Neutral Citation Number: [2022] EWHC 2494 (Comm)

Case No: CL-2020-000316

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2022

Before :

LIONEL PERSEY KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

VITOL S.A.	**Claimant**
- and -	
JE ENERGY LTD.	**Defendant**

- -
- -

Paul Henton (instructed by **Reed Smith LLP**) for the **Claimant**
Oliver Caplin (instructed by **by Watson Farley & Williams LLP**) for the **Defendant**

Hearing dates: : 28 February 2022 and 1-3 March 2022

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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.

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LIONEL PERSEY KC SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 07th October 2022 at 10:30am.

Lionel Persey KC (sitting as a Judge of the High Court) :

Introduction

1. In this matter the Claimant, Vitol S.A. ("**Vitol**") claims damages from the Defendant, JE Energy Ltd. ("**Jeda**") arising from the repudiation of a contract for the sale of 30,000MT (-/+ 10%) of Fuel Oil to be delivered FOB Tema in Ghana. Jeda denies liability and contends that Vitol was itself in repudiatory breach of contract. It has a counterclaim.

The parties and the factual witnesses

2. Vitol is one of the world's largest energy and commodities trading companies. Jeda is a Ghanaian crude oil and petroleum products trading company.

3. Three factual witnesses were called to give evidence on behalf of Vitol. They were:-

   (1) Mr Joshua Tobechukwu Okpalanne, Vitol's Business Development & Commercial Manager, Ghana. He was Vitol's man on the ground in Ghana and his role was to present potential opportunities for the sale of oil products for the approval of Vitol's West Africa Crude Oil desk in London. I found him to be an excellent witness.

   (2) Ms Filipa Osorio de Barros Mateus Martinho, who is employed by Vitol's Rotterdam branch as a financial operator. Her role was to deal with all of the financial aspects of Vitol's operations, including the issuance of contracts and taking care of matters such as letters of credit ("**LCs**") and guarantees. She too was an excellent witness.

   (3) Mr Frederick Nicholas Barrow, a crude oil broker employed by Vitol Broking Limited. Mr Barrow and his team were responsible for crude oil coming out of West Africa and his role included the recommending to Vitol of particular contracts for the sale and purchase of crude oils. I found his evidence in relation to issues of liability to be reliable and supported by the contemporaneous exchanges. As I discuss below, however, I was not convinced by some of his evidence that is relevant to the quantum of Vitol's claim.

4. Two witnesses gave evidence for Jeda:-

   (1) Mr Joseph Ilebode, Jeda's managing, and sole, director. I did not find him to be a satisfactory witness. His evidence did not accord with the contemporaneous exchanges and often seemed to me to be more concerned with presenting a case on behalf of Jeda than with giving an accurate account of events. This was also the case with some of the contemporaneous email and WhatsApp messages sent on behalf of Jeda. I am only prepared to accept Mr Ilebode's evidence where it is consistent with the reliable contemporaneous evidence.

   (2) Mr Obed Assensoh, the commercial director of Jeda. He is responsible for managing all operational, financial and commercial matters concerning Jeda's Ghanaian business. Prior to joining Jeda he had about 10 years' experience in the banking sector in Ghana. His evidence was confined to fairly narrow parts

of the case and was argumentative in parts. I am again only prepared to accept his evidence when it is consistent with the reliable contemporaneous documentation.

The set-up in Ghana

The Tema Oil Refinery

5. Vitol's business activities concerning Ghana include the supply of crude oil for processing into refined products at the Tema Oil Refinery ("**TOR**"), and the sale of oil products produced at the TOR.

6. The TOR is Ghana's only oil refinery. It was built more than fifty years ago, at a time when there was a lower demand for oil products and energy in Ghana than today. It cannot meet all of Ghana's domestic needs. The country also relies on imports, and in times of shortage ("brownouts") berthing priority at the port will be given to imports ahead of export cargoes of oil products produced at the TOR.

Woodfields

7. Only local Ghanaian companies can secure processing agreements with the TOR. They are known as bulk distribution companies ("**BDC**").

8. Vitol has an arrangement with Woodfields Energy Resources Ltd ("**Woodfields**") that uses Woodfields' status as a BDC. The arrangement in outline is that Vitol sells crude oil to Woodfields for processing at the TOR into products such as fuel oil. Vitol then either buys back the refined products which it then sells locally or internationally, or else directs that they be sold directly by Woodfields to Vitol's intended buyer, with Woodfields earning a processing fee (essentially a commission) per barrel processed. Vitol remains in control of, and on risk in relation to, the crude oil and its products at all times.

The NPA / GPHA

9. The Ghanaian downstream oil products market is regulated by the National Petroleum Authority ("**NPA**"). The NPA grants licences to the BDCs. It also controls the scheduling of vessels at the Port of Tema. The Port of Tema itself is maintained by the Ghana Port and Harbour Authority ("**GPHA**" or "**Port Control**"). The port operates two berthing facilities: a conventional buoy mooring system (CBM) for larger vessels, and an oil jetty for smaller vessels. The vessels in the present case berthed at the jetty. The jetty is used for both loading and discharging operations.

10. The NPA has control over berth allocation. It publishes a quarterly schedule of berth allocations/slots, colloquially referred to as its "Laycan Allocation Programme". Berthing is, however, at the NPA's discretion and it may not follow the slot allocation. For example, discharging vessels may be given priority, especially cargoes intended for the AKSA power plant to prevent brownouts, and/or cargoes prioritised on orders from the Ministry of Energy. Vessels may also be ordered to leave the berth due to inactivity.

11. Both parties had some contacts at the NPA: Vitol through Mr Okpalanne and his team on the ground in Ghana, and Jeda through Mr Ilebode's contacts and also through the

port agents appointed by their sub-buyers Afco in due course. There was, however, competition for berthing allocations from a range of sources and, as the facts of this case show, neither party was able to wield significant influence over the NPA.

The Contract

12. The Contract was concluded following discussions between Mr Okpalanne and Mr Ilebode between 9 and 10 December 2019. It was the second (and last) contract concluded between the parties.

13. The deal was recapped on 10 December 2019 ("the **Deal** Recap") as follows:-

> "… **Buyer**: JE Energy Ltd.
> **Quantity**: 30,000mt (-/+ 10% in Buyer's option)
> **Quality**: as per TOR typicals
> **Delivery**: FOB Tema in one lot
> **Laycan**: 23 — 24 December 2019
> **Price**: Platts CIF NWE Fuel Oil 1.0% (Cargoes) + 100 $/mt (plus one hundred USD dollars per metric tonne)
> **Pricing Period**: Fixed date range 20-30 Dec (both dates included)
> **Payment terms**: BL +30 calendar days
> **Payment Security**: Documentary LC
> **Port & Calling costs**: For Buyer's account
> **Laytime**: 48 hrs total NOR SHINC
> **Demurrage**: As per CP terms
> **Inspection**: 50/50 between Buyer and Seller
> **Q&Q determination**: As per load port inspection
> **Licenses & Clearance**: Export and associated clearances are Seller's responsibility
> **Law**: English …"

14. The parties agree that the terms of the Deal Recap formed at least a part of their contract. Vitol says that their long-form contract terms were also agreed. Jeda, however, contends that the parties' negotiations did not lead to an agreement and that only the Deal Recap terms apply. This stance is in fact contrary to that taken by Jeda's solicitors in pre-action correspondence.

15. It is well established in the cases that where, as here, a recap has been agreed that sets out the essential terms then this may readily be supplemented by a subsequent long-form contract and that it is not necessarily appropriate for the strict requirements of a positive offer and a positive acceptance to be satisfied. In *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601 at 614, Bingham J (as he then was) said this:-

> "…if (as I think) the parties were not negotiating terms, agreement of which was to be a pre-condition of contract, but sorting out details against the background of a concluded contract, these exchanges take on a very different colour. In its true context the buyers noting of the sellers' compromise proposal for pricing the quantity tolerance and their lack of any objection to it is in my view to be regarded as acceptance of it."

