (82%) share of the GOSM, that being the average OSP (official selling price) for GOSM for August 2018. EGPC responded with amendments to BPOI’s draft on 18 October 2018, effectively reframing it as a sale of Vega’s share of the GOSM entitlement to EGPC rather than assigning it. BPOI accepted the amendments on 29 October 2018, save for changing one point concerning how the arrangement between BPOI and BP Egypt was to be termed (the latter to be collecting the sale price, which was to be in Egyptian pounds, on BPOI’s behalf).
98. The deal then lost some momentum, with BPOI chasing for a conclusion over November and into December 2018. On 13 December 2018 BPOI pressed for a meeting with EGPC. BPOI’s impression was that EGPC was waiting for senior management approval before signing off on the deal. BPOI pushed for news on the internal approvals on 28 December 2018.

2019

99. In January 2019 BPOI continued to push EGPC to conclude the sale/assignment agreement – and eventually sought a meeting with EGPC in Egypt, arranged to be for 14 February 2019. Meanwhile, Hussein Al-Ruhaimi of BPOI held a meeting with Wael Attia of Vega on 13 February 2019 during which he and Mr Attia discussed the EGPC Agreement. Mr Al-Ruhaimi says there were separate meetings because it was good to meet and greet Vega who he had not met before
100. After the meeting Mr Al-Ruhaimi sent copies of the proposed agreements to Vega for its approval.

101. A large meeting took place on 14 February 2019, ultimately attended by representatives of BPOI, EGPC, Vega, and Dover. EGPC once again raised a concern about the proof of Dover's involvement and ownership of its share of the GOSM entitlement. But, in addition, it transpired EGPC's Control of Foreign and Joint Venture companies department had some concerns about Vega's operations obligations which were preventing EGPC from signing off on the EGPC Agreement. A meeting was to be set up between Vega and EGPC on 17 February 2019 to resolve the issue. BPOI and EGPC also agreed to revisit entirely the pricing of the transaction, which by this time had become a sale/purchase agreement, and not an assignment (as originally termed).
102. Subsequent to 15 February 2019, Mr Al-Ruhaimi chased Mr Attia of Vega a number of times for an update on the meeting Vega was supposed to have had with EGPC to resolve the concerns aired at the 14 February 2019 meeting – but without receiving a substantive response. However on 17 February 2019, Dover emailed Mr Al-Ruhaimi to ask a few questions, including about the precise allocations between Dover and Vega based on actual quantities, which Dover did not have access to.
103. By June 2019 Vega's dispute with EGPC's Control of Foreign and Joint Venture Companies department had not been resolved. BPOI wrote to EGPC to seek a meeting to push forward the EGPC Agreement, which it said should not be impacted upon by the EGPC/Vega dispute.

The end

104. In mid-2019 BPOI returned its focus to the Defendants directly. On 10 June 2019 it wrote a formal letter to Vega seeking reimbursement of the sums that it had paid over for the GOSM that had not yet been delivered. that letter stated:

“... VPL and DIL last delivered crude oil under the Agreements in July 2013. Prior to 31 January 2015, BPOI prepaid a total of USD17,235,448 to VPL and OIL for 211,387bbls of GOSM which has not been delivered to BPOI, and VPL and OIL have not reimbursed BPOI for the payments made in respect of it.

Since January 2015, several attempts have been made to resolve this matter, but to date no reimbursement has been made.

BPOI remains open to discussing possible solutions, but it expects to be repaid in full. Please therefore respond as soon as possible, and by no later than close of business on 17 June 2019, to confirm that VPL and OIL will reimburse BPOI and how the reimbursement will be carried out.

As you know VPL and OIL have been provided with ample opportunity to make the reimbursements.

In light of VPL and Oil's ongoing failure if we do not receive the confirmation requested above by 17 June 2019, BPOI will need to take steps necessary to protect and enforce its legal rights.”

105. A similar letter was sent to Dover on 13 June 2019. BPOI's case is that these letters acted to terminate the Contracts (i.e. bring to an end the parties' persisting primary obligations thereunder).

106. On 26 June 2019 Vega responded, thus:

“We refer to your letter of 10 June 2019 in relation to the above matter and in particular the delivery of crude oil by Vega Petroleum Limited (“Vega”) to BP Oil International Limited (“BP”).

As you are aware, pursuant to instructions given by BP to Vega, delivery of crude oil pursuant to the Gulf of Suez Crude Oil Purchasing Agreements was varied to provide for Vega to pump the crude oil to BP's then joint venture facility, GUPCO.

Vega has complied fully with this instruction and any delay by BP in crude oil lift is as a result of BP's own actions or agreements it has reached with EGPC. Accordingly, Vega does not owe the sum claimed by BP and no reimbursement will be made.”

107. On 28 June 2019 these proceedings were commenced, as notified to the Defendants on 2 July 2019. If the 10 June 2019 letter did not act to terminate the Contracts, BPOI's position is that the commencement of these proceedings, seeking restitution of the purchase price of the GOSM, did so. Vega's case is that the purported termination was wrongful was accepted as bringing the Contracts to an end by the Vega defence in this action.

108. It is, therefore, common ground that the Contracts have been terminated. The parties differ as to when and how that took place – and the consequences which flow from the termination.

The Terms of the Contract

109. The 2013 Contract, as the first contract in which Vega had participated, set out a series of explanatory recitals. The 2013 Contract is otherwise is materially identical to the 2014 and 2015 Contracts.

110. Clauses 1 and 2 of the 2013 Contract set out the parties, with both Vega and Dover listed as the “Sellers” (Clause 2).

111. Clause 3 provides that the 2013 Contract was to run from 1 January 2013 to 31 December 2013.

112. Clause 4 provides that the commodity being sold/purchased is GOSM.

113. Clause 5, the quantity clause, is a long and complicated clause. It is split into three main sections: A, B, and C:

- a. Section A “Volume Setting”: The first part of this section of the clause explains that the GOSM to be sold and delivered by the Sellers FOB is equivalent to

100% of the Sellers' Entitlement, in an 82%/18% ownership split. The monthly corrected volume of the Sellers' entitlement (and thus the volume of GOSM BPOI is to buy) is to be ascertained by a determination made between the Sellers and GUPCO of the amount of GOSM delivered to Ras Shukheir by GUPCO under the terms of a Processing Agreement dated 13 July 1997. The determined entitlement is to be reported to BP Egypt. That quantity is defined as the "Entitlement Qty". Under this part of the clause Vega is to provide an "Estimated Qty" 45 days in advance of a particular month's entitlement accruing, and to report that estimate to BP Egypt. BPOI is then entitled to draw up a bill of lading based on an Estimated Qty (as a precursor to taking delivery of and lifting a parcel of the GOSM in that amount of which it has become entitled to take delivery).

b. Section B "Revisions": This section provides essentially for the reconciliation of any differences between an "Estimated Qty" provided by Vega for any given month, and the "Entitlement Qty" as ultimately calculated under Section A. The reconciliation is achieved by an upward or downward adjustment to the Estimated Qty for a later month ("M+2").

c. Section C provides:

"C. Buyer and Seller will ensure that for the last 2 months of this Agreement the volumes lifted or specified in a bill(s) of lading cut in advance of the actual lifting will not result in the total volume lifted under this Agreement exceeding the Seller's entitled share for entire period of this Agreement. This will be done by making a conservative estimate of volumes for these last two months, inclusive of any volumes that need to be added on in accordance with B.

Furthermore, in the event that Buyer underlifts the Sellers' Entitlement for the entire period of this Agreement, the Buyer shall have no obligation to lift the remaining volume."

114. This latter provision, it should be noted, is the keystone in the Defendants' analysis.

115. Clause 6 is, on BPOI's case, the single most important clause in the Contracts. It provides:

"6. DELIVERY

Delivery shall be given and taken FOB RAS SHUKHEIR TERMINAL.

At the Buyer's option delivery can be given and taken FIP at the inlet flange of the SUMED system in AIN SUKHNA REGION, EGYPT. However such option shall be mutually agreed between the Buyer and the Sellers, provided that, such option shall not result in any additional expense or delay in payment to the Sellers"

116. Clause 7 and 8 concern price and payment respectively. Clause 7 provided:

“For each Month M, the fixed price per US barrel shall be the mean of the Platts Dated Brent assessments as published during the period from and including the first day of Month M up to and including the last day of Month M adjusted by a differential 'D'.

For each Month M and by no later than the COB London of the 5th of Month M+1, Buyer will notify Vega of the value of 'D'.

