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Claim No: LM-2021-000160

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

LONDON CIRCUIT COMMERCIAL COURT (KBD)

Before His Honour Judge Pearce sitting as a Judge of the High Court

BETWEEN

KSY JUICE BLENDS UK LIMITED

Claimant

-and-

CITROSUCO GMBH

Defendant

Ms LIISA LAHTI instructed by **BLAKE MORGAN LLP** for the **Claimant**

Mr THOMAS CORBY instructed by **ENYO LAW LLP** for the **Defendant**

Hearing dates: 5, 6, 7, 8 March 2024

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on Friday 9 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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INTRODUCTION

1. This is a claim for the price of certain goods, alternatively for damages for breach of contract, which the Claimant, a Greek company, alleges the Defendant, a Brazilian company, was obliged to, but did not, accept under a contract for the sale of a product

known by various names, most commonly orange pulp wash or wesos¹. For brevity's sake I shall use the latter term, though several people in this case generally use the former. At its highest, the claim is put at around €4.8 million, though there are a variety of arguments about the correct calculation of the claim, even accepting the Claimant's core case.

2. The contract with which the case is concerned is what is defined below as the 2018 Contract. It related to the sale of wesos in 2019, 2020 and 2021 and was negotiated by Mr Tim Kaden for the Claimant and Mr Dirk Lansbergen for the Defendant. It is common ground that, pursuant to that contract, the Claimant delivered 400 Metric Tonnes² of wesos to the Defendant in 2019 for which the Defendant paid. The Defendant declined to take delivery of a further 800 MT in the sense of not giving instructions for the delivery of the product. In 2020, the Claimant delivered 126 MT of wesos to the Defendant of which the Defendant has paid for 84 MT but 42 MT remains unpaid on an invoice for which the Defendant admits its liability. In September 2020, the Claimant terminated the contract alleging that the Defendant was in repudiatory breach of contract.
3. The Defendant admits its liability on one invoice for the balance of the wesos delivered in 2020 for which it has not paid, in the sum of €64,287.72. It states that that liability is however exceeded by the Claimant's liability on a cross claim for US\$240,112.42. Otherwise, the Defendant disputes the Claimant's claim.
4. In turn, the Claimant admits its liability on the cross claim for US\$240,112.42 but asserts that its claim well exceeds that figure.

THE PRODUCT AND ITS MARKET

5. Those accustomed to purchasing pure orange juice from their local supermarket will be aware that it comes in two forms, of which one is typically labelled "not from concentrate" (NFC). Both NFC orange juice and the other type of pure orange juice, which is made by reconstituting frozen concentrated orange juice (FCOJ), are made by the extraction of juice from oranges. Both processes leave a residue of orange pulp. That orange pulp can be subject to a water extraction process producing the product known as wesos.

¹ Wesos is an acronym from the term "water extracted soluble orange solids."

² Hereafter "MT"

6. Wesos is not itself an orange juice and cannot be marketed as such in many countries (including the European Union and the United Kingdom). However it is a natural product in the sense that it is made only from oranges and water. It has a number of uses including (in some countries) being reconstituted into a drink similar to orange juice but more widely being used as a base for orange flavoured drinks.
7. The FCOJ market is dominated by Brazilian producers, the three largest being Cutrale, the Defendant and Louis Dreyfus. However, Northern Hemisphere orange-producing countries such as Greece have a significant place in the market because their peak production time, December to March, is six months before/after the peak production time in the Southern Hemisphere. This is particularly significant given that wesos has a shelf life of 12 months so that Northern Hemisphere production may assist in making up for a prospective gap in the supply of Southern Hemisphere production.
8. Two other concepts should be noted. Brix³ is a measure of the amount of dissolved solids in a liquid via its specific gravity. The “Brix unit” is commonly used in the orange juice business as a means of pricing, the price being fixed on the basis of an assumption as to the Brix level with an adjustment to reflect the actual level.
9. The concept of “free trucks” is of relevance to the calculation of price in this case. It is described by Professor Koutoupis, the Claimant’s expert, in the Joint Statement of the experts as *“a promotional pricing strategy used in contractual agreements. The mechanism is used to adjust the contracted price in response to market price fluctuations. It involves providing free product on top of the contracted volume, thus aligning the price of the goods with the current market conditions.”* It is not a concept with which the Defendant’s expert, Mr Apa, has been familiar in Brazil. Indeed, there is some suggestion that it is a practice of the wholesale drinks industry, rather than the food and drinks manufacturing industry. In addition it may be that the concept is used in some countries rather than others. In any event, it appears to be more familiar to some of the players in this case than to others. However, there seems no reason to doubt that Mr Lansbergen and Mr Kaden each understood it to mean as defined by Professor Koutoupis.