His decision was upheld by the Court of Appeal. Bingham J's reasoning was followed by Aikens J (as he then was) in *Statoil ASA v Louis Dreyfus Energy Services LP: The Harriette N* [2008] 2 Lloyd's Rep 685, at [70]:-

> "… If the principal terms have been agreed and the parties are, to use Bingham J's phrase in the *Pagnan* case, "sorting out details against the background of a concluded contract", then the strict requirements of positive offer and positive acceptance are not necessarily appropriate. If one party makes a proposal for terms and the other does not object to it when asked if it has objections that can, in appropriate circumstances, be taken as acceptance of that term: *Pagnan* at page 614 per Bingham J …"

16. Jeda did not refer to either of these cases in argument. They instead relied upon cases that involved different questions to those relevant here. For example, the case of *Jayaar v Toaken* [1996] 2 Lloyd's Rep. 437 did not involve post-contractual negotiations about details but rather an attempt by one party to present a fundamentally different contract from that which had been concluded. The cases of *Pacific Inter-link SDN BHD v Efco Food Ingredients Ltd* [2011] EWHC 923 (Comm) and *Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd* [2021] EWHC 287 (Comm) are both concerned with the very different question of whether arbitration had been agreed between the parties.

17. I was referred to the judgment of Moulder J. in *BP Oil International Ltd. v Glencore Energy UK Ltd.* [2022] EWHC 499 (Comm). This was given after the end of the trial in the present case. That was a case in which the court was asked to determine whether the boilerplate clause relied upon by BP Oil should apply to the parties' contract. Moulder J. held that "the analysis depends on an assessment of what the parties must objectively be taken to have intended" [114]. The case was very different to the present. It was concerned with the applicability of the "last shot" doctrine in contractual negotiations and was a case in which the parties continued to negotiate on accept/except terms after the recap had been agreed. Neither the *Pagnan* case or the *Harriette* were referred to in the judgment.

18. The starting point here is that both parties envisaged that the Deal Recap would be supplemented by fuller terms in due course. This was Vitol's invariable practice. Mr Ilebode said that Jeda regards long-term contracts as extremely important and that it never conducts trade on the basis of short recaps only. It is against this background that the relevant exchanges fall to be considered:-

    (1) As late as 9 January 2020 Vitol appreciated that the Deal Recap had not been converted into a long-form contract as per its usual practice. Ms Mourinho therefore inputted the details into Vitol's systems and drew up a long-form contract ("Sale Confirmation") in Vitol's usual format. She also drew up a long-form Sale Confirmation for the up-the-chain sale from Woodfields to Vitol.

    (2) The Sale Confirmation was sent to Jeda's operations team on 16 January 2020. The originally agreed laycan dates were inserted into the Sale Confirmation.

    (3) On 22 January 2020, Jeda sent its counter to Vitol. The changes proposed were shown in red text. These included a suggested change to the laycan from 23-24

December 2019 to 18-20 January 2020. Jeda's proposed revised dates had by now already passed.

(4) Vitol responded later that day. Four of Jeda's proposed changes were accepted either fully or partially. Two, however, were rejected with the words "*we maintain our wording*". These included Jeda's proposed change to the laycan.

(5) Vitol's email closed with: -

> "… Only the terms and conditions expressly agreed to by Vitol SA in writing shall form part of our agreement and nothing else (including without limitation our delayed, or lack of, response for this deal or otherwise) shall be deemed or constitute acceptance to any amendment by Vitol SA of any term.
>
> Please be advised that notwithstanding a further reply from you wishing to contest our position, we shall consider our position herein to stand as definitive and final without any need for us to further revert …"

(6) Jeda responded on the following day, 23 January 2020, with just two small comments. The first related to the pricing clause - on which the parties had already agreed. The other was that the demurrage terms should include "as per CP terms/agreement" which again was something the parties had already agreed and included in the Deal Recap. Jeda did not pushback or counter or re-raise its previous position on the laycan dates. These, therefore, remained 23-24 December 2019.

19. In my judgment this was a classic case of the parties sorting out the terms against the background of a concluded contract. The parties both envisaged that a long-form contract would be concluded, Vitol put this forward in the form of its Sale Confirmation and the parties then discussed it in correspondence until there were no differences between them. I find that they were *ad idem* on the Deal Recap and long-form terms of their contract and that they both apply.

The Facts - liability

20. As soon as the deal was recapped, the parties began discussing the terms of an acceptable LC and a suitable provider. Mr Okpalanne's evidence, which I accept, is that he told Mr Ilebode before the recap was agreed that Vitol would only accept LCs issued or confirmed by international recognised banks approved by Vitol. On 10 December 2019 Jeda's Mr Assensoh requested that Vitol provide its acceptable LC format, and volunteered either Access Bank UK or Citibank London as the issuing bank. Of the two banks offered, Vitol selected Citibank London and Jeda acknowledged this. Vitol's Credit/Treasury Department did not consider Access Bank to be of an acceptable financial standing to provide an unconfirmed LC for a cargo of this value. Vitol sent Vitol's required LC wording to Jeda, adding "let us check again before you transmit your request to Citibank". Jeda in fact made no attempt to open an LC (whether Citibank or otherwise) until weeks later.

21. Vitol were unaware at this stage that Jeda had no sub-buyer for the cargo. On 9 December Mr Ilebode had told Mr Okpalanne by WhatsApp that his sub-buyer was Mercuria and Mr Okpalanne reported this internally. Vitol continued to believe this for some time. Jeda had in fact bought on speculation. On 17 December 2019, Jeda offered to sub-sell the cargo to Gunvor SA and their negotiations with Gunvor continued until 8 January 2020.

22. As the laycan approached, Vitol began to chase for performance of the Contract: On 13 December 2019 Vitol asked Jeda "How are we looking on a boat?". On 17 December 2019 Mr Okpalanne asked "Where are we on LC draft". Mr Ilebode replied "We sent your draft [LC terms] to the bank [i.e., Citibank]. So should be fine". This was incorrect. There is in fact no evidence of Jeda even attempting to open the LC until weeks later. Jeda were still without a sub-buyer. Mr Okpalanne emphasized that the LC needed to be in place before loading could commence. Mr Ilebode said his finance team would revert; but that vessels were scarce at year-end, and that "laycan is most likely 1-7 Jan". Mr Ilebode was using the word "laycan" to refer to the vessel's actual arrival date, rather than the dates contractually agreed. On 19 December Mr Ilebode sent Vitol details of an alleged candidate performing vessel, the ACAMAR. Jeda still had no sub-buyer and I find that they had no intention of nominating this or any other vessel at that time.

23. The pricing period opened on 20 December 2019. On 22 December 2019 Mr Okpalanne reported internally to Vitol that he was waiting for Jeda/Mercuria to lift the cargo but it seemed they were struggling to find a performing vessel. The laycan opened on 23 December 2019. Mr Okpalanne chased Mr Ilebode again by WhatsApp, explaining he was coming under increasing internal pressure, amidst concerns Jeda might not perform. Mr Ilebode said he had secured a Vessel to load around 10 January 2020 and was clearing her with port agents. This was not true. Jeda had no vessel and no sub-buyer.

24. The laycan closed on 24 December 2019. Vitol did not cancel.

25. On 26 December, Mr Okpalanne chased by email and WhatsApp for an update on the loading status, expressing concern the TOR was reaching capacity and may have to shut down if the fuel oil was not loaded soon. Mr Ilebode said in response that he was trying everything possible, but that holidays and lack of freight were impeding his efforts. Vitol chased by email again on the following day and Jeda replied that: "We are working round the clock to sort out logistics. But freight market is very tight at the moment… Once we firm up a candidate we'll inform you promptly, so to agree on a laycan".