For the purposes of pricing and payment, the quantity of oil available to be lifted (the “Invoiced Quantity”) in each Month shall equal the Estimated Qty for Month M plus or minus any Difference allocated to such Month M under the provisions of clause 5 above.”

117. The key point here is that the per US barrel price of the GOSM was calculated not just by reference to the Platts Dated Brent assessments during any particular month but also by reference to a variable adjustment that was determinable at BPOI’s discretion and to be notified to Vega – the discount factor.

118. Clause 9 sets out that Vega and Dover are to be jointly and severally liable under the Contracts for “*Sellers’ respective obligations and Sellers’ liabilities arising...and each Seller's share of the Cargo will be stated in the shipping documents*”.

119. Under Clause 10.1 the Defendants warranted that Vega had been duly authorised by Dover to act as Dover’s agent under the Contracts. This is also reflected back in Clause 2, which states Vega to be “*Acting in its own right and also as agent for and on behalf of*” Dover. By Clause 10.2 the Defendants warranted that they had title to sell the GOSM “*free of any encumbrance, lien or charge*”.

120. Clause 11 covering “Sanctions, Trade Controls and Boycotts” concludes with the words: “*Nothing in this Section shall be taken to limit or prevent the operation, where available under the governing law of the Agreement, of any doctrine analogous to the English Common Law doctrine of frustration.*”

121. Clause 13.1 provided that the 2007 edition of BP’s general terms and conditions for crude oil sales and purchases (the “**BP GTCs**”) would apply “*except as specifically detailed herein*”. Clause 13.2 provided that any reference to the “Incoterms” in the Contracts were to the 2000 edition. Clause 13.6 of the Contracts which required variations to the terms (including the contacts in Clause 14) to be in writing.

122. When the 2015 Contract was concluded (or the 2014 Contract amended), the following terms were included at the end of the document:

“Please note that your bills of lading and other shipping documents should be sent to our Operations Department...”

Demurrage and all shipping related ancillary claims...must be sent to newclaims@bp.com”

123. The relevant parts of the GTCs are as follows.
124. Part I, which concerns FOB deliveries and applies to this case, includes the following terms:

“Section 2 – Risk and property

2.1 Notwithstanding any right of the Seller to retain the documents referred to in Section 29 until payment, the risk and property in the crude oil delivered under the Agreement shall pass to the Buyer as the crude oil passes the Vessel’s permanent connection at the Loading Terminal. If the crude oil delivered hereunder forms an unascertained part of a larger bulk, payment for the crude oil delivered hereunder shall, solely for the purpose of enabling property in such crude oil to pass to the Buyer pursuant to Section 20(A) of the Sale of Goods Act 1979, be deemed to have been made as such crude oil passes the Vessel’s permanent hose connection at the Loading Terminal....

Section 4 – Nomination of vessels etc.

4.1 Full and part cargo lots

Unless otherwise provided in the Special Provisions, delivery hereunder shall be given and taken in full or part cargo lots at the Buyer’s option but subject always to the prior agreement thereto of the Loading Terminal operator

4.2 Nomination of Vessel

4.2.1 Each Vessel which is to load crude oil hereunder shall be nominated in writing by the Buyer to the Seller”

125. Part 3 of the BP GTCs relates to FIP and In situ (stock transfer) deliveries, and includes the following terms:

“Section 17 – Risk and Property

The risk and property in the crude oil delivered under the Agreement shall pass to the Buyer:

17.1 in the case of delivery FIP, as the crude oil passes the inlet flange of the Buyer’s receiving pipeline system

...

17.4 where delivery is effected in Situ (by way of stock transfer), at such time and day and in such tank(s) as shall either be specified in the Special Provisions or as agreed between the parties prior to such transfer being effected and, where applicable, confirmed by the owner/operator of such tank(s)”

126. Section 24 (in Part 5) of the BP GTCs contains various definitions:

“24.1.1 “the Agreement” means these General Terms and Conditions....together with the Special Conditions...

24.1.12 “crude oil” means crude petroleum of the grade specified in the Special Provisions which has been stabilised and is suitable for loading into Vessels or for delivery by such other method as is specified in the Agreement...

24.1.14 “delivery” means placing or procuring to place the crude oil at the disposal of the Buyer at the time and place agreed upon. “deliver” includes “procure to be delivered” and the term “delivery” shall be construed accordingly, and “deliverable” and “delivered” shall be similarly construed;...

24.1.20 “FOB” shall have the meaning ascribed thereto in Incoterms 2000 (as amended from time to time), except as modified by the Agreement...

24.1.24 “Loading Terminal” means the Berth at which the crude oil to be delivered hereunder is or will be loaded...

24.1.32 “Special Provisions” means the contract or telex or other form of agreement in which, by reference, these General Terms and Conditions are incorporated to form the Agreement.”

127. Section 32.3 (a time-bar provision) reads:

“...any claim arising under the Agreement and any dispute under Section 38 shall be commenced within 2 years of the date on which the crude oil was delivered or, in the case of a total loss, the date upon which the crude oil should have been delivered. Failing which the claim shall be time barred and any liability or alleged liability of the other party shall be finally extinguished”

128. Section 39 provides:

“39.5 Modification

The Agreement shall not be modified unless mutually agreed by the parties, which agreement must be evidenced in writing...

39.9 Entire Agreement

The Agreement contains the entire agreement between the Seller and the Buyer with respect to the matters set forth in the Special Provisions and supersedes all prior agreements, whether oral or written, in connection therewith”

129. In relation to FOB deliveries, the Incoterms 2000 (applicable by virtue of Section 24.1.20 of the BP GTCs) provide in material part:

“A THE SELLER’S OBLIGATIONS...

A2. Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization and carry out, where applicable, all customs formalities necessary for the export of the goods...

A4. Delivery

The seller must deliver the goods on the date or within the agreed period at the named port of shipment and in the manner customary at the port on board the vessel nominated by the buyer

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship’s rail at the named port of shipment

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- all costs relating to the goods until such time as they passed the ship’s rail at the named port of shipment; and
- where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export”

The issues

130. The issues between the parties can be briefly summarised:

- a. On their true construction are the Contracts:
 - a) (per BPOI) contracts for the sale and purchase FOB of crude oil or
 - b) (per Defendants) are they modern commercial contracts, with both (i) a substantial duration and detailed provisions apt for both operative and terminated contracts, and (ii) various features that are inconsistent with BPOI having a right to demand its money back at any time?
- b. Did Vega breach its delivery obligations under the Contracts?
- c. Did BPOI effectively terminate the Contracts?
- d. Was there a total failure of the basis for BPOI’s payments to Vega and Dover under the Contracts?

- e. Did the Contracts contain an implied term to the effect that, upon termination, the Defendants must repay the contractual price to BPOI in relation to GOSM to which it had become entitled but had not lifted?
- f. Is BPOI estopped by convention from contending that Vega failed to deliver the GOSM?
- g. Are BPOI's claims time barred?
- h. Should BPOI only recover for the difference in value?

131. Following this long introduction, the issues can actually be disposed of fairly shortly.

Issue 1: Construction

132. On one level the answer to this question is very simple. The Contracts provide for delivery FOB; they certainly appear to be FOB sale contracts.

133. The case advanced by the Defendants is however that that appearance is deceptive, and that if one approaches the exercise of construction rigorously the real answer is that on the proper interpretation of the Contracts, both BPOI and the Defendants understood the payments to be unconditional, such that BPOI was to have no recourse against the Defendants to recover those payments once they had been made. This is because, viewed properly, the basis for BPOI's payments under the Contracts was BPOI's acquisition of a right to lift quantities of oil (the subsequent exercise of which was expressly contemplated to be a choice entirely for BPOI) not the lifting of the oil itself.

134. This point was advanced by reference to the allusion to the Contracts as "modern commercial contracts", a categorisation owed to the approach of Mr McMeel in his article "Unjust Enrichment, Discharge for Breach, and the Primacy of Contract" in A. Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford: Oxford University Press, 2006), at p.241 where he refers to the contracts in *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 W.L.R. 574 (HL) and *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1980] 1 WLR 1129.

"a clear example of a modern commercial contract for a substantial duration with detailed provisions apt for both operative and terminated contracts. Similarly many long-term contracts for the supply of goods will resemble Hyundai and will be equally unsuitable for a restitutionary response if terminated. Identifying what species of contract one is dealing with may help orientate the court, but it is only a precursor to the more detailed exercise in construction which is necessitated if one party seeks to raise a restitutionary claim in the wake of the contract's failure."

135. Little argument was addressed to the law on contractual construction, the parties rightly appreciating that the court is well familiar with the major authorities. But given the fact that one party stares fixedly at the words of the contracts, while the other takes a similar approach to the factual matrix, it is worth just citing briefly two well-worn but pertinent passages, and one recent one.