³ The unit is named after Adolf Brix, who was a Prussian civil servant with an interest in mathematics and measurement.

10. The result of the use of the Free Trucks method, at least as deployed here, is that the invoicing price remains constant and the delivery volume varies according to market conditions. The Claimant, through its witness Mr Papadimitrakopoulos, indicated that it was using invoice factoring. It may well be that the use of a fixed invoice price assists in that kind of financing. However, for the sake of clarity, I should indicate that I have no reason to think that there was any impropriety in the Claimant's use of a financial institution to factor invoices at the fixed rate of €1,600/MT. At one point in his evidence, Mr Papadimitrakopoulos expressed concern that it might be being alleged that Mr Kaden or the Claimant generally had acted fraudulently. Mr Corby made clear that he was not alleging this and I accept that there are no grounds for suspicion that the Claimant was so acting.

CHRONOLOGY

11. In preparation for the trial, the parties produced an agreed dramatis personae and chronology. Those documents greatly assist the reader in understanding the case. I have appended the documents to this judgment, with a small number of corrections where I have noticed errors⁴ and a small number of additions where I have referred to documents that were not in the original. All documents referred to in this judgement are summarised with a reference in the appendix and it is unnecessary to repeat the detail of most of those entries in the body of the judgment.
12. In addition, I am grateful to the parties for the list of actors which again is appended to the judgment, again with minor additions to meet the contents of this judgement.

THE CONTRACT

13. The Claimant's case is based upon alleged breaches of the 2018 Contract. It will be noted from the chronology above that there were two earlier contracts between the parties in 2017 which were on similar terms to the 2018 Contract.
14. The First 2017 Contract, numbered KSYCITROSUCO24022017.24/2017 and dated 13 March 2017, was for the sale by the Claimant to the Defendant of a fixed quantity of 200 MT of wesos. The agreement as to price was in the following terms:

“EURO 1.600/MT for 60 Brix

⁴ I have not corrected what may be punctuation or similar errors.

Price adjustable according to Brix value +- 5 brix”

15. The parties entered into the Second 2017 Contract (No: KSYCITROSUCO 07072017.51/2017) for increased amounts. Pursuant to the Second 2017 Contract the Claimant agreed to sell to the Defendant an initial fixed quantity of 100 MT of wesos followed by further quantities of 400 MT and 500 MT,

16. The terms as to price in the Second 2017 Contract were:”

“100mt EURO 1.600/MT for 60 Brix

Price adjustable according to Brix value +- 5 Brix

400mt price to be agreed until September 2017

500mt price to be agreed until January 2018”

17. The terms as to delivery were:

“100mt July 2017 – August 2017

400mt October /November 2017 - March /April 2018

500mt May 2018 – October 2018 - the volume of 500mt must be confirmed from both sides within January 2018”

18. The 2018 Contract provides:

“3. Price

Invoicing price is 1.600euro/mt for 60 brix

Price adjustable according to Brix value +- 5 Brix

Free trucks will be offered from the seller according to the agreed volume & price of each year.

Calculation basis for the 1.200mt fixed is 1.350 euro/mt which corresponds to the 400mt/year 2019-2020-2021

...

5. Delivery period:

1.200MT per each year

Deliveries to start January to December with the following split:

400mt fixed at 1.350euro/mt – invoicing price is 1600euro/mt

Difference of price in free trucks

800mt at open price to be fixed latest by December of the previous year

Difference of price in free trucks

...