26. On 30 December 2019, Mr Ilebode said that he "should have a ship before weekend". He had apparently reserved a tentative loading slot for 18-20 January 2020, as shown on the NPA's quarterly "laycan allocations" which he forwarded to Mr Okpalanne by WhatsApp. Mr Okpalanne responded that he would speak to Vitol London but that they would prefer an earlier loading e.g. 4-5 January 2020. Mr Ilebode said this "may be too prompt".

27. It seems that it was not until 31 December 2019 that Jeda first approached Citibank with a view to issuing the LC. Jeda's Finance Manager, Tunji F Jones, sent a materially identical application to Access Bank UK, who sent back an LC application form on 3 January 2020. However, Mr Ilebode emailed his finance team on the same day, saying

that they should wait until they had completely finalized the deal. I infer that this was a reference to the deal with Gunvor.

28. Vitol continued to press for performance into the New Year. Mr Ilebode gave evidence that on about 2 January 2020 he orally agreed with Mr Okpalanne to "vary the laycan from 23-24 December 2019 to 18-20 January 2020". I do not accept this evidence. What happened, in fact, was that on 3 January, Mr Okpalanne told Mr Ilebode by WhatsApp that Vitol London wanted loading to take place on 13-18 January given that Jeda were late. Mr Ilebode responded suggesting loading on 18 January. Mr Okpalanne replied: "Have to pull up our recap but we agreed 30kt 23-25 Dec?", in other words that Jeda were being held to the agreed laycan. Mr Okpalanne then intimated that Vitol might exercise its right to cancel, saying:-

> "… bit of a conundrum here… the view is that you guys taking a free option on this deal as you'll essentially be lifting a month later than we agreed on the deal. So I'm getting serious pressure here to shift pricing to 5 after BL or walk on the deal …"

Mr Ilebode responded that in his view "you guys [Vitol] forced us to price early and gave us flexibility on the loading in return". This was in my view inaccurate. The parties had agreed 20-30 December 2019 as the pricing period, and 23-24 December 2019 as the laycan. Mr Okpalanne responded that Vitol were concerned about Mr Ilebode "flaking on the deal" and asked Mr Ilebode to please ensure a vessel nomination was made by Monday, 7th January. Mr Okpalanne reported to Vitol London that Jeda were "outta the money" on the trade, having apparently struggled to find a performing vessel: Mr Okpalanne had refused to countenance further trade with Jeda until they had taken delivery of this first cargo.

29. On 6 January 2020, Jeda provided Vitol with details of "two candidate vessels" which they said had been "cleared" and would be used: these were the CONTI BENGUELA and the SKY. Vitol responded, asking for the proposed loading dates, and pressed for berthing on 13-14 January. Vitol were still unaware that Jeda still had no sub-buyer for the cargo.

30. Jeda's negotiations with Gunvor broke down on about 8 January 2020. That same day, Jeda offered to sub-sell the cargo to AFCO Energy Pte Ltd ("**Afco**"). A sub-sale to Afco was then concluded on 10 January 2020 and the formal sub-sale contract was drawn up on 14 January 2020. Pricing was on the basis of Platts 1% CIF NWE +US$45. This was a much lower premium above Platts than had been agreed with Vitol, and pricing was to be averaged over the five days following the bill of lading date ("**BL** + 5"). The cargo having been priced with Vitol basis 20-30 December, Jeda were at risk if the market declined thereafter (as it in fact did). The pricing was later amended further in Afco's favour to +US$43. Afco's proposed performing vessel was the HAFNIA PEGASUS ("**the Vessel**").

31. On 9 January 2020, Mr Assensoh requested Vitol's full style for the LC and promised to share the draft LC with them for review in the coming days. Vitol asked him to confirm that the issuing bank would still be Citibank. Mr Assensoh responded the following day that: "LC will com [sic] from Access Bank but confirmed with 1st Class European bank". It was Jeda, therefore, who proposed to use a confirming bank, Vitol

having already rejected Access Bank as an issuing bank in favour of Citibank). The parties subsequently agreed that Standard Chartered Bank ("**SCB**") would be the confirming bank.

32. From around 9 January 2020, Jeda opened discussions with Afco on the text of the "incoming LC" (i.e. the LC in Jeda's favour) which Jeda were intending to use for the majority of the trade finance. On 10 January 2020 Jeda submitted its application to Access Bank for an LC in Vitol's favour. The same day, Jeda advised Vitol that HAFNIA PEGASUS would be the performing vessel, and gave an ETA of 17 January 2020 (later revised to 18 January 2020). The formal nomination was not made until 14 January 2020.

33. Jeda requested Access Bank to issue the LC by COB on Wednesday 15 January 2020. Access Bank's position, however, was that they first needed to see the "wording of the primary instrument"- i.e., the incoming LC from Afco.

34. Internally, Vitol discussed that Jeda would be almost a month late in arriving. Henry Assah-Akuffo of Vitol Ghana Services Ltd (who dealt with day-to-day operations in Ghana) asked whether Vitol had agreed any new vessel arrival dates. Mr Barrow summarised the position as follows: "… To be very clear – the agreed window was 23-24 December. They are late. We can tell them we have secured them a new window and that the ship should berth on or close to arrival but time will only start to count once the vessel berths as we are not going to pay them demurrage when they are a month late arriving …" This position was later conveyed to Jeda in the long-form contract discussions.

35. Jeda sent some proposed LC text to Vitol on 11 January 2020. Ms Martinho then reverted with required amendments to the draft LC text. In particular, the amount requested was US$17.5 million, and confirmation of the LC was required. Mr Ilebode says that the parties were agreed on a mutually acceptable wording. Jeda did not seem to have been particularly proactive in actioning the agreed text. I have seen no evidence of any approach to SCB at this time to act as confirming bank. Jeda's focus seems instead to have been on the negotiations over the incoming LC from Afco.

36. Ms Martinho chased Jeda for an update on the LC on 14 January 2020 and Mr Assensoh in turn chased Access Bank. Access Bank responded that two particular clauses (relating to *force majeure* and amount escalation) would need to be deleted from the agreed text. Vitol agreed to both. Jeda received a draft LC in Vitol's favour from Access Bank on about 15 January 2020. The LC amount was only US$16,416,000, well short of the US$17.5 million which Vitol had requested. Vitol pointed out that this was not the final draft that had been agreed. Ms Martinho continued to chase Mr Assensoh by WhatsApp and he told her that the LC would be out soon.

37. Jeda continued to chase Access Bank, whose position was they could not issue the LC until they were in receipt of Afco's incoming LC. It appears that one particular requirement of Access Bank was that the incoming LC from Afco's bank should bear a later expiry date and latest shipment date than the LC that Access Bank issued in Vitol's favour (by 15 days and 7 days respectively). Mr Assensoh confirmed the requirement was acceptable although Vitol was not told.

38. Jeda approached Citibank to act as confirming bank on the *incoming* LC, and asked if they, Citibank, could also check the possibility of transferring part of the same LC on Jeda's behalf to Vitol. Jeda do not yet appear to have made an approach to SCB to act as confirming bank on the LC for Vitol as Mr Assensoh had proposed and Vitol had agreed. This was now only one day before the Vessel's arrival at Tema.

39. By 14 January 2020, the Vessel was giving an ETA at Tema of 16 January 2020. However, no LC was in place. The Vessel arrived at the anchorage at 02:00 hrs LT on 16 January 2020. Jeda provided documentary instructions and a pre-berthing meeting with the Ghana Petroleum Mooring Systems ("**GPMS**") took place at 1300 hrs that day.