136. The first is from *Wood v Capita* [2017] AC 1173 (a case in which Mr Cumming, of course appeared), where at [13] Lord Hodge affirmed the importance of both these aspects of the process:

“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type”

137. The second, though somewhat antique, has the benefits both of being a dictum of Sir Thomas Bingham MR and of summing up the position with elegance and brevity. In *Arbuthnott v Fagan* [1995] CLC 1396 he said this at 1400:

“Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.”

138. The third is the recent consideration of the principles by the Divisional Court in *FCA v Arch* [2020] EWHC 2448 (Comm), a consideration described by the Supreme Court in the same case as being “authoritative”:

“64. The unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, but as Lord Neuberger said in *Arnold v Britton* at [19]-[20], commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it: *Rainy Sky* at [23].

65. There may be certain cases, however, where the background and context drive a court to the conclusion that “something must have gone wrong with the language”: ... A “strong case” is required because courts do not easily accept that people have made linguistic mistakes in formal documents (*Chartbrook* at [15]). But if it is clear that something has gone wrong with the language, the court can interpret the agreement in context to “get as close as possible” to the meaning which the parties intended: This is part of the construction exercise, as opposed to a separate process of correcting mistakes, or a summary version of rectification: *Chartbrook* at [23]. Nonetheless, there are certain limits to the exercise. First, there must be a clear mistake in the language or syntax in the contract, as distinct from the bargain itself: Second, the court can only adopt this approach if it is clear what correction should be made:”

139. Lord Hodge in *Wood* at [12] indicates that it does not matter which way round one approaches the exercise of construction. It is often easier to start with the wording, particularly in a formal contract such as the present.
140. As to the words, the Contracts plainly on their face provide for FOB delivery. That could not be and was not in issue. Furthermore that FOB designation is effectively multi-layered, reflected through not just the Contract itself but via the documents to which it refers. Thus:
- a. There are two explicit and matching mentions of FOB conditions in the Contracts. Clause 5 provides “*The quantity of Oil to be sold and delivered by the Sellers FOB to Buyer*”, Clause 6 provides “*Delivery shall be given and taken FOB RAS SHUKHEIR TERMINAL*”.
 - b. There is also the reference in clause 9 stating the Seller's share of the Cargo in the shipping documents. Further changes were made over the years to some of the terms consistent only with FOB sales – such as the references to demurrage.
 - c. The section of the BP GTCs concerning FOB trades provides “the risk and property in the crude oil delivered under the Agreement shall pass to the Buyer as the crude oil passes the Vessel’s permanent connection at the Loading Terminal” (section 2.1).

- d. Incoterm A4 required the Defendants to deliver the GOSM “*on board the vessel nominated by*” BPOI with risk in the GOSM passing when it “*passed the ship’s rail at the named port of shipment*”.
141. That indication is not on its face remotely ambiguous. While Mr Cumming sought to persuade me that labelling contracts is not terribly helpful, the term FOB is one which is thoroughly well known to and understood by everyone who operates in the world of contracts for the international sale and carriage of goods. It is a term which can be seen to have been in use since the nineteenth century. It is useful to merchants to know what that means. The obligations of an FOB seller are trite law:
- a. *Benjamin’s Sale of Goods* (11th ed) explains at §20-30: “*It is the duty of an f.o.b seller to put the goods on board a ship nominated or designated by the buyer...The place at which the goods are thus delivered is considered to be the place of performance under an f.o.b contract*”.
- b. *Bridge, The International Sale of Goods* (4th ed.) at §3.04: “*Since delivery occurs when the goods are placed free on board ship, the seller is bound to ensure the shipment of the goods*”.
142. That is the case of BPOI, pure and simple. BPOI submits that the language is unambiguous and the Court must therefore apply it. There are obvious attractions to this course.
143. I also note that when one looks at the wording there is on its face a complete absence of material which supports the Defendants' case. There is no language that provides delivery is effected through (i) GUPCO having been told about the Contracts and (ii) notification of an entitlement to lift.
144. The closest that one can come to either of these is that some sort of entitlement to lift can be spelled out if one conflates the FOB delivery obligation (Clause 6) with the separate Clause 5 regime. But those are entirely separate clauses with on their face separate purposes – and nothing which suggests that they are intended to be read together in this way.
145. Clause 5 has nothing to do with how the Defendants effect their delivery obligations under the Contracts. As can be seen from the description above, Clause 5 deals rather with a precursor to the Defendants’ delivery obligations – the ascertainment of and agreement upon the actual volumes of GOSM that are being generated from the processing of the REU Field’s Petroleum Fluids, and thus the actual volumes that BPOI is buying from the Defendants. Clause 5 is there to ensure the parties know how much GOSM must be paid for and then delivered. There is then on its face a separate (conventional) regime for delivery under Clause 6. The “disjoint” between the payments and the oil which may be uplifted, upon which the Defendants placed some reliance, is simply a consequence of the prepayment scheme operating on the basis of estimates, and having to be adjusted for reality.
146. Further Clause 6 itself provides indications that it is as conventional as it looks, because of the alternative delivery regimes which were incorporated over the years.

147. As noted above, for the 2010 year of the contracts, before Vega participated, Clause 6 provided an alternative delivery option of “*in tank In Situ (stock transfer)*”. Clause 6 of the Contracts offered BPOI an optional alternative form of delivery: “*FIP at the inlet flange of the SUMED system in AIN SUKHNA REGION, EGYPT. However such option shall be mutually agreed between the Buyer and Sellers...*”.
148. If the Defendants' reading were correct there would be no need for and no sense in these alternatives. The existence of a delivery option tends to demonstrate that the parties understood the Defendants had real delivery obligations that post-dated the GOSM's processing at Ras Shukheir. Whether FOB or FIP the Defendants had to do something, or actively consent to something happening, to effect delivery.
149. Further if the Defendants' construction were correct, these alternatives would themselves become unworkable. Taking the FIP option: on the Defendants' case it would only be for BPOI to decide whether it wished to pump any GOSM that had already been delivered to it in the tanks at Ras Shukheir into the SUMED system for lifting at Ain Sukhna instead of Ras Shukheir. So, why would the option need to have been exercised at all, and even mutually agreed?
150. As for the 2010 *in situ* alternative option, this is in substance what the Defendants are contending their FOB delivery obligation entailed – delivery being effected by the accrual of GOSM in the storage tanks at Ras Shukheir. But the existence of the option (albeit in an earlier contract) makes it very hard indeed to contend that the later FOB term itself could mean the same thing.
151. Much reliance was placed on clause 5C, which was said to justify the “no repayment”/risk allocation analysis. That clause (or more accurately sub-clause) states: “*Furthermore, in the event that buyer underlifts the sellers' entitlement for the entire period of this agreement the buyer shall have no obligation to lift the remaining volume.*” But again read in its context that simply clarifies that if the estimates are out, there is no obligation to take some few barrels extra separately to make up the numbers. It is not, and in my judgment cannot sensibly be read as an indication that BPOI's rights in unjust enrichment were being excluded or abandoned.
152. Nor does the fact that there is an express saving in relation to frustration at clause 11 somehow suggest an “open door” policy to the exclusion of other common law rights. Given the approach to exclusions that would be a reading too far at the best of times; but in the context of frustration, where interrelationship with contractual force majeure provisions is notoriously problematic even less can be made of this point.
153. The other provision of the contract on which the Defendants rely is the provision for the discount factor. But that is relied upon as a factual matrix /commercial purpose aspect. No suggestion was made that the construction contended for could be spelled out of this clause.
154. It follows that the wording of the Contracts provides a very strong preliminary indication in favour of the construction for which BPOI contends.
155. The iterative process however requires that that preliminary indication be tested against the factual matrix. It is therefore necessary to look at the factual matrix. Here I should pause to say that there is a considerable oddity about this case in that factual matrix is

central to the case which is now run. Indeed, the Defendants submit that it is transformative. Yet no factual matrix was pleaded originally. Nor was a case on factual matrix ever proffered by way of amendment. That is contrary to paragraph C1.3(h) of the Commercial Court Guide, which says:

“Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in its statement of case each feature of the matrix which is alleged to be of relevance.”