9. Instructions for dispatch, Advice for Dispatch:

The Buyer should inform the Seller 15 days prior to every delivery.

The Buyer is obliged to inform the Seller concerning the receipt and condition of goods as well as any potential remarks within five (5) days from date of receipt of the Product.

10. Quantity: 3600MT...

...

16. Entire Agreement

The Agreement constitutes the complete agreement between the parties hereto, and no representations or understandings other than those herein expressed shall add to, vary or modify the Agreement, unless such addition, variance or modification is made in writing and signed by both parties.

17. Severance

The parties hereto intend this Agreement to be valid and enforceable to the fullest extent possible. Therefore, every provision of this Agreement is intended to be severable, and if any provision or term is declared to be invalid or unenforceable for any reason, that provision or term shall be severed from this Agreement and the remaining provisions will be fully valid and enforceable in accordance with their terms.”

19. The Claimant’s case is that the Defendant was in repudiatory breach of the 2018 Contract by its failure to take delivery of wesos and that the Claimant was entitled to and did terminate the 2018 Contract by accepting the Defendant’s repudiatory breach in a letter dated 25 September 2020. The Defendant’s case is that that letter itself was a repudiatory breach of the contract which the Defendant accepted by letter dated 26 October 2020. On any version of events, the contract did not survive the end of October 2020.

THE ISSUES

20. It is common ground that the Claimant was obliged to deliver 400 MT of wesos per year. The price in respect of that quantity of the product is not in dispute, though the

liability to deliver and pay for it after termination of the contract is. The issues that arise relate to the balance of 800 MT of wesos per year.

21. Within their skeleton arguments the parties at trial set out the issues in very similar terms. They can conveniently be summarised thus
 - a. Issue 1 – An Agreement to Agree? In so far as the 2018 Contract did not specify the price for wesos beyond 400 MT per year, was the contract for the sale of wesos beyond 400 MT per year enforceable or rather unenforceable as a mere agreement to agree?
 - b. Issue 2 – The Contractual Price of the Wesos. If the contract was enforceable for the sale and purchase of wesos beyond 400 MT per year, what is the contractual price?
 - c. Issue 3 – The Claimant’s claim for price in the period prior to termination. Is the Claimant entitled to claim the contractual price for wesos up to termination?
 - d. Issue 4 - The Claimant’s claim for damages in the period prior to termination. Alternatively is the Claimant entitled to damages for non acceptance of the wesos prior to termination?
 - e. Issue 5 - Termination of the 2018 Contract. Was the Claimant entitled to terminate the 2018 Contract on 25 September 2020 as a result of the Defendant’s repudiatory breach of the contract or was that termination itself a wrongful repudiation or renunciation of the Contract?
 - f. Issue 6 – Damages for Termination of the 2018 Contract. If the Claimant was entitled to terminate the Contract, what damages is it entitled to claim as a result thereof.

THE TRIAL

General Matters

22. During his opening submissions, Mr Corby for the Defendant accepted that the witness statements in this case, particularly those for the Claimant, contained a considerable amount of inadmissible opinion evidence on the issue of the construction of the contract. In reply to a comment from me, he stated that PD57AC is more honoured in the breach than the observance. Both he and Ms Lahti were astute neither to rely on inadmissible evidence from their own witnesses nor to cross examine on such evidence

in the statements adduced by the opposing party. That is greatly to their credit and meant that the trial was dealt with efficiently. But the mere fact that more was not made of the issue of non compliance with PD57AC does not mean that it should go without mention. As Fancourt J said in *Greencastle v Payne* [2022] EWHC 438 (IPEC) at [22], “*The whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination.*” Further it is not for the parties alone to determine how the court deals with non-compliance (see paragraph 34 of his judgment in the same case). With respect, I agree. There is far too much lip service paid to PD57AC by those preparing and certifying witness statements. Whether they see this as a way of managing their clients’ desire to be given a voice on the issues in the case or as a convenient way to summarise material, they should not work on the assumption that non-compliant witness statements will not have consequences, whether simply by way of unfavourable costs orders or through the range of sanctions in PD57AC including their being ruled inadmissible.