40. Afco's appointed port agents at Tema were New Maritime and Inchcape Shipping Services Ghana. Both entities began to send regular updates as to the terminal line-up and berthing prospects. Jeda were amongst the recipients. These updates were caveated with the words "kindly note vessels are not listed in any order of berthing as same will only be confirmed by NPA/GPMS". At this stage the berth was occupied by ENRICO FERMI, an LPG vessel chartered by Geogas that was discharging with an ETC 17 January 2020.

41. It was around this time that the "long-form" contractual negotiations to which I have referred above commenced. Mr Ilebode said in his evidence that the parties recorded an agreement to vary the contractual laycan to 18-20 January so as to coincide with the Vessel's anticipated berthing. I reject this. Vitol were objectively clear throughout the exchanges that they would not be agreeing to vary the laycan.

42. With the Vessel at anchorage, Vitol continued to chase for Jeda's LC. On 16 January 2020 Access Bank provided Jeda with an "updated" draft LC in Vitol's favour, and asked to see a pro-forma invoice ("PFI") to confirm the value of the cargo. The request was relayed to Vitol, who provided the PFI on request on the evening of 16 January. The PFI showed a total amount due to Vitol of US$17,263,500. Further particulars of the calculation by reference to Platts quotations were sent by Vitol to Jeda on 17 January 2020 and were eventually agreed.

43. Also on Friday 17 January 2020, with no LC of any sort in place, Vitol placed the cargo on "Financial Hold". Ms Martinho explained that this meant not allowing the cargo to be released for loading until Vitol was comfortable that payment would be received. It is Vitol's usual response where the cargo is otherwise ready to load but adequate financial security is not in place.

44. The Vessel was otherwise approved to berth on 17 January and, notwithstanding the financial hold, the Vessel proceeded to berth on that day, being all fast alongside by 1348 LT. Her Master tendered and re-tendered NOR periodically until the Vessel's eventual departure post-termination. With loading operations not commencing due to the financial hold, the port agents warned that the Vessel could be kicked off the berth if she remained idle.

45. Vitol continued to chase for the LC. Afco's incoming LC was issued during the course of Friday 17 January 2020. Jeda sent a copy to Access Bank and chased for the outgoing LC. The Access Bank LC in favour of Vitol was finally issued on Friday 17 January 2020 and Jeda forwarded a copy to Vitol under cover of an email which admitted to one "slight error", as to the value of the LC, which Jeda said would be rectified first

thing on Monday [20th January]. The LC in fact contained a number of errors. For example:-

(1) The value was US$500,000 short (US$17 million rather than US$17.5 million as agreed), and insufficient to cover the full cargo value as per the PFI. The PFI was for US$17,263,500 based on 30,000 mts, but in fact Jeda had the option of +/-10% on the loaded quantity; and had already indicted they wished to minimize deadfreight;

(2) The LC was not confirmed by SCB (as Jeda had both proposed and promised it would be);

(3) The LC did not provide for a credit tolerance of +/- 10%;

(4) The LC was not as per the draft which Vitol had circulated almost a week earlier.

46. Jeda argued that this was nonetheless a "contractually compliant" LC. Mr Ilebode said the errors were of minor importance. This case is further addressed below but it is wrong. Ms Martinho confirmed in her evidence, and I agree, that the errors were very significant because, the US$500,000 shortfall and lack of credit tolerance meant Vitol had no financial security for part of the cargo value, the lack of confirmation was a problem because Access Bank did not hold sufficient creditworthiness with Vitol Treasury/Credit Team to issue an unconfirmed LC, and the text was contrary to the parties' mutually agreed wording.

47. It in fact transpired that the reason for the US$500,000 shortfall was because Jeda had reached its credit limit with Access Bank, who had made it clear they were only prepared to issue an LC "with value US$17 million (no tolerance)". They would need internal approvals to increase the value on a cash backed basis. Vitol sent Jeda a list of the amendments urgently required. The cargo remained on financial hold.

48. On Saturday 18 January 2020, Mr Ilebode wrote to Vitol, blaming his sub-buyer for what had transpired, assuring them that the LC amendments were being prioritised for "very early Monday" and asking Vitol to start loading on the faith of these assurances. Vitol (Mr Barrow) responded later that morning, in the following terms:-

> "… With all due respect, your boat is a month late in arriving at the loading terminal which has caused considerable issues to our refinery operation and it is disappointing that the LC was then left until the last minute as well. This has all come at considerable cost to us.
>
> For the sake of good order, we have no choice to put you on notice for your failure to present a vessel on time and indeed for failing to now have satisfactory security in place in order to facilitate the loading in a timely manner. All costs that arise from this will be for your account and we expect you to put the necessary security in place as soon as possible on Monday morning and perform all your contractual obligations under the contract.
>
> We are doing everything we can to keep the ship on the berth until Monday so that we are in position to load as soon as you have got

> your LC in place but we are unfortunately unable to load until we have satisfactory financial security in place. The berth is not exclusive to the refinery so we cannot guarantee keeping the boat on the berth whilst we wait for the LC but should she be unberthed we will endeavour to get your boat back on the berth and loading as soon as possible ..."

49. On Sunday 19 January, Afco's port agents advised that the next vessel to arrive at the port was expected the following morning, which could force Jeda's Vessel to vacate the berth. Afco forwarded this information to Jeda, and pressed for loading to commence with the bills of lading to be withheld as a form of security until the financial hold was lifted. Jeda passed this request on to Vitol, stating that: "We have been informed that vessel will be kicked out of berth on Monday if we don't start loading today; the costs of re-berthing vessel and other associated cost will no longer make the trade viable for us."

50. Also on 19 January, Mr Okpalanne met Mr Ilebode (and others) at the Polo Club in Accra, Ghana. There is a conflict of evidence as to what was said. Mr Okpalanne's evidence is that Mr Ilebode did not offer any excuses for not correctly opening the LC and simply said that Access Bank was working on it. He said Mr Ilebode showed on his phone that he was exchanging messages with the head of the NPA, saying that Jeda required more time to issue the LC. Mr Ilebode says, for his part, that Mr Okpalanne used the meeting to convey that Vitol wished the WILHELM SCHULTE to discharge ahead of the Jeda Vessel. I prefer Mr Okpalanne's evidence. Vitol had every incentive to prioritise loading of Jeda's cargo but could not take the financial risk of doing so without adequate financial security.

51. The WILHELM SCHULTE arrived on Monday 20 January 2020 and tendered NOR, awaiting NPA permission to berth. The port agents advised that the Vessel could be kicked off the berth to make way for her. Later that day, the NPA directed the Vessel to vacate the jetty due to inactivity, to make way for the next vessel scheduled to berth. Mr Ilebode said in his evidence that he strongly believed that this was the result of commercial pressure from Woodfields. He also alleges that an agreement had been reached with Vitol to the effect that if the WILHELM SCHULTE was allowed to berth, then Jeda's Vessel would come back on berth afterwards. This agreement is unsupported by the contemporaneous documents and contradicted by Vitol's witnesses and by the commercial realities. First, neither Vitol nor anyone else had the commercial sway to influence the NPA and direct its berthing priorities in this way. Secondly, whilst the WILHELM SCHULTE was a Vitol-chartered vessel, discharging butane for Woodfields, her cargo was worth a fraction of the value of the Jeda cargo. Thirdly, Vitol were concerned that Jeda might "flake" on the deal and were anxious to ensure this did not happen.

52. In the meantime, no LC amendments had yet been received and Ms Martinho continued to chase. Mr Assensoh promised on the afternoon of 20 January that "we should have everything ok today". This did not happen.

53. As regards the LC value, Access Bank agreed to book cash collateral for US$400,000. The incoming LC from Afco was valued at US$17.1 million due to the lower pricing on the sub-sale and US$400k thus reflected the shortfall in value between the two proposed LC amounts. Mr Assensoh told Ms Martinho that "I have max out on my line

with the bank" and so could not offer any further tolerance on the LC amount. Vitol considered internally whether a US$17.5m LC without further tolerance was acceptable. The amended LC in the correct amount was awaited. Access Bank also required the incoming LC to be amended first. Afco's position towards Jeda was that they had put up the LC agreed under the sub-contract and it was for Jeda to get the financial hold lifted.