156. Strictly speaking therefore it is not open to the Defendants to make points by reference to the factual matrix. But BPOI dealt with the point in any event, and I propose to do likewise.
157. Thus moving on to deal with the factual matrix as best one can given this default, the Defendants rely upon what they say is an unusual and unique factual matrix, including the following facts:
- a. They were concluded against the background set out above where the Defendants had had to incur substantial exploratory, extraction and other costs upstream;
 - b. BPOI's own witnesses regarded the situation as unique:
 - a) Mr Lunn described that context as one “the like of which I don’t think exists anywhere else in the world”;
 - b) Mr Al-Ruhaimi said that, although he has (now) “*operated a lot of cargoes, this is the only one where I’ve had to deal with an entitlement*”;
 - c) Mr Finlinson acknowledged in his oral testimony that “*I cannot recall during my time as a trader another deal where we have pre-paid for the entitlement that is yet to be delivered*”.
 - c. The Contracts gave BPOI complete discretion to choose (i) the contractual price it paid from month to month, (ii) how and when to call to uplift any GOSM following the accrual (between 2013 and January 2015) of the relevant entitlements (or otherwise to deal with its entitlement), and (iii) whether to uplift, or otherwise deal with, any or all of the relevant GOSM at all;
 - d. BP, through its relationship with BP Egypt, and through BP Egypt, EGPC and GUPCO, had such a connection to the circumstances on the ground and to the system in which the GOSM to which it was entitled was inevitably being held and, as a consequence of that, it had a real ease of dealing with these entities.
158. As to these features, I accept that to the extent made good they provide material which is capable of being relevant factual matrix evidence. However on evaluating the points the real position appears to be somewhat “oversold” by the submissions of the Defendants.

159. So the fact that the Defendants had had to incur exploratory extraction and other costs is hardly unique; this is part and parcel of selling on from the producer. It is a feature which will be common to many transactions.
160. As for the witness evidence, Mr Lunn was not talking about the factual matrix – he was addressing the reasons for the discount factor being low. Mr Ruhaimi talked about a sale via an entitlement on the part of the Defendants being unique and Mr Finlinson regarded the combination of prepayment and purchase from an entitlement as being unusual.
161. The supposed complete discretion to choose the contractual price is plainly a striking point; and it was the point which seemed to me to best assist the Defendants' case. But it is more apparently striking than really so. The nature of the discretion is a contractual one. It follows that this is a discretion and it would have to be exercised in good faith and rationally. It was not, as Mr Cumming repeatedly tried to suggest, a case of BPOI being able to pay “whatever price it wanted to pay”. The expectation, objectively construed, was that BP would have to be able to justify the discount commercially. Although the evidence on this was not as full as it might have been, because this point was not (as it should have been) pleaded there was a certain amount of evidence about the discount factor. Mr Finlinson said:
- “in fixing the level of a discount factor BPOI takes into account a number of anticipated risk factors or costs, such as hedging costs, working capital costs, price fluctuations and freight costs”
162. That reflected what Mr Ataya recalled being told by Mr Lunn:
- “the discount factor took account of a number of factors including BPOI’s storage costs, lifting costs, hedging costs and the risks caused by the geo-political situation in Egypt”.
163. There was also the evidence to which I have referred earlier about the need to accumulate these small parcels of cargo to make an economical lifting; this obviously fed into the risks perceived by BPOI and hence to the discount.
164. The evidence also demonstrated the Defendants pressing BPOI from time to time to justify BPOI's exercise of the discretion – ie they expected it to be exercised rationally. But perhaps more fundamentally the correspondence on this subject indicates that there was a sense they saw it as an objectionable facet of a sale contract; there is no sense of them seeing it (as it is now said to be) as part and parcel of or in being in harmony with a risk allocation scheme.
165. As for the BPOI relationship, that ignores both the separate corporate personality of BPOI, and also the Defendants' own relationship with EGPC through their own JV arrangement.
166. The Defendants also submit that I should take into account the fact that their contractual interpretation reflects BPOI’s own expectations. Thus they submit that:
- a. Mr Finlinson was forced to accept that “*it was of some value to BP to have an assignable right to lift oil at Ras Shukheir*”.

- b. Mr Finlinson also recognised that part of the basis for BPOI’s payments to the Defendants was to acquire the entitlement to lift GOSM at Ras Shukheir.
 - c. Mr Gimenez accepted that BPOI viewed itself as having paid money in exchange for the entitlement to lift.
167. However I reject this evidence as admissible factual matrix evidence. This is because of the timeline. It is trite law that the matrix of fact must be confined to matters “*known or reasonably available to the parties*”; logically - and as held by Briggs LJ in *BlueCo Ltd v BWAT Retail Nominee (1) Ltd* [2014] EWCA Civ 154 (endorsed by Lewison paragraph 3.169) “*the objective analysis of the meaning of an agreement is to be conducted by reference to the background in which the parties were at the time when they made their bargain*”.
168. The *terminus ad quem* for factual matrix evidence is therefore January 2015 – and arguably given the first contract was 2013 and there is no suggestion that the construction of the different contracts differs, the relevant matrix of fact would have to predate that first contract. However that point matters not. Mr Lunn's email dates from February 2015 – well after all the relevant contracts. As for the BPOI's witnesses' evidence, plainly that cannot be factual matrix evidence.
169. Further as to “expectations” it is equally trite law that the subjective intentions of the parties are irrelevant and inadmissible as part of the process of construction.
170. Further the evidence relied on was really rather more nuanced than the Defendants suggested it was. For example Mr Finlinson’s evidence accepted some value to the entitlement, but was quite clear that that was not what was being paid for and that the real value came with delivery.
171. I should deal here with the submission that I should draw adverse inferences because of the absence of Mr Lunn. As Mr Cumming anticipated, I have a firm view on this point. I indicated in *Magdeev v Tsvetkov* that is a submission which requires a proper grounding. That grounding was lacking here, because it was not apparent what relevant and admissible evidence (based on the pleaded case) Mr Lunn's evidence would have gone to. Principally Mr Lunn’s evidence seemed to be said to be relevant to the agreement or understanding which Mt Ataya first mentioned in his oral evidence. That was not a pleaded point, such that there was a burden on BPOI to rebut it. There was therefore no route to making it appropriate to draw any adverse inference. A similar point arises as regards the discount factor – a facet of the unpleaded factual matrix case.
172. At the same time the Defendants' factual matrix arguments ignore a number of genuine factual matrix points which tell in favour of BPOI. One is that this was not an informal contract but a high value “lawyered” commercial contract. Another is that it occurs in the context of a business where such arrangements as FOB contracts are commonplace. There is the law on transfer of property in the context of contracts for unascertained future goods – which cannot happen until ascertainment. There is also a background, which includes the 2012 year, where there was an FOB lifting with perfectly standard FOB documents. All of these documents were shared with the Defendants. The Defendants never protested or expressed surprise – or sought to change the drafting of the Contracts.

173. There is therefore in my judgment essentially nothing in the aggregate which pulls against the natural reading of the words in any way. But in addition even if there were more “heft” to the factual matrix evidence it is not enough that such evidence creates some sort of tension with the plain reading of the contract. There must – as the authorities make crystal clear - be a route to the construction contended for. The authorities are also clear that if the words are unambiguous the court must honour them. The Defendants would need to show first that their factual matrix creates the necessary ambiguity and then demonstrate a way of arriving at the reading of the contract for which they contend based on the composite of the wording and the factual matrix – presumably by some sort of implied term. This is because at the end of the day what the Court is doing is not optimising the contract with the benefit of hindsight but saying how the reasonable person in the parties' shoes would read that contract in the light of the documents and the other relevant facts.
174. This is where, despite Mr Cumming's very lively and skilful submissions, the Defendants' case has nowhere to go. One asks the question of how, given the wording of the contract, and the admissible matrix of fact, one arrives at a reading which says:

“the Defendants’ obligations pursuant to the 2013 Contract to deliver to the Claimant 100% of their monthly entitlement to GOSM crude oil at Ras Shukheir Terminal are to be satisfied by: (i) GUPCO being informed of the 2013 Contract, and (ii) ongoing confirmations of the monthly entitlement to uplift GOSM crude oil at Ras Shukheir Terminal” (adapted from Defence paragraph 8.2).

But answer comes there none. If the reading cannot be arrived at expressly, all the authorities which the Defendants then pray in aid against BPOI’s implication case then have to be grappled with; and no attempt was made to do this.