23. In the event, the non-compliance with PD57AC did not significantly affect the progress of the trial. This is not a trial in which I was asked (or indeed I considered that I ought in any event) to take any of the more draconian sanctions referred to in PD 57AC, [5.2]. I shall leave as an issue to be dealt with consequential to this judgment whether the costs order ought to reflect the non compliance.
24. Professor Koutoupis, the Claimant’s expert witness, described the market in wesos as oligopolistic, dominated by the three major players identified above, one of which of course is the Defendant. On the other hand, the Claimant is a relatively small company. The discrepancy in market position between the Claimant and the Defendant is of some relevance to issues in the case, in particular the ability of the Claimant to mitigate its loss by selling wesos to others in the market as well as their relative negotiating strength in respect of resolving disagreements as to price.
25. At the beginning of his evidence, indeed before he was first asked a question, Mr Papadimitrakopoulos, the CEO of the Claimant, told me of his pride in the history of the Claimant company as a family business and, as he put it, “*I give the future and the existence of my KSY, my company, to the British court and to your Lord.*” I am of course conscious that a discrepancy in size between parties might be a relevant consideration

in respect of some of the issues to be determined, but the court cannot be influenced simply by a sympathy for the financial situation of one party and the potential affect of the litigation upon it. To have regard to such matters would be the antithesis of applying the rule of law.

Lay Witnesses

26. During the trial, I heard evidence from the following lay witnesses:
 - a. For the Claimant, Mr Christos Papadimitrakopoulos and Ms Mary Riga;
 - b. For the Defendant, Ms Corinna Hogan and Mr Luis Armando Figueiredo Junior.
27. In addition, the Claimant relied on statements from Mr Petros Kapasakalidis, Mrs Varvara Giannoulidou and Ms Orieta Tzani.
28. As I have noted above, the claim is brought on a contract negotiated by Mr Tim Kaden on behalf of the Claimant and Mr Dirk Lansbergen on behalf of the Defendant. Neither was called to give evidence. Perhaps unsurprisingly, neither party invited me to draw an adverse inference from the other side's failure to call the witness. Indeed, both counsel emphasised during their submissions the limited extent to which evidence of the parties' intentions or even discussions during the period of negotiating the contract is relevant to this judgment. For reasons dealt with later, the intention of the parties is potentially relevant in particular as to whether the parties intended there to be a binding contract for the whole 1,200 MT per year of wesos or simply the sale of 400MT of wesos with in effect an option for the sale/purchase of more, in the event that the parties could agree a price.
29. I agree that in terms of contractual construction (as opposed to determining whether the parties intended to contract) the subjective thoughts of the negotiators, even if shared, would not be admissible. As Mr Corby put it in opening, the court has probably been spared plainly inadmissible evidence through their not being called, though as he also rightly says that has not spared the court from other inadmissible evidence on the same matters from witnesses who have provided statements. Given the limited amount of evidence within statements that was both admissible and relevant, cross examination of all witnesses was brief. It is unnecessary for me to deal with much of what they had to say but I note several relevant matters that were raised.