54. Separately, given that the Vessel had been taken off the berth, Vitol requested that the latest date of shipment in the LC be amended to 31 January 2020. This was a routine LC amendment and one that is expressly contemplated by the Sale Confirmation "Payment" clause. Ms Martinho explained that the concern was to ensure the LC was "cashable", that is to say that the bills of lading once issued would not be liable to rejection by the banks because they post-dated the latest-shipment date. Mr Ilebode gave evidence that this date became the "ultimate deadline" or "cut-off date" or "unmovable deadline" for Vitol to ship the cargo under the sale Contract. I disagree. I accept Mr Henton's submission that it was simply a routine LC amendment to ensure that the LC would be cashable. That day, SCB also wrote to Vitol, advising they had now been asked to confirm the LC, and were seeking internal approval. However, SCB had not received the amended LC from Access Bank.

55. The Vessel shifted to anchorage on 21 January 2020. WILHELM SCHULTE then proceeded to berth. Mr Okpalanne gave evidence that he was required to personally apologise to the NPA for the perception that Vitol had commandeered the jetty for days without being in a position to load.

56. On 21 January 2020, Access Bank told Jeda that SCB had advised the LC with their confirmation and Mr Assensoh in turn told Ms Martinho that LC had been confirmed. SCB had, however, been asked to confirm the *unamended* LC. Ms Martinho objected by email and WhatsApp. Mr Assensoh responded that the amendments were being added. Later that night he said the amendments had been done and promised to share the swift asap. After COB Mr Assensoh said Access Bank had not agreed to two of the amendments. These concerned the "copy documents" clause (Access Bank required originals) and a "date of presentation" clause. Vitol agreed to both changes on the following morning.

57. As at 22 January 2020, Jeda were still chasing Access Bank to issue the LC, and threatening to hold them liable for any losses due to delay. Access Bank effected the changes and advised Jeda. Later that day SCB confirmed receipt of the amendment and said they were seeking internal approval to extend their confirmation to cover the amendments. Vitol finally received the confirmed amended LC through bank channels later that day and accordingly confirmed the lifting of the financial hold, advising Jeda that they were pushing to get the Vessel back onto berth asap.

58. Jeda pleads that the reason why their vessel did not re-berth thereafter until 31 January 2020 was that Vitol was "choosing to prioritise the berthing of other vessels in which it and/or its commercial partner Woodfields had a commercial interest in berthing in priority to the Vessel". Vitol's witnesses gave evidence that every realistic step was taken thereafter to try to expedite the re-berthing and that Mr Barrow coordinated while Mr Okpalanne acted as the man on the ground and point of liaison with the NPA and the terminal. Vitol's internal emails corroborate this evidence and I accept it. The port line-ups were showing that various other vessels had either arrived or were expected. I

accept Mr Okpalanne's evidence that the NPA's default position was that once a Vessel had been asked to depart the berth, she would generally go to the back of the queue.

59. Also around this time Afco also reported that the local authorities were saying the Vessel could not re-berth because Jeda had not paid the shifting and stevedoring charges for the first berthing. Jeda later paid the terminal's shifting charges invoice but had apparently still not paid the stevedoring charges invoice as of 23 January 2020, which Afco said needed to be paid in order to re-berth.

60. The WILHELM SCHULTE completed discharge operations on 23 January 2020 and cast off. Port agents advised that they were awaiting the NPA's confirmation as to which vessel would berth next. On the following day the berthing line-up showed three vessels: the Vessel, HAFNIA PEGASUS, MAERSK CALLAO (she arrived 19 January in order to discharge fuel oil) and CELTIC GAS (ETA 24 January, in order to discharge butane for Fueltrade/Maranatha). Berthing was not shown in order of priority but was subject to the discretion of the NPA. Mr Okpalanne reported internally that Vitol were still pushing for the Vessel to berth, but the NPA appeared to be prioritizing the CELTIC GAS. Mr Barrow instructed Mr Okpalanne to push. Although they were not the charterers of the CELTIC GAS Vitol even approached Fueltrade (one of the offtakers of her cargo), offering to pay their demurrage in exchange for jumping the berthing queue. Fueltrade declined, citing the risk of her owners departing and the risk of stock shortages in Ghana if their cargo was not urgently discharged.

61. The NPA confirmed the CELTIC GAS for berthing on the afternoon of Friday 24th January. Mr Okpalanne said that the NPA would probably have prioritized the CELTIC GAS regardless of Vitol's attempts to persuade Fueltrade to swap places in the berthing queue, given the NPA's inclination to prioritise discharge of LPG to ensure continuity of stocks in the country. CELTIC GAS continued to discharge over the weekend of 25-26 January 2020, and into the following week. The port agents' line-ups showed the HAFNIA PEGASUS and the MAERSK CALLAO awaiting berthing prospects.

62. Internally, Vitol raised concerns about Jeda "flaking" on the deal. However, Vitol/ Mr Okpalanne was unable to persuade the NPA to allow the Vessel to re-berth next. On 28 January 2020 the NPA granted clearance for the MAERSK CALLAO and she berthed later that day. What in fact had happened was that the Ghanaian Minister for Energy had ordered the NPA to berth the MAERSK CALLAO next, having purchased her cargo to supply the AKSA power station in Tema: A formal letter was later sent from AKSA to Woodfields on 30 January 2020 explaining that AKSA had received a request from the Ministry of Energy demanding a boost in stock of heavy fuel oil (of the quality suitable for AKSA) to augment the reduction in power in Ghana due to the unavailability of gas.

63. Upon learning the NPA had given priority to the MAERSK CALLAO, Afco held Jeda liable for all further delays and demurrage. There is no evidence that Afco threatened to terminate the sub-contract. Nevertheless, on 28 January 2020, Mr Assensoh emailed Vitol stating that "our offtaker [Afco] is requesting for deal cancellation", and asked Vitol to "propose a structure to trade out the losses…". Vitol refused, saying "… We are not in a position to cancel this deal. And to sail now, without us agreeing to cancel, would place you in breach when this loading has been delayed only by the late arrival of your vessel and the subsequent delay in the opening of an acceptable LC". Jeda maintained its position

that "Our offtaker is no longer on the table for us unless we can find a middle ground to move forward".

64. On 29 January 2020 Mr Okpalanne advised Vitol internally that the MAERSK CALLAO was discharging for the AKSA power station, but that Jeda's Vessel should berth by 2pm the following day. With loading operations likely to take 3-4 days, however, it was necessary to ask Jeda for a further extension to the LC latest shipping date. Ms Martinho therefore wrote to request a further extension to the latest shipment date in the LC to read 5 February 2020. This was another routine, but necessary, LC amendment request so as to ensure the banks did not reject a documentary presentation of bills of lading with later shipment dates. Ms Martinho said that Vitol still expected the Vessel to berth on 30 January. Jeda responded on 30 January, stating that they were awaiting a response to their proposal (to renegotiate the contract) "to enable us to amend the LC as requested". I agree with Vitol's submission that Jeda were seeking to use the need for a further routine LC amendment as leverage to try to renegotiate a loss-making bargain. Vitol resolved to hold the line until Jeda could show they were ready to comply with their contractual obligations. Later that day the NPA directed the MAERSK CALLAO to vacate the berth and granted clearance for Jeda's vessel to re-berth to commence loading. The MAERSK CALLAO in fact remained alongside until Friday 31st January, apparently due to cargo residues onboard.