175. Still less is there an answer when the way in which this case was put forward in the pleading did not entirely gel with the evidence or the skeleton argument, which sometimes tended to suggest the trigger for the delivery/fiscalised entitlement was something else, such as the delivery of fluids into the GUPCO system (despite the fact that such fluids could on no analysis be described at that stage as GOSM). While Mr Cumming suggested that this was a fuss about nothing, it is of course a significant point that the case on construction advanced by the Defendants lacked a clear and consistently stated iteration of the construction contended for.
176. Setting aside factual matrix the Defendants make at least one “commercial common sense” point. This is that BPOI has not been able to offer adequate explanation as to why – if it was entitled to reimbursement of its payments to the Defendants if it terminated the Contracts without lifting the entitlement to GOSM to which those payments are said to relate – BPOI went to the trouble of involved negotiations with EGPC between January 2015 and June 2019 about a potential transaction in respect of its entitlement that can have been worth no more than between US\$10m and (at most) US\$15m to BPOI. Why, they ask, did it not simply demand immediate reimbursement of nearly US\$17.3m?
177. But with great respect to the ingenuity of the argument this also goes nowhere. Conduct in the context of ongoing commercial relationships can frequently appear quixotic to

outsiders. But in any event (i) this point cannot approach to the level required for a commercial common sense argument to drive construction and (ii) (again) it actually says nothing which would indicate the correctness of the construction contended for. It is perfectly consistent with BPOI trying to resolve the matter consensually before trying to enforce against Dover and Vega, with the costs and uncertainties inherent in that process.

178. I conclude without any hesitation that the Defendants' case on construction must fail. As BPOI submitted, it appears convoluted and extremely uncommercial to the eye of a commodities lawyer; but even putting that to one side and road testing it against first principles, it proves to be simply impossible to reach the pleaded construction in any acceptable way. This is perhaps not surprising when one bears in mind that what is being contended for is not an FOB contract with some variants, but a contract which is entirely inconsistent with the clear FOB delivery terms of the Contracts.
179. I note, though this forms no part of the exercise of construction, that consistently with this conclusion at an earlier point in time Vega's position (for itself and on behalf of Dover) was not that the Contracts did not provide for FOB delivery – but that their terms had been varied so as to provide for the different method of delivery for which they now contend. That is the effect of Vega's letter dated 26 June 2019. That contention was both fundamentally at odds with the case now run, and also an implicit acceptance that the contract as written, provides for FOB delivery.

Issue 2: Breach by the Defendants

180. In one sense the question of breach by the Defendants is academic, since BPOI principally seek a remedy in unjust enrichment. However breach was said to have at least a potential impact on interest, and possibly in the light of the argument on *Dies* to which I will come below.
181. The Defendants submit that the duty to deliver is predicated on the giving by BPOI of effective shipping instructions. That reflects the fact that under an ordinary FOB contract, a seller's obligation to deliver, or to tender for delivery, arises only after the buyer has nominated a vessel. It is common ground that shipping instructions were not given to the Defendants directly.
182. It was the Defendants' case that equally, no shipping instructions or nominations were given to EGPC, submitting that BPOI's witnesses identify no communication that can constitute effective shipping instructions or vessel nominations. Instead their testimony, and the documentary evidence, show that BPOI had simply made preliminary inquiries about potential uplifts. BPOI never decided that it would pursue any of those potential uplifts (as distinct from swapping or assigning its entitlement to EGPC), and ultimately decided not to pursue any of them. As Mr Al-Ruhaimi put it during cross-examination, "*we wanted to keep... all of the potential options open to us at any given time*".
183. This was another area where the Defendants' case, though very well argued, really failed to engage with the nature of the contract and the realities of the situation. One aspect of this is that shipping instructions in such a situation cannot be simply given by a party in BPOI's position. There has to be the ascertainment of a laycan as a first starting point. It will often be necessary for the party to then obtain a vessel to nominate. It was Mr Ruhaimi's evidence, which I accept, that this was the case here.

184. The Defendants focussed on the absence of shipping instructions to the Defendants. But of course the Defendants were as a matter of fact in no position to give a laycan. While they may have had permission to export under their export agreement with EGPC, that could not enable them to approve an effective laycan at a terminal run by EGPC. Given the factual circumstances, in agreeing to FOB delivery terms, everyone must have understood that the physical act of delivery itself would have to be carried out on the Defendants' behalf by GUPCO/EGPC – as the entities in physical control of the Ras Shukheir facility, in charge of scheduling liftings. The Defendants simply could not do this. Thus while it might not have been necessary for BPOI to provide instructions only to EGPC and/or GUPCO rather than also to the Defendants, the Defendants could in practical terms do nothing. However willing they may have been they were not in a position to load GOSM onboard a vessel FOB Ras Shukheir if and when BPOI provided an effective request, nomination, and instructions to do.
185. For the same reasons nor were the Defendants in a position to respond to any nomination. The only entities who were utile in this respect were EGPC and GUPCO. Absence of “instructions” to the Defendants is therefore a false point.
186. Further the situation was expressly contemplated in the BP GTCs definition of delivery (section 24.1.14) which expands the FOB terminology and delivery obligation to include not just the physical act of delivery, but procuring that act. In this case that meant the Defendants were responsible for procuring EGPC and/or GUPCO to get the GOSM through the performing vessel's permanent hose connections.
187. As for the position regarding EGPC and GUPCO, I do not accept the submission that relevant instructions were lacking, though it is true to say that toward the end of the time line those effectively petered out. What can be discerned from the lengthy outline which I have given above is that:
- a. The factual background to this relationship meant that in practical terms EGPC and GUPCO had the ability to control the lifting of cargoes;
 - b. The Processing Agreement provided that GUPCO shall handle, store, transport and offload crude oil for Petrozeit, a JV including the Defendants;
 - c. This was not a simple linear relationship where each amount of cargo was treated separately. The economics meant that often BPOI asked GUPCO to accumulate cargo until a sufficient amount was available to justify a lifting;
 - d. Requests for a laycan were made of EGPC and GPCO, both in 2012-2013 and in 2014 and 2015. After the last delivery that did take place (July 2013 on the Afra Willow) BPOI repeatedly requested laycans from the EGPC for delivery of the GOSM that it was entitled to have delivered to it across 2014 and 2015 – just in the same way as it had always done when arranging physical liftings of the GOSM;
 - e. Vessel nominations were made after a laycan had been approved. An example is the lifting on the “True” noted above.

- f. There was considerable formal and informal correspondence around the logistics of delivery. No objection was ever taken to the way in which this was handled;
 - g. EGPC were often slow to respond and a reluctance to engage does appear manifest on the documents – for whatever reason that may be.
188. A suggestion was made at the hearing that dealing with EGPC or GUPCO was contrary to the terms of the Contract, in particular to section 35.1 of BP’s Standard Terms specifically required “*any communication*” under the Contracts to be sent to “*the address of the other party specified for this purpose in the Special Provisions [i.e. the Contracts]*”.
189. Since this was an argument which would (almost inevitably) have resulted in an argument about agency, variation or course of business in relation to which factual evidence would require to be called, this was an argument which required to be pleaded. It was not. It was therefore not open to the Defendants to run it.
190. In any event, had it been pleaded, it seemed to me that on the evidence EGPC and/or GUPCO were agents for the Defendants for this purpose. The absence of formal authorisation (the point on which Mr Ataya and Mr Salna focussed) is nothing to the point.
191. It must be right, as BPOI submitted that EGPC and GUPCO, for the purpose of effecting delivery FOB at Ras Shukheir, are to be treated as the Defendants’ agents because it was EGPC/GUPCO, and only those only entities, who carried out the relevant lifting / offtaking operations for the Defendants through their obligation to do so under the Processing Agreement under which Petrozeit paid GUPCO for “*offloading of Crude Oil*”.
192. The situation is thus not dissimilar to the approach taken by Lord Sumption in *The Global Santosh* [2016] 1 WLR 1853 at [19], and the Court of Appeal in the earlier case of *The Crudesky* [2014] 1 Lloyd’s Rep 1 at [26-39]. There is no need for the Defendants to have had any actual formal contractual or other kind of relationship or agreement with GUPCO or EGPC. The real question is whether there has been any kind of implicit or necessary delegation of responsibility of an aspect of performance of the Contracts to EGPC/GUPCO by the Defendants. In the circumstances I conclude there was such a delegation.
193. The Defendants also argued that there were no proper shipping instructions by reference to the proposal for a co-load in June 2014 and in late 2014 as well as by reference to a proposal for a May 2015 uplift. However this is to ignore the interrelationship between the provision of a laycan with the provision of shipping instructions. What the factual background evidences – as I have found above – is that EGPC and GUPCO did not provide laycans for uplifts when they were sought. Without that BPOI could not provide any meaningful nominations.
194. It follows that there was a breach by the Defendants, via the failure of EGPC to approve a laycan when asked in May 2015. True it may be that EGPC never positively refused the request. It may well also be the case that, as in December 2014, BPOI was unsure whether it wished to proceed to lift its entitlement, or, instead, to another course.