30. In respect of those witnesses from whom I heard evidence, there was little by way of factual dispute, cross examination rather focusing on matters of emphasis and to some extent interpretation.
31. I have noted above certain of Mr Papadimitrakopoulos' oral evidence. In truth, apart from providing valuable background to the dealings of the parties, most of which was not disputed, his evidence did little to assist on the central issues in the trial.
32. During the course of her evidence, Ms Riga explained how the Brix level would lead to an adjustment in the price of wesos, for example, an invoice where the Brix level was 57, leading to an adjustment of the contractual invoice price of €1,600/MT to an actual invoice price of €1,520/MT. She also set out the Claimant's position as to invoicing for the wesos. She was cross examined at some length about attempts to find alternative markets for the wesos, once it became apparent that the Defendant would not take delivery. In essence her evidence was that the Claimant exhausted all attempts to do so without success.
33. Mr Figueiredo Junior for the Defendant did not shy away from his belief that the Second 2018 Contract was bad from the Defendant's point of view, the effective price of €1,350/MT for the first 400 MT per year being excessive for wesos of minimum of 50 Brix. He accepted that, from late 2019, the Defendant no longer had a contract with one of its customers, Dohler, for which it could use the Greek wesos and that it was looking for alternative markets. This was not straightforward, even for a large company like the Defendant. There were two particular issues here: the relatively short shelf life of the product and the low Brix levels.
34. Mr Figueiredo was taken to various documents relating to the Defendant's excess of wesos in 2020 and agreed that, had it been reasonable to sell the Greek wesos, they would have done so. In fact they could not.
35. Some of the cross examination of Mr Figueiredo related to his assertion that the Claimant had acted unprofessionally and/or unethically in trying to extract money from the Defendant to meet storage costs. Whilst I do not consider these allegations to be made out, they do not in my judgment affect the issues before the court.
36. Ms Hogan's evidence also dealt with the Defendant's position regarding using the wesos and she too agreed that by late 2018, the Defendant had an excess of wesos and that it was trying to slow down delivery, even under the 2017 Contracts. Indeed, they

tried to use the Claimant's product in place of producing more wesos of their own where this was possible. However there had been difficulties, in particular in using the Greek wesos to fulfil a contract with Juice Dream because of a quality issue – Ms Hogan did not however know the detail of this. She also acknowledged that the contract with Doehler had terminated, shutting off another use for the Claimant's product.

37. The Defendant continued to look for ways to sell the Greek wesos into 2019. Ms Hogan pointed out that she was not a member of the sales teams, but acknowledged that they were trying to find ways to use the 400 MT that (on the Defendant's case) they had committed to purchase in 2019 but were having difficulties with this. She agreed that finding purchasers for the product would take time and would be hard as the remaining shelf life of the product reduced.
38. Ms Hogan was taken to her calculations referred to in an email to Mr Mateus Carmo of the Defendant dated 6 November 2018. In that document, she referred to the Greek wesos and set out figures relating to the Second 2017 Contract and the 2018 Contract in a section headed "Contract Overview":

"Current contract all fixed

<i>Vol</i>	<i>€ Price @ 60 Brix</i>	<i>Rev</i>
<i>189</i>	<i>--</i>	
<i>643</i>	<i>1,600</i>	<i>1,028,352</i>
<i>832</i>	<i>1,236</i>	<i>1,028,352</i>

New Contract 800mt to be fixed

<i>400</i>	<i>1350</i>	<i>540000 fixed</i>
<i>800</i>	<i>1180</i>	<i>944000 open</i>
<i>1200</i>	<i>1,237</i>	<i>1484000"</i>

39. It was put to Ms Hogan that the suggested price of €1,180 matched the evidence of the Defendant's expert as to the market price of the wesos, indicating that there was a readily calculable market price for wesos. Ms Hogan responded that she could not recall how the figure had come to be put there. She did not accept that she was aware of a market price for wesos.
40. Ms Hogan agreed that the process with delivery of the product was that she would request shipment to the relevant location, her counterpart at the Claimant would agree

it, shipping the product, whereupon the Claimant would invoice the goods and the price would become due.

41. In general terms, I found that witnesses were keen to emphasise the commercial interests of the companies for whom they worked, but I found no evidence of witnesses seeking to embroider their evidence so as to make it more favourable, still less any examples of misleading evidence.