65. Vitol chased by email for the LC amendment extending the latest shipment date. Jeda said that they were working on it, but they still sought to link the LC amendment to contract renegotiation. Internally, Vitol discussed the possibility of loading up to a cut-off point pending the amendment but resolved not to take this risk. Mr Okpalanne telephoned Mr Ilebode and reported back: "Just got off the phone with him reaffirming our stance that no point re-berthing this vessel with no amended LC in place and such if we don't get an amended LC before 6pm then it's out of our hand as we can't hold the jetty for another weekend and taking heat from NPA.". Vitol's enquiries with SCB revealed that they had heard nothing about this amendment.

66. By 31 January 2020, the HAFNIA PEGASUS was cleared to re-berth. Vitol continued to chase Jeda for the LC amendment, making it clear that the Vessel could not commence loading until this amendment was made. Ms Martinho continued to chase Mr Assensoh, and reaffirmed Vitol's position as follows:

> "… As you are aware from our discussions today, we are waiting for your amendment to the L/C to ensure that it is acceptable to us after the delays to the loading, resulting from your late arrival, have made the form of opened L/C unsatisfactory. As we are yet to receive your amendment, for good order we refer to the Payment and Credit Risk clauses in our contract and request that you now amend the L/C by no later than Tuesday 4 February. In the meantime we must exercise our right to postpone delivery and take steps to mitigate the issues caused by your breach of contract, including by loading another ship with fuel oil in order to alleviate tank tops at the refinery. We will try to get you loaded as soon as possible after that first ship if we have the satisfactory L/C amendment ..."

67. Mr Okpalanne was rather more robust, saying on WhatsApp "…you guys trying to hold me hostage? Not good … TOR at tank tops on fuel oil as this export delayed massively… We about to go into another wkend of doing nothing because of the damn LC …" In fact, Jeda were preparing drafts of what would become their termination notice.

68. In the early hours of 1 February 2020, Jeda gave notice that it now considered the contract "null and void". The full notice was as follows:-

> "… On the 24th January 2020, our Commercial Director, Mr. Obed Assensoh made it emphatically clear through his emails that if our vessel was not allowed to berth and load the contracted quantity of 30,000 MT Fuel Oil when the berth was vacant then we would not be able to meet our delivery lay can, which will eventually make this deal no longer viable to JE Energy.
>
> He again followed up with additional emails on 28, 29 and 30 January 2020 and all our efforts to get Vitol SA trade team to come to the table and discuss the best workable solution before vessel re-berths as our offtaker were futile. No single member from Vitol SA Trade team had responded to our email request.
>
> Please note that, our Lady MT Hafnia Pegasus vessel arrived at Tema Harbour 2 clear days before the laycan. LC was also issued on the 17th January 2020 with only a confirmation awaiting from SCB whilst our Lady MT Hafnia Pegasus awaits at anchorage. We sought your approval to load while the LC amendment and confirmation were being sorted out. Furthermore in our effort to prevent these avoidable circumstances and the associated losses, we even offered an advice to the trade team to load the vessel and retain vessel documents until Vitol team were satisfied with the LC. All these efforts by JE Energy team to make this our trade successful were vehemently and totally neglected by Vitol.
>
> At this stage, our offtaker has no confidence in our ability to deliver as Vitol refused to load us. As 31st January 2020 marked the deadline for the latest shipment on LC terms and yet berth is still busy, we hereby hold Vitol accountable for non-performance of this contract. As such, we have no other option but to place Vitol on notice for all costs and consequences, including but not limited to demurrage, Chartering costs and Shifting costs due to these delays.
>
> Consequentially, we find this contract null and void. As my Commercial Director has previously proposed, if you wish to discuss new terms, we're more than happy to so ..."

69. Jeda's Vessel re-berthed and was all-fast alongside at 11:48 hrs LT on 1 February 2020. The LC was by this stage worthless, the latest shipment date having now passed. Vitol repeated its position that the Vessel could not commence loading until the LC amendment was in place. Notice was given to the port agents that the Vessel was back on financial hold. When Mr Okpalanne chased to see if the LC amendment would be

in place by Monday, Mr Ilebode's response was simply: "If you wish to discuss new terms we are available".

70. Vitol did not immediately accept the repudiation. On 3 February 2020 they sent a formal letter through solicitors calling for performance by 5 February 2020. Jeda failed to do so and instead persisted in their repudiation. In the meantime, on 2 February 2020, the Vessel had shifted back to anchorage, awaiting orders. By this time the TOR refinery was at tank tops and had had to shut its operations.

71. Under the sub-contract Afco were still pressing Jeda to perform, and were now threatening to terminate if loading did not commence soon. Jeda's position was that they had asked Vitol for "new terms and guarantees" and that they would perform the sub-contract if they got them. Jeda even suggested to Afco that they (Jeda) would "consider stepping out of the chain of this trade", thereby suggesting that Afco should contract directly with Vitol.

72. On 4 February 2020, Jeda sent Vitol a "new offer" to take the cargo at the very much reduced price of +40US$/MT, pricing BL+5. Around this time Mr Barrow had a conversation with Afco in which he learned just how loss-making the deal had been for Jeda. He also learned that Afco had in fact extended the latest shipment date beyond 31 January 2020 and up to 7 February 2020 in the LC under the sub-contract. However, Jeda had never made any attempt to seek such an extension from Access Bank.

73. On 10 February 2020, Vitol accepted Jeda's repudiatory breach as bringing the contract to an end.

Liability

The issues

74. Vitol's case is that Jeda was in repudiatory breach of contract because:

    (1) It failed to nominate a performing vessel to arrive within the agreed laycan of 23-24 December 2019.

    (2) When the Vessel was eventually nominated and arrived Jeda failed to open an acceptable LC.

    (3) Once the Vessel was back at the anchorage Vitol's obligation was to load within a reasonable, non-frustrating, time. That period never elapsed.

    (4) It became necessary for Jeda to obtain a further LC amendment beyond 31 January 2020 but they did not do this.

    (5) Jeda was in clear repudiatory breach when it declared the Contract null and void on 1 February 2020. That repudiation was accepted by Vitol on 10 February 2020.

75. Jeda described the issues somewhat differently, as follows:-

    (1) The meaning of "laycan" in the Contract and whether it was ultimately agreed that Vitol would ship the cargo by 31 January 2020;

(2) The nature of Jeda's nomination obligations and whether Jeda breached them;

(3) The nature of Jeda's obligations concerning the LC and whether Jeda breached them.

Discussion

76. "Laycan" in a charterparty means the earliest day upon which an owner can expect his charterer to load and the latest day upon which the vessel can arrive at its appointed loading place without being at risk of being cancelled. When the term is found in fob sales it means that the seller can cancel the contract if the vessel, which it is the buyer's duty to procure, does not arrive at the port by the cancellation date. This is the classic definition of laycan as found, for example, in *ERG Raffinerie Méditerranée SpA v Chevron USA Inc ("The LUXMAR")* [2007] 2 Lloyd's Rep.542 at [16-18]. Jeda submits, however, that these parties did not mean "laycan" in the classic sense above when they used it in this Contract. Instead, they say that "laycan" simply means the shipment or loading period.

77. I reject Jeda's submission. It is contrary to the usual meaning given to "laycan" in fob contracts. It is also contrary to the long-form terms that were agreed between the parties and the 2015 BP Oil International Limited General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products that was specifically incorporated into the Contract by the "Other Terms" provision. Clause 6.1.2 of the latter expressly provided that the vessel nominated by the Buyer shall arrive at the loading terminal and in all respects be ready to commence loading the crude oil deliverable thereunder by no later than 2359 on the last day of the laydays. There is no evidence before me to suggest that the parties had agreed that a different meaning was to be given to "laycan".