However it sought the laycan and no response was given, as it should have been. Without that confirmation BPOI could not effectively nominate a vessel.

Issue 3: Termination

195. However when it comes to termination I accept the Defendants' submissions. There was a breach, but it went not simply unacted upon but acquiesced in by BPOI for some considerable time.
196. This was the broad effect of BPOI's witnesses' frank oral testimony. As Mr Al-Ruhaimi explained during cross-examination: BPOI was content with the position that prevailed following May 2015, as it "*had 211,387 barrels of entitlement*"; and BPOI had never firmly decided that it wanted to lift in May 2015 anyway. It "*wanted to keep... all of the relevant options open to us at any given time*".
197. The only other matter relied upon by BPOI is the Defendants' letter dated 26 June 2019. This responded to BPOI's letter dated 10 June 2019. However, BPOI's letter did not ask the Defendants to deliver the GOSM to which BPOI had become entitled. Nor did it refer to any alleged breach of the Contracts, or any failure by the Defendants to discharge delivery obligations as required by the Contracts. Instead it focussed purely on reimbursement: "*... VPL and DIL have not reimbursed... no reimbursement has been made it expects to be repaid in full*". It would therefore be wrong to say that the Defendants indicated by their letter dated 26 June 2019, that they "owed no further obligations" to BPOI.
198. It follows that the termination of the contract was effected by the commencement of the proceedings asserting (wrongly) the termination, which termination was then accepted by the Defendants. However this has no impact on the main issues.

Issue 4: Was there any total failure of the basis for BPOI's payments?

199. It is common ground that the Defendants did not deliver the GOSM and that they have not repaid any sums to BPOI.
200. BPOI thus seeks the restitution of the sums it paid over to purchase the GOSM, on the basis that it has received no consideration whatsoever, and the Defendants have thus been unjustly enriched by this amount. This is the so-called "failure of basis" ground for restitution, previously referred to as the "total failure of consideration".
201. The availability of this remedy is enshrined in Section 54 of the Sale of Goods Act 1979 which provides that "*Nothing in this Act affects the right of the buyer...to recover money paid where the consideration for the payment of it has failed*". See *Benjamin* at §17-090§12-069 – 070 which describes the claim in the specific context of a failure to deliver:

"Where, after the buyer has paid the price (or part of it) to the seller, the seller fails to deliver the goods...he may either sue for damages, or for restitution of the money paid to the seller...If he sues for restitution, he can avoid the rules of damages, since his claim is for return of the precise sum of money which he paid to the seller, but he must terminate the contract."

202. Technically the hurdles to establishing this are simply that:
- a. BPOI has not received any consideration (here, delivery) for the payments it has made; and
 - b. The Contracts have been terminated / determined / discharged.
203. When one gets to the details BPOI submits (and this did not seem to be controversial) that if it is right about failure of basis, the Contracts are clearly divisible such that those payments for which no GOSM was delivered can properly be excised out from the payments made in 2013 against which some GOSM was delivered FOB: see *Chitty* at paragraph 29-066, *Goff & Jones, The Law of Unjust Enrichment* (9th ed.) paragraphs 12.26-12.32 .
204. BPOI's case on consideration is simple: there has been a failure of basis / total failure of consideration here because, despite paying US\$17,235,448 over to the Defendants under the Contracts in return for the delivery of 211,387 barrels of GOSM, none of it has been delivered. BPOI derived no benefit whatsoever from a right to delivery of the GOSM which could never be realised – because EGPC would not allow the lifting of the GOSM. In any event, BPOI was paying the Defendants not for a right or entitlement to lift the GOSM, but for the actual FOB delivery of it. Anything less was not what BPOI bargained for, and paid over the purchase monies for.
205. As for the need for the Contracts to have been terminated/discharged as a precursor to a claim for unjust enrichment like this, this is also not controversial. As just noted BPOI's case is that it terminated the Contracts on 10/13 June 2019 (via its letters to the Defendants seeking reimbursement of the monies paid for the undelivered GOSM), and/or through the commencement of these proceedings seeking the same. The Defendants do not dispute that BPOI purported to terminate the contracts as aforesaid, but deny that BPOI was entitled so to do. Their key point however is that the Defendants positively assert that the Contracts have been terminated and are at an end. The authorities are clear that the determination need not be made by the claiming party: e.g. *Chitty* at paragraph 29-061, *Benjamin* paragraph 17-092 and *Goff & Jones* paragraph 3.36)
206. The resistance to this claim by the Defendants was primarily on the basis that by the Contracts, BPOI and the Defendants defined and allocated, and – to that extent – circumscribed, their mutual obligations and the consequences of non-performance so as to preclude BPOI from seeking reimbursement of the sums paid to each of the Defendants under the Contracts.
207. But this was, as the oral opening and the cross referencing of this point in the written closing note made clear, essentially a return to the construction argument which I have already dealt with. Unless some different principle governed the question of failure of basis the conclusion as to construction effectively answers the question as to basis.
208. And there is no different approach to ascertaining the basis of payment. *Goff and Jones* states:
- “As a matter of both principle and authority the objective approach should continue to apply in England. The objective

approach to identifying the basis on which a benefit has been transferred is very similar to the approach taken in the construction of contracts, namely to ask what a reasonable person in the position of the parties would have understood the words to mean. In answering that question in cases concerning contracts the courts have relied upon principles of construction when interpreting the parties' words and have developed rules governing the extent to which materials extrinsic to the agreement can be used in the interpretative process.”

209. That is essentially the answer to the Defendants' case. If this contract is not (as I have found it is not) some *sui generis* “modern commercial contract” but an FOB sale contract, the essence of the contract has failed, and that *prima facie* satisfies the test for failure of basis.
210. The Defendants tried to make inroads on this simple argument in a number of respects, but without success.
211. Thus the Defendants argued that there was no failure of basis because in this case the Defendants were required to undertake extensive actions before BPOI was to lift, or could lift, any oil, referring to the requirements in the contract to inform BPOI “*of the estimated volume (“Estimated Qty”) available for lifting*”, to “*give an initial best estimate... at least 45 days before the start*” of each month and to agree with GUPCO actual monthly volumes “*corrected for temperature and pressure, net of BS&W*” to which BPOI became entitled and report the same to BP Egypt.
212. Ingenious as this line of argument is, it is faulty because all of these provisions have nothing to say to the substance of the contract – they are necessary administrative provisions which define the entitlement. If this argument were right it would be possible to argue that by printing a ticket for a flight from A to B, which is cancelled because the airline decides not to fly to B at all anymore, the customer has received sufficient consideration such that they should not be entitled to a refund. That is plainly wrong.
213. The Defendants also argued that BPOI also received substantial benefits in the form of its entitlement to uplift the entirety of the entitlement that accrued in the relevant months. The argument was that the acquisition of this entitlement was a significant part of the bargain and of the basis for BPOI’s payments to the Defendants (reflected in BPOI referring to its entitlement volumes as belonging to BPOI and being BPOI’s “equity” and “stock”). The Defendants argued that in return for its payments to the Defendants, BPOI was able to trade, and to seek to trade, this valuable right without ever lifting any oil, as illustrated by BPOI’s various negotiations with EGPC.
214. Again this argument essentially comes back to the same points made earlier on construction. BPOI was not buying a tradeable entitlement. It was buying goods, with a right to have them delivered. The fact that attempts were made to mitigate the consequences of the failure to delivery by discussions as to trades and so forth does not mean that the basis of the contract (as written) had not failed. What BPOI was doing was attempting to mitigate its position.
215. As Mr Ashcroft QC noted the Defendants’ arguments ignore the fact that any contract notionally gives a right to an embryonic version of the actual benefit you pay for and,

if the defendants' analysis were correct, unjust enrichment would be precluded in any kind of sale contract “because you could always say: well, you have a right to insist on future performance of an obligation under that sale contract.”