Expert Witnesses

42. The Claimant relied on the expert evidence of Dr Andreas Koutoupis expressed in a report of 2 November 2023 and on his contributions to the joint memorandum of the experts dated 18 January 2024. The Defendant relied on the evidence of Mr Ricardo Miranda Apa dated 3 November 2023 and again on what he had to say in the joint statement.
43. Professor Koutoupis accepted at the beginning of this evidence that he was an expert in corporate governance, business risk management, compliance and internal audit. He had not personally negotiated contracts involving the sale of orange juice or wesos.
44. During his evidence, both written and oral, Professor Koutoupis dealt with the extent to which wesos might be sold as independent product, as opposed to forming part of a larger deal with FCOJ. He said in his report that “*nowadays [wesos] is not sold separately as it is incorporated into the standard FCOJ production.*” It was put to him that this was wrong, and that the material in the court bundle showed several examples of the sale of wesos as a stand alone product. Professor Koutoupis explained that, in using the word “*nowadays*” he was referring to the time of his report, 2023, and he accepted that, at least as of 2020, the separate sale of wesos may have happened from time to time, albeit in what he considered to be “*isolated*” cases. He said that this evidence was based on conversations that he had with several people working in this area, albeit that none of them had wanted their names to be included in the report because of the litigation context.
45. Professor Koutoupis considered that the sale of wesos depended heavily on market conditions and that it was an oligopolistic market in which a small number of players (including the Defendant) would greatly affect the demand for the product. Further, he considered that a small player such as the Claimant would have considerable difficulty in achieving sales quickly.

46. I have identified above Professor Koutoupis' evidence about the free trucks mechanism. During cross examination, he agreed with Mr Corby's proposition that, on his (the expert's) understanding of the free trucks mechanism, "*a seller will offer the free trucks as a sort of unwritten rum or a gentleman's agreement.*" He agreed that the result of the fact that the offer of free trucks came simply from the seller was that the buyer would not be protected from price fluctuations. There was no contractual entitlement in the buyer to the free volume, so it could only have application where a fixed price had been agreed.
47. The experts agreed a table of ranges for the market price of wesos of 60 Brix as follows:

Month or Crop Year	Price (US \$ per MT)	Price (EUR per MT)
May 2018	US\$ 1,453 to US\$ 1,550	EUR 1,203 to EUR 1,283
December 2018	US\$ 1,340 to US\$ 1,551	EUR 1,180 to EUR 1,365
Crop year ending June 2019	US\$ 1,368 to US\$ 1,434	EUR 1,202 to EUR 1,260
December 2019	US\$ 1,066 to US\$ 1,163	EUR 971 to EUR 1,059
Crop year ending June 2020	US\$ 1,101 to US\$ 1,207	EUR 983 to EUR 1,078
December 2020	US\$ 1,179 to US\$ 1,163	EUR 985 to EUR 972
Crop year ending June 2021	US\$ 1,185 to US\$ 1,216	EUR 997 to EUR 1,023

48. These figures were rather lower than the figures given by Professor Koutoupis in his original report – he had previously indicated prices in the December of each year as follows:

2018	EUR 1,289
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2019	EUR 1,060
2020	EUR 1,069

49. Professor Koutoupis agreed in cross examination that prices could not be 100% precise and that this justified looking at a range rather than a precise figure. He acknowledged that the range with which he and Mr Apa had come up was one that had involved them looking at various different sources. Further one would have to add duty, packing costs and transportation costs. Ultimately, Professor Koutoupis replied that the market price of pulp wash was not readily identifiable with the words, “*no, not at all.*” He agreed with the assertion that the assessment of a market price was a matter of the judgment of an expert.
50. Mr Apa accepted that the material that he had used to reach his price range would have been widely available to the industry, including both the Claimant and the Defendant. He further accepted that the adjustment of price to reflect the Brix level of the product was well established. He also accepted that there was a correlation between the price of FCOJ and wesos, stating in his report (and confirming in cross examination) that, “*In my experience, a good quality 65° Brix Pulp Wash might generally expect to achieve around 70% of the FCOJ market price, subject to prevailing levels of supply and demand.*”
51. Mr Apa, for the Defendant, had a rather more specialist background than Professor Koutoupis, running his own business that assisted clients in the fruit-based products and by-products market with commercial negotiations and logistics. He accepted that, in a business such as the sale of wesos, it was important for parties to develop relationships based on a confidence in the product that was being sold and bought. Such contracts would normally be concluded before production to allow the producer to plan the necessary production and the purchaser to have its use of the product identified. Sale of the product after production would likely be considerably more difficult, with the need to discount the price dependent upon the state of the market and the shelf life of the product. This would be all the more difficult if the proposed purchaser was someone with whom the seller did not already have a relationship.