78. Jeda's failure to present a vessel within the arrival window stipulated in the laycan clause gave Vitol the right to terminate upon the expiry of the laycan. Vitol's decision not to do so meant that it was entitled to demand performance and, all other things being equal, had a reasonable time (i.e. one that was not frustrating) in which to load the cargo after Jeda had provided a vessel.

79. Jeda argue that if they are wrong about the meaning to be given to laycan the parties did in any event later agree that Vitol would load the HAFNIA PEGASUS by 2359 on 31 January 2020. This agreement is said to have crystallized through Vitol's request on 20 January 2020 that the latest date for shipment under Jeda's LC be amended to 31 January. This request was, Jeda say, accepted by them when they provided an amended LC on 22 January.

80. It is common ground that the parties to a sale contract under which payment is to be made by means of an LC can vary their contractual obligations by subsequently agreeing to an LC in different terms to those specified in the contract: see *Ficom v Sociedad* [1980] 2 Lloyd's Rep. 118 at 131 (Robert Goff J.); *WJ Alan & Co Ltd v El Nasr Export and Import Co.* [1972] 1 Lloyd's Rep. 313 (CA). Jeda also relied upon the decision of Colman J. in *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128 at [105]. Vitol submitted, however, that each case must turn on its facts and that the parties here did not agree to amend the contract to provide for a 31 January shipment *deadline*. I agree. As I have already found, Vitol required the LC to be amended so as to ensure that it would be cashable. As at 20-22 January 2020 it was

assumed that the cargo would be loaded by 31 January 2020. Once it became clear that there was a risk that this was no longer going to be the case, Vitol asked for the LC to be amended. Jeda was required to amend the terms pursuant to the payment provisions in the long-form contract terms. These provide, insofar as material, as follows:

> "… If for any reason the delivery, loading and/or discharge of the Product, as the case may be, will not take place within any relevant period which may be referred to in the LC, Buyer shall promptly provide a new documentary letter of credit or amend the existing LC in terms acceptable to Seller. Buyer will remain responsible for payment in the event that payment is not made under the LC for any reason …"

81. Finally, Jeda contend that even if there was no binding agreement that Vitol was required to ship the cargo by 31 January 2020 Vitol is nevertheless estopped by convention from denying that both parties were, as from 22 January, working under the assumption that it was under such an obligation. The relevant principles were set out by Briggs J (as he then was) in *Revenue and Customs Comrs v Benchdollar Ltd* [2010] 1 All ER 174:-

> "… In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings . . . are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) 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 upon it. (iii) 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. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) 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 ..."

This was approved and applied by the Supreme Court in *Tinkler v Revenue and Customs Commissioners* [2021] 3 WLR 697 at [45].

82. I agree with Vitol that Jeda does not satisfy principle (i). The chronology shows, at best, a hope that loading would take place by 31 January 2020. There was, however, no common assumption between the parties that this was the date by which Vitol had to load, failing which the contract would be terminated. There is no scope here for the application of any estoppel by convention.

83. Finally, Vitol contend that Jeda was in breach of its obligations concerning the LC that it was required to open in Vitol's favour. Jeda, however, submits that Vitol was in

breach of its obligations. I agree with Jeda that as until 23 January 2020 their obligations were governed by the terms of the Deal Recap. This is because agreement had not yet been reached on the long-form terms. The Deal Recap provided that the Payment security would be a "Documentary LC". What does this mean? Jeda submits that it means that they simply had to provide an LC and that they did so on 17 January 2020. Vitol disagree, saying that the parties had in fact agreed to provide an LC on Vitol's form. As I find in paragraph 35 above, the parties did in fact agree on a mutually acceptable wording for the LC. This included that the LC was to be to be for US$17.5 million and that it was to be confirmed. The cargo was placed on "Financial Hold" by Vitol before Jeda had provided it with any LC and the LC which they did provide on the evening of Friday, 17 January 2020 contained, as I have found in paragraphs 45 and 46 above, a number of errors and was not in the form that had been agreed between the parties. Vitol were in my view entitled to place and keep the cargo under Financial Hold. They were not in breach in doing so. Nor did Vitol facilitate the "overlapping preferential berthing" of the WILHELM SCHULTE.

84. I am satisfied that Jeda failed to put up an LC in satisfactory terms. I am also satisfied that Jeda was in repudiatory breach of contract when it treated the contract as being null and void. It had no grounds for so doing.

Conclusions on liability

85. I find that Vitol succeeds on liability. Jeda's counterclaim is without merit and I dismiss it.

Quantum

86. Vitol's primary claim is for damages according to the usual contract/market measure. If, as Jeda contend, the contract/market measure is not applicable then Vitol advance an alternative claim based on their actual hedging and related losses. Jeda's primary case is that Vitol suffered no recoverable loss.

87. The parties originally put their case on the basis that Vitol's loss, if any, was to be assessed on the basis that the contract was for the sale of 30,000MT of fuel oil. The contract was, however, for the sale of "30,000MT +/- 10%". I raised with the parties whether the claim should in fact be limited to 27,000MT (i.e. 30,000MT – 10%) on the assumption that it should be assumed that Jeda would have performed the contract in the way most beneficial to their interests: see *McGregor on Damages* (21st Ed.) at §10-111. They both agreed that it should be.

Did Vitol suffer any loss?

88. I deal first with Jeda's submission that Vitol suffered no loss. The basis of this contention is that following the termination Vitol did not perform its inward purchase from Woodfields, without any liability falling on Vitol. Vitol therefore is said to have mitigated its loss away from that which it stood to suffer as a jilted seller to the position of a party who had suffered only its net loss of profit on the intended transaction. Jeda submits that Vitol has not led any evidence of its loss of profit and can therefore only recover nominal damages.

89. I have no hesitation in rejecting Jeda's submission. It does not reflect the facts. Vitol had the exclusive right to sell crude oil to Woodfields for processing and either (i) to buy back the refined products itself to on-sell, or (ii) to cause Woodfields to make such sales to third parties directly and pay the funds into escrow or assign the proceeds to Vitol. This is clear from the Master Sale Agreement: see clauses 3.1, 3.3, 4.1.1, 4.1.2, 6, 6.3, 6.4, 7.3. In exchange, Woodfields received a processing fee (or commission), but Vitol otherwise remained in control of the crude oil and refined products and their sale to third parties: see the payment mechanism in the Umbrella Agreement. Although individual spot contracts were drawn up for each parcel (with Vitol selling crude to Woodfields and Woodfields selling fuel oil to Vitol), Vitol remained the party which bore either the profit or loss from the sales of fuel oil to third parties such as Jeda. When the Jeda contract was terminated, the corresponding purchase from Woodfields was similarly not performed. The cargo remained at the TOR and could only be re-sold with Vitol's approval. I find that the usual contract measure is therefore entirely apposite. Vitol was not an intermediate party who had persuaded its own seller to take the product back. Vitol remained the party who needed to place the cargo on the market. It was in exactly the same position as any other innocent seller whose damages are to be assessed under s. 50(3) of the *Sale of Goods Act 1979*.

The evidence

90. *Factual evidence*. The following facts, which I find, are relevant to the arguments that were addressed to me and to my assessment of the damages:-

(1) Vitol sold 20,000MT of fuel oil to Litasco on 31 January 2020 for delivery in February and March 2020. This cargo was sold at a premium of +US$75 per MT.

(2) On 28 January Mr Okpalanne valued the oil at +US$95 per MT and on 7 February he valued it at +US$75 per MT on the basis that the Litasco sale was the best indicator of the value of the oil at that date. On 31 January Mr Barrow thought that he could sell it for +US$80 per MT.

(3) On 11 February there is evidence that Vitol either offered for sale, or at least showed that they had available for sale, 30,000MT of Fuel Oil to five international trading outfits. These were PetroChina, Shell, Fujairah Refinery Company Ltd, Aramco and Uniper. None of them appears to have shown any interest in the oil.