216. The attempted route round this - the attempted analogy with *Stocznia Gdanska* and *Pournaras* cases – cannot succeed. Those deal with shipbuilding cases which have been analysed (principally in *Hyundai v Papadopoulos*) specifically as combining sale and services; the yard designs, transmutes basic materials into a new form and sells the result. Such cases are a world away from this FOB contract which is explicitly for a defined commodity: oil. This is (on its terms) a contract of sale “simpliciter”.
217. Nor, as I have already alluded to in the context of construction, would I consider that there was by any means material based on (for example) the saving for frustration, to infer an intention to exclude common law rights such as rights in unjust enrichment.
218. The Defendants also argued that it would be wrong as a matter of principle to allow BPOI to rely on its own repudiatory breach of contract (in renouncing any interest in lifting oil under the Contracts) to found a claim in unjust enrichment claim based on an alleged total failure of consideration (in the form of that lifting having not taken place) in the circumstances of this case. The Defendants relied on *Stray v Russell* (1859) 1 Ellis and Ellis 888, 120 ER 1144 where an eight-member bench of the Court of Exchequer upheld a decision that a purchaser of shares, who had paid for the shares but refused to accept a transfer and be registered as a shareholder, was not able to recover the purchase price paid as money had and received on the basis of an alleged total failure of consideration. The action failed at first instance on the basis that the defendant had complied with all of its obligations, and the plaintiff had got what he had bargained for, but the court stressed that no such action lay where any failure of consideration was due to the plaintiff's own actions, not those of the defendant, and on appeal it was said:

“Nor can the common count be supported; for the transaction did not fail, and the transfer did not fail, by any failure on the part of the vendor without the default of the vendee. The vendee himself was in fault for not taking the proper steps to obtain the transfer.”
219. The obvious problem for this line of argument is *Dies v British and International Mining and Finance Corporation Limited* [1939] 1 KB 724. In that case the court found that a party which repudiates a contract of sale by refusing to accept goods may nonetheless recover the price paid in unjust enrichment. Undaunted by this Mr Cumming boldly submitted that that case is wrongly decided and/or should be distinguished. It was said that the Court of Appeal in *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras Same* [1980] 1 WLR 1129 made clear that it did not approve *Dies*, or the principle it is said to stand for, and was at pains to note that the argument that a contract breaker could not bring an unjust enrichment claim had “considerable merit”. While independent, the law of unjust enrichment is, and should be, subservient to the law of contract.
220. Once again I am not attracted by this argument. There is a good deal of authority that a contract-breaker can claim in unjust enrichment if at the time of the termination it has made payments for which the benefit has not been received. So for example Goff & Jones at paragraph 3-36 says:

“The fact that a party has committed a breach of contract does not deprive him of the right to claim in unjust enrichment. This holds true even where the claimant has committed a repudiatory breach, which has led to the contract being terminated.”

221. It is fair to say that the law in this area is far from being as clear as it might be. The learned authors of Goff and Jones lament the way the analysis was approached in *Dies* and note, as does Mr Cumming that the House of Lords in *Pournaras* expressed some doubts about it. However it was not overruled by the House of Lords in *Papadopoulos*, and the decision was applied in *Rover v Cannon* [1989] 1 WLR 912 in the context of a claim for unjust enrichment by a party whose repudiatory breach had brought the contract to an end. Dillon LJ identified the crucial question as being whether the claimant in unjust enrichment “*had received any of the consideration*”. Kerr LJ said:

“if Proper had paid the disputed instalment of 900,000 and if the contract had thereafter been rescinded by Cannon for whatever reason Proper would have been entitled to recover this sum and if the reason for the rescission of the contract had been a breach on the part of Proper then Cannon would still not have been entitled to retain this sum but would have been limited to a claim in damages.”

222. Further this line of argument was rejected by the Privy Council in *Mayson v Clouet* [1924] AC 980 - albeit allusively, simply saying that various complicated arguments in another case would have been completely pointless if this point had been good. Still further, as already noted Goff and Jones is quite clear that that analysis is correct. Although Mr Cumming reminded me that none of this is strictly speaking binding authority, I am persuaded that the arguments advanced for BPOI represent the law.

Issue 5: Implied term

223. As an alternative to the common law claim in restitution, BPOI also advanced a contractual claim to entitlement to repayment of the purchase monies on the basis of an implied term. The submission was that “*the implied term contended for is manifestly necessary to make the Contracts work commercially, and is an obvious part of the parties’ agreement*”.
224. This argument does not arise, given my conclusion on construction, and the remedy it seeks is un-needed given my conclusion on unjust enrichment. Had it arisen, it would have done so on that basis that BPOI was wrong about construction. In those circumstances I would certainly not have found an implied term to be justified – and indeed Mr Ashcroft QC for BPOI appeared tacitly to acknowledge the difficulties which it faced..
225. The argument was predicated on an assumption that there had been “*a persistent failure by the Defendants to deliver the subject matter of the Contracts*”. That of course is an erroneous approach if the construction argument has failed. If I had found otherwise on construction I would have acceded to the entirely orthodox submissions for the Defendants that the term contended for failed the “*so obvious as to go without saying*” test and the requirement that without the term the contract would lack commercial or

practical coherence: by reference to Lord Neuberger in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [21] and [23].

226. I also agree that in this eventuality BPOI would have failed the further requirement that the implied term was be capable of clear expression and (ii) not be inconsistent with the express terms of the contract: see Lord Hodge in *Hallman Holding Ltd v Webster* [2016] UKPC 3, at [14], and *Chitty on Contracts* (33rd ed., 2020) at paragraph 14-012. As observed in *Chitty*:

“Given the strict nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in *Marks & Spencer* and, on that basis, have declined to imply a term into the contract between the parties. If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied.”

Issue 6: Estoppel

227. Ultimately the Defendants' real line of defence was the estoppel argument. As is so often the case, when faced with a construction which turns out to be uncongenial the Defendants have suggested that there was an estoppel by convention.
228. The way in which this was put in closing was that there was a common practice and understanding to the effect that the Defendants discharged their delivery obligations under the Contracts by: (i) making GUPCO aware that the Defendants had sold their entitlement to GOSM at Ras Shukheir to BPOI, which was thereby entitled to uplift the entitlement that resulted from the Defendants' delivery of fluids into the GUPCO system; and (ii) confirming the relevant monthly entitlement to BPOI. It was submitted that where the parties had shared this common practice and understanding for many years, and the Defendants had *inter alia* entered into the Contracts in reliance on it, BPOI is estopped from denying that the Defendants effectively delivered the GOSM to it by completing those steps.
229. To some extent the argument appeared to be a recasting of the Defendants' original suggestion in the June letter of variation. That was an argument which was doomed to failure, not least because of:
- a. Section 39.5 of the BP GTCs, which is in substance a no oral-variation clause.
 - b. The Supreme Court's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 which recognised the effect of such clauses.
230. That authority however also creates a difficulty for any estoppel case, because the Supreme Court (unsurprisingly) anticipated this kind of fallback argument at [16] with strong discouragement:

“...the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself”

231. The Defendants also placed emphasis on the dictum of Hamblen LJ in *Tinkler v Commissioners for Her Majesty's Revenue & Customs* [2019] EWCA Civ 1392, at [54]:

“(1) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. The assumption must be shown to have crossed the line in a manner sufficient to manifest an assent to the assumption.

(2) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(3) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(4) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(5) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

232. The Defendants also placed reliance on estoppel by representation, citing *Spencer Bower: Reliance Based Estoppel* at paragraph 1.18.

233. The essential problem for the Defendants is that the evidence simply did not come close to establishing the requirements for either form of estoppel.

234. Central to this is the fact that the “shape” of the transactions was always consistent with what the Contracts said – it was, in short, an FOB shaped transaction:

- a. Bills of Lading, for the shipments that did occur, were issued with either Dover or Vega listed as the “Consignor” of the GOSM. It is trite that the “consignor” of goods on a bill of lading is known to be “*the party in possession immediately prior to shipment*”: see *Aikens, Bills of Lading* (3rd Ed) at paragraph 3.106.