ISSUE 1 – AN AGREEMENT TO AGREE?

The Relevant Law

52. The starting point in considering whether a contract for the sale of goods fixes the price of the contract is the express terms of the contract. Section 8(1) of the Sale of Goods Act 1979 provides, “*The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.*” If the contract is silent on the price, the buyer is obliged to pay a reasonable price (see section 8(2) of the 1979 Act).
53. The more difficult situation arises where, as here, the contract leaves the prices to be determined at a later time. It is not in dispute that “an agreement to agree” is not enforceable. As Viscount Dunedin put it in *May & Butcher Ltd v The King* [1934] 2 KB 17 at p. 21, in a sale of goods contract “*undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract.*”
54. Since the court leans in favour of giving effect to parties’ bargains, a body of principles has arisen to determine whether there is an unenforceable “agreement to agree.” These were summarised by Rix LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd’s Rep 76⁵:

“69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:

- (i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:*
- (ii) Where no contract exists, the use of an expression such as “to be agreed” in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that “you cannot agree to agree”.*
- (iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.*

⁵ Hereafter, “*Mamidoil*”.

- (iv) *However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out.*
- (v) *Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.*
- (vi) *Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.*
- (vii) *This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.*
- (viii) *For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable.*
- (ix) *Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in s. 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in s. 15(1) of the Supply of Goods and Services Act 1982).*
- (x) *The presence of an arbitration clause may assist the Courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."*

55. In *BJ Aviation Ltd v Pool Aviation Ltd* [2002] 2 P&CR 257, Chadwick LJ adopted the review of the law by Rix LJ in *Mamidoil* identifying five principles at [19]-[24] including, of potential practical relevance here:

“23. Fourthly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a “fair” price, or a “market” price, or a “reasonable” price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979 . But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.”

56. Since, as Rix LJ identified in *Mamidoil*, each case must be determined on its own facts, having regard to the construction of the contract in question, it is likely that issues as to contractual interpretation and the implication of relevant terms are likely to be relevant.
57. As regards contractual interpretation, the relevant principles are well established. In *Arnold v Britton* [2015] AC 1619, Lord Neuberger, with whom Lords Sumption and Hughes agreed, said:

“[15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, ... it does so by focussing on the meaning of the relevant words, ..., in their documentary, factual and commercial context. That meaning has to be assessed

in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease⁶, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

58. In respect of the implication of terms into a contract, the following principles are not in dispute:
- a. Terms are implied to give effect to the intention of the parties to the contract (objectively assessed) considering the express terms of the contract, commercial common sense and the facts known to the parties at the time of entry into the contract.
 - b. The test is necessity not reasonableness, though not "absolute necessity" but rather whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term in order to "make the contract work".
 - c. The implied term must also be capable of clear expression.
 - d. The implied term must not be contradicted by the express terms of the contract.
 - e. An entire agreement clause does not generally affect or prevent the implication of terms as a matter of fact.

The Claimant's Case

59. The Claimant contends that, where the parties have agreed on a term which contains (expressly or impliedly) an objective standard for determination, the courts will generally be able to give effect to that standard so as to complete the contract. It draws attention to the cases where, in appropriate circumstances the Court has for example imported terms from trade custom or a previous course of dealings or has found that the parties intended the contract to contain a term as to a reasonable price or a reasonable quantity, citing Benjamin's Sale of Goods (12th Ed, 2023) at [2-017], *Foley v Classique Coaches Ltd* [1934] 2 KB 1, *Cudgen Ruttle (No. 2) Pty Ltd v Chalk* [1975] AC 520 and *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205 PC.

⁶ The relevant contract in *Arnold v Britton* was a lease, though the same principles would apply to any other type of contract.