(4) Also on 11 February, Vitol's Mr Barrow valued the fuel oil at +US$75 per MT in a mark to market report. That report was meant to be, as Mr Barrow told me, an absolutely accurate reflection of the price at which Vitol thought they could sell the oil. He said that the cargo was revalued on 17 February 2020 at +US$40 per MT following a privileged exchange within Vitol. There is no documentary evidence of this remarking and I find it surprising that the fuel was apparently remarked on 17 February at US$35 per MT less than it had been on 11 February.

(5) On 20 March Vitol sold further parcels to Litasco at +US$30 per MT.

91. Mr Barrow said in cross-examination that sometimes traders mark the things a little higher than they can sell them for and that the mark to market process is highly fluid

and is wrong all the time. He also said that the market was affected by Covid. I was unable to accept this evidence. There is nothing to suggest that the market was in any way concerned about Covid as at mid-February 2020 although the experts agree that there was a rapid reduction (a steep contango) in early to mid-March 2020. Whilst I accept that the mark to market process will not always reflect the actual market value I am satisfied that it is, when carried out by a broker with the knowledge and expertise of Mr Barrow, more likely than not to reflect a good assessment of market conditions.

92. *Expert evidence*. Both parties called expert evidence:-

(1) Vitol called Mr David North. He is an expert in the fields of oil and gas pricing and embedded contract options. He started work in 1988 as a graduate trainee with BP and remained within the BP group until 2007. He was then involved in setting up and running trading businesses for Klesch and Co, RWE Supply and Trading and BTG Pactual. This was the first time that he had given expert evidence in court. His view is that there was a market for the fuel oil as at 11 February 2020 and, in his supplementary report he valued the cargo at a premium of between US$51.36 and US$64.81 per MT using the netback process.

(2) Jeda called Ms Catherine Jago. Ms Jago has been involved with the commercial side of the oil industry for over 39 years as an oil trader, oil broker, oil pricing journalist and consultant. She has given expert evidence over a period of some 31 years. Her view was that there was no market for the fuel oil as at 11 February but that , if she was wrong about that, she valued the cargo at US$75 per MT.

93. Both experts gave their evidence well and I consider that both were trying to assist the Court.

Was there a market?

94. Vitol's claim is made pursuant to section 50(3) of the *Sale of Goods Act 1979* which provides as follows:-

> "… 50. Damages for non-acceptance …
>
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept ..."

95. Ms Jago considered that there was no available market for the fuel oil in late January or early February 2020. She was of this view because it was not possible for Vitol to export cargoes for the last days of January and because, in addition, it seemed to her that there was only one active seller, Vitol, and one active buyer, Litasco, in the market for fuel oil cargoes ex Tema. Mr North disagreed. He considered that there was one seller in the shape of Vitol and that there was a pool of potential buyers for the fuel oil.

96. I am satisfied that there was a market for this fuel oil. The fact that Vitol are, by themselves or through Woodfields, the only seller of fuel oil from Tema does not mean that there cannot be a market. The relevant questions to my mind are (1) whether there was a fuel oil cargo available and (2) whether there was a buyer or pool of potential buyers for the cargo. As to (1) there was most certainly a fuel oil cargo of at least 27,000MT of fuel oil available at and after 11 February 2020. As to (2), I find that that there was a potential pool of buyers for the cargo. The experts agreed in their Joint Expert Memorandum that "if there was a cargo available at Tema, there was a large constituency of buyers for this kind of product, many of whom could be comfortable buying this product in Tema for transport to markets elsewhere". I am not satisfied on the evidence before me that Vitol took active steps on or after 11 February 2020 to market the oil across the full constituency of potential buyers. Had they done so I am satisfied that they would have found a buyer for it.

97. It follows that it is not necessary for me to consider Vitol's alternative claim for hedging losses.

What was the market value?

98. It is common ground that the likely sale price of the oil if it had been delivered to Jeda would have been $575.45MT. It is also common ground that the benchmark price as at 11 February 2020 was US$378.50 plus whatever the appropriate premium is assessed to be on that date. The only issue between the parties, if I conclude that Vitol did suffer a recoverable loss, relates to the market uplift which is appropriate. They had agreed an uplift of US$100 per MT in their contract.

99. It is common ground between the experts that the netback approach adopted by Mr North can be an appropriate way of assessing the market value of oil. In order to assess this Mr North performs a calculation which assesses the highest value of the product at market net of freight and deducts the freight and associated costs in moving the product to that market. His analysis established that the optimum market in which to place this product would have been the Western Mediterranean. In his supplementary report he conceded that the value of this straight run fuel oil was enhanced by the fact that it had a sulphur content that was lower than (and therefore superior to) the required specification for Very Low Sulphur Fuel Oil and that this could have had an effect on pricing. He therefore amended his calculations to make allowance for the added sulphur value that would likely be retained by the seller. This produced a "low end" premium of US$51.36 per MT on the basis that the seller (i.e. Vitol) retained 25 percent of the added sulphur value and US$64.81per MT on the basis that he retained 75 percent of the added sulphur value.

100. Ms Jago did not accept that the netback approach was the best method by which to value this cargo. She regarded the price paid by Litasco at the end of January 2020 as representing the value of the oil as at 11 February. If the netback approach was appropriate then she considered that Mr North had underestimated the net value of the cargo. Mr Caplin submitted that if the appropriate adjustments were made to Mr North's assumptions (a retention of 75-100% of the added sulphur value, a US$1-2MT addition to the price to reflect the cargo's improved viscosity and a reduction in the amount of assumed freight) the netback figure would have yielded a result of about US$75 per MT.

101. Mr Henton submitted that evidence of actual sales was *res inter alios acta* and that I should pay no, or very little, regard to it. He relied on *Benjamin* (above) at §16-076 and the decision of the Court of Appeal in *Campbell Mostyn (Provisions) Ltd v Barnett Trading Company* [1954] 1 Lloyd's Rep 65. The editors of Benjamin observe that

> "… The individual characteristics of the claimant, such as his personal ability to negotiate sales, are irrelevant: 'the subsection contemplates a hypothetical sale by a hypothetical seller of the amount in question of the goods in question'. If there is proof of the market price at the date of the buyer's breach, the actual price obtained by the seller upon his reselling the goods at a later date should be res inter alios acta and irrelevant to the assessment of damages, whether the resale price if higher or lower than the market price …"

The editors go on to observe, however, that where normal proof of the market price is not available the court may accept other evidence, such as proof of the price at which the seller in fact resold the goods to another buyer.

102. It is, in my judgment, important to emphasize that s.50(3) of the 1979 Act establishes a prima facie rule. That is why there can and will be exceptions to it. In the present case I have to determine the market value of this particular fuel oil. There is only one seller of that fuel oil, namely Vitol. I am satisfied that the price at which Vitol sold fuel oil to Litasco at the end of January 2020 represented the market value of the oil as at that date. There is no evidence to suggest that the market had fallen between that Litasco sale and the 11 February 2020. If there had been any concerns that it had then I consider that Mr Barrow would have reflected this in his mark to market report on that day. As I have said, I am satisfied that the mark to market report prepared by Vitol on 11 February 2020 is more likely than not to reflect a good assessment of market conditions. I find that the likely premium recoverable for this fuel oil as at that date was US$75 per MT.

103. The quantum of Vitol's claim is, therefore, US$3,292,650, calculated as follows

US$575.45 – US$378.5 + US$75 x 27,000MT = US$3,292,650

Relief

104. I find that Vitol is entitled to judgment in the sum of US$3,292,650. Interest is payable at the rate of 8% above LIBOR pursuant to the Late Payment Interest clause included in the long form terms agreed as part of the Sales Confirmation.

105. I am grateful to Mr Henton and Mr Caplin for their able and concise presentation of their respective clients' cases and to their instructing solicitors for the case preparation.