- b. Neither Dover nor Vega ever challenged these documents once issued. Equally if BPOI had thought that it was the owner or party in possession of the GOSM transferring that possession to the carrier of the performing vessels, no doubt it would have named itself as the consignor.
 - c. Dover and/or Vega were always copied into and/or otherwise made aware of liftings. The obvious purpose behind this would be so that Dover and Vega would know when the final stage in their performance of the Contracts had been completed.
 - d. BPOI did not pay storage charges to GUPCO – but the Defendants (via Petrozeit) did.
 - e. BPOI did not pay fees to GUPCO for the loading of parcels of GOSM that were delivered under the Contracts (and their predecessors) – but the Defendants (via Petrozeit) did.
 - f. When the 2015 Contract was renewed, information concerning the issue of bills of lading and demurrage claims was included in the Contract, and neither of the Defendants objected. Terminology and provisions such as these are consistent with a conventional FOB delivery contract – and not the type of delivery obligation contended for by the Defendants.
 - g. In 2017 Vega signed the draft Acknowledgment, in the context of the attempted sale of BPOI's rights to EGPC, without caveat. That document expressly acknowledged that delivery of the GOSM had not yet been made. Mr Ataya's attempt to suggest that he did not know what he was signing or that he did not read it or that he was co-operating as a favour to BPOI, was not convincing.
235. This creates a huge difficulty for the Defendants in suggesting that there was anything which even began to approach the clear, unequivocal and consistent conduct or representations that the Defendants would need to establish in order to justify an estoppel precluding BPOI from relying upon the true meaning and effect of the terms of the Contracts.
236. The centre of gravity of the Defendants' argument was that:
- a. The Defendants were not asked to play any active part in the deliveries that did take place;
 - b. Mr Ataya and Mr Salna each subjectively understood there to be a common understanding that the Defendants' delivery obligations were treated as discharged by the matters set out above;
 - c. Mr Lunn's conversations with Mr Ataya in 2013 amounted to representations to this effect;
 - d. BPOI's internal records, which recorded GOSM as having been delivered on a monthly basis once its entitlement was confirmed – and not when it was actually lifted physically also evidenced this understanding;

- e. BPOI acted consistently with the alleged common practice and understanding by seeking to arrange uplifts of, or transactions relating to, its entitlements, with EGPC and/or GUPCO to the exclusion of the Defendants.
237. I have no hesitation in saying that this material is a country mile from the evidence which would be needed to establish any form of estoppel.
238. Dealing with the representation case first, this was not pleaded, and seemed to emerge effectively as a tactical response to the way the evidence had developed. It was a case which was reliant on Mr Ataya's evidence, which was not consistent with his witness statement, nor with the absence of protest at the clear terms of the contracts, the shipping documents and the Acknowledgement. I did not find his evidence remotely convincing. I am not persuaded that any representations were made, still less that they were unequivocal so as to give rise to estoppel by representation.
239. This links to the point which I made earlier in the context of construction of the inconsistency of the Defendants' own case; it was never quite clear, what it was the Defendants said formed the term contended for. This naturally extends to both estoppel cases where it effectively undercuts the argument that there was an unequivocal representation, or a consensus.
240. Similarly when it comes to estoppel by convention the element of crossing the line and of BPOI having "*assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it*" are both manifestly lacking.
241. As for the lack of involvement of the Defendants, I do not consider that anything can be made of this in circumstances where, as I have found above, the Defendants were upstream production entities with no physical presence at the Ras Shukheir Terminal – which was operated by GUPCO and over which EGPC clearly exerted significant control.
242. The BPOI internal records may not have reflected the position as I have found it to be as a matter of the contract's terms. But this was plainly a slightly odd contract which would fit ill in BPOI's systems; and these are not materials which were shared so as to assist with a representation or the Defendants' own understanding. At best they can be said to be consistent with an understanding of BPOI. However these are accounting documents. They are functional. They have nothing really to say as to the understanding of BPOI.
243. Nor do I find either the lack of communication with the Defendants between 2015 and March 2017 or the draft contracts with EGPC for the swap to be something which taken alone or together with these other matters can be said to be unequivocal or as denoting the existence of a common understanding.
244. The real thrust of the Defendants' case is that their understanding was that the contracts had been performed in this way before Dover, and later Vega, became involved. This seemed to be inherent in the reliance on [95] of Hamblen LJ's citation in *Tinkler v Grundt v The Great Boulder Proprietary Goldmines Ltd* (1937) 59 CLR 641 at 675-6.

245. However, in the first place that seems to be wrong on the facts. But in any event an erroneous pre-contractual understanding of how the Contracts would operate informing their decision to sign up to them cannot give rise to an estoppel by convention: see *Keen v Holland* [1984] 1 WLR 251 at 261F – 262C. The only way to pursue this situation would be via the remedy of rectification; which was not sought in this case.
246. Finally, I note that had the estoppel argument progressed so far I would in any event have concluded that the requisite evidence of reliance and unconscionability was lacking.

Issue 7: Time bar

247. The Defendants argue that BPOI's claims should have been made within "2 years of the date upon which the GOSM crude oil was delivered or, in the case of total loss, should have been delivered" and that on its proper interpretation, section 32.3 of BP's Standard Terms operates to preclude all of BPOI's claims.
248. The submission made was that the scope of section 32.3 itself, particularly when read with section 38.2, could hardly be wider. It is to cover "any claim" under the Contracts, or "any dispute" arising out of or in connection with the Contracts. Its express purpose is to require any proceedings in respect of any such claim or dispute to be brought within two years. It clearly and unambiguously encompasses and applies to all of BPOI's claims.
249. The Defendants submitted that while some interpretation is required to divine how precisely the two triggers for time running that are specified in section 32.3 – namely (i) "the date on which the crude oil was delivered" and (ii) "in the case of a total loss, the date upon which the crude oil should have been delivered" – will apply in every instance, this offers no proper basis for suggesting that section 32.3 ought not to apply to BPOI's claims, or that questions of interpretation should simply be decided by resorting to preferring the narrowest imaginable interpretation, as BPOI contends.
250. There are a variety of answers to this point. The most straightforward is that as a matter of construction section 32.3 of the BP GTCs is not apt to cover the situation here. The clause focussed on two things: delivery and (in case of a total loss) the due date for delivery. But here neither is in issue. The very premise of BPOI's claim is that delivery has never been made. It follows that there is no date 2 years from the date upon which the GOSM crude oil was delivered.
251. As for the total loss point, though Mr Cumming gamely tried to argue that it could apply, this was a hopeless argument.
252. While the Defendants contended that to adopt a narrower interpretation would be inconsistent with, and frustrate, the express application of the two-year contractual time bar to disputes of the kind identified in section 38.2 of BP's Standard Terms I did not find this persuasive. While there is a degree of tension inherent in the fact that the clause refers to "any dispute under Section 38" this is (on both parties' cases) a substantial commercial contract. As I have noted above, this puts it at the end of the spectrum of approaches to construction where greater regard is had to the words. The words here are clear – time bar is triggered by (a) delivery and (b) non-delivery where there has been a "total loss".

253. Further it is trite law that that time-bar clauses are to be interpreted strictly – they are akin to limitation of liability clauses. A time-bar must clearly and unambiguously apply to the matters in question: As can be seen from the dictum of Briggs LJ in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, an ambiguity in the meaning of an exclusion clause falls to be resolved by a preference for a narrower interpretation “*if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity*”.
254. It follows that if there is any doubt about what the time-bar clause means (i.e. whether it applies to any given set of facts is ambiguous) then that ambiguity in meaning should be resolved in such a way as not to prevent an otherwise legitimate claim from being pursued: see *Lewison, The Interpretation of Contracts* (7th ed.) at paragraph 12.128.
255. Here I am in no doubt that the time bar clause does not apply. But at best, if I were wrong about that, there would plainly be an ambiguity. In either event the time bar argument fails.
256. Finally there was an argument about the applicable date if the clause did apply. Obviously that does not arise and I mention it in passing only for completeness. If it had done so I should have preferred BPOI’s argument on this point. There was no time provision for delivery of the GOSM purchased. Delivery only definitively failed to occur on termination.

Issue 8: The difference in value issue

257. The Defendants contended that in the event that, I were to find (as I have done) that BPOI is entitled to a restitutionary remedy, the Defendants should be given credit for the fact that BPOI was entitled to 211,387 bbls of GOSM crude oil, with which the Defendants were themselves precluded from dealing, between the dates on which that entitlement accrued and the date of termination of the Contracts (whenever that may have been). On this basis, it was said, any enrichment on the part of the Defendants, and thus BPOI’s right to restitution, is limited by the difference between the value of the relevant oil when the entitlement to that oil accrued and the date of termination of the Contracts. It was therefore submitted that any sum that the Defendants might be ordered to pay by way of restitution falls to be calculated by deducting the appropriate sum – which will have to be calculated once it is clear how the case is to be determined – from the total payments made.
258. This argument however comes back to the same point which has driven most of the other arguments, and is answered the same way. BPOI did not under the Contracts buy an entitlement to lift GOSM. It bought the FOB delivery of GOSM. That is the relevant consideration for which the payment price was paid over.
259. Again this is not a contract for work and materials but a contract of sale. That was the basis of the contract. It was paying for actual goods, not an entitlement. The point ends here.
260. In any event, even if this were not the case, given that the “entitlement” or the attempt to mitigate by treating the cargo on this basis proved to be incapable of negotiation with EGPC either by way of swap or assignment the evidence would suggest that that entitlement was lacking in value. A right that is not in practice exercisable has no value,

and BPOI has in fact obtained no value whatsoever from the payments it made to each of the Defendants. The Contracts have, in any event, been terminated, as is common ground.

Conclusion

261. It follows that BPOI's claim succeeds in full.