60. The Claimant says that it is clear that the parties intended to sell 1,200 MT per year over three years. This is apparent from the express terms of the 2018 Contract commercial common sense and an examination of the factual matrix.
61. On the first issue, the 2018 Contract expressly states under the heading “Quantity”, the figure of 3,600 MT which, under the heading “Delivery Period” is to be delivered at 1,200 MT per year. There is no suggestion that the amount to be delivered was anything other than 1,200 MT per year and correspondingly no suggestion that the price will not be agreed.
62. This intention is also evident from communications from Dirk Lansbergen (see email to Tim Kaden of the Claimant dated 7 May 2018) and Corinna Hogan (see email to others at Citrosuco dated 8 May 2018). There is no indication in any of this material that the Defendant was only doing anything less than committing to the purchase of the full 3,600 MT.
63. The Claimant notes that the Defendant lays particular emphasis on the language of Mr Kaden’s slightly earlier email of 5 May 2018 where he refers to the terms of the intended contract and states in respect of the volume of goods, “*Target⁷ per year is 1200mt per year of which 400mt is fixed and 800 mt is open.*” Whilst the Defendant relied upon this precontractual material as evidence of the quantity being no more than what the parties were aiming for, as opposed to a contractually binding quantity of delivery, the Claimant contends that this email is of little if any relevance given that the Claimant disputes the true meaning of the word in this email and that in any event it was always the parties’ intention to draw up a formal written contract, which contract itself contains an entire agreement at clause 16.
64. As to commercial common sense and the factual matrix, the Claimant points to the evidence that the Defendant needed wesos in 2018 for a contract that it had with Döhler. The need for a contract with the Claimant to provide the necessary quantities is apparent from the email from Mr Lansbergen of the Defendant to Corinna Hogan dated 7 May 2018 (“*We need good quality wesos as our quality is very unreliable*” and “*We are short in wesos overall*”) and the email from Ms Hogan to others dated 8 May 2018 (“*Dirk bought a 3-year Wesos frame contract with KSY 1200 mt per year with more or less equal monthly proportions. Mainly we can use it to stretch the Döhler Blends with*

⁷ My emphasis

roughly 30%”). Later emails from Marc Clinckspoor of 13 May 2020 and 22 July 2020 show that the contract with the Claimant could have been used to fulfil the Defendant’s contract with Döhler, notwithstanding the lower Brix level. This need to secure supplies of wesos to fulfil the Döhler contract is, the Claimant contends, relevant contextual evidence in support of the finding of a concluded contract between the parties on the full quantity of wesos, not just the 400 MT for which the price was agreed.

65. In the event, the Döhler contract was not renewed when Mr Lansbergen left the Defendant in summer 2018. However, the Claimant says that it is clear earlier in 2018 that the Defendant was intending to renew that contract and that, had it done so, its contract with the Claimant could have assisted it to deliver to Döhler.
66. The Claimant notes that, after Mr Lansbergen’s departure, it is clear that the management at the Defendant considered the 2018 Contract to be a bad one – see for example the email from Mr Figueiredo to Marc Clinckspoor of 22 July 2020 which speaks of having “*inherited a terrible contract.*” Nevertheless, at the time of the contact, it made commercial sense to the Defendant’s needs for it to secure delivery of significant quantities of wesos from the Claimant.

The Defendant’s Case

67. The Defendant starts by cautioning against the court placing reliance on pre-contractual negotiations and/or post contractual statements. Neither pre-contractual declarations of intent nor post contractual communications are relevant to the task of contractual interpretation in hand.
68. However, the Defendant contends that there are two sets of contractual documents that are admissible. First, reference is made to the exchange of emails between the Claimant and Defendant on 5 and 7 May 2018. In the email of 5 May 2018, Mr Kayden on behalf of the Claimant refers to a “*3 years frame contract for abt. 3600mt for 2019-2021*” and says, “*target per year is 1200mt per year of which 400mt is fixed and 800mt is open,*” to which Mr Lansbergen replies that “*We indeed also agree on 3 year frame contract of 3,600 MT for delivery starting in January 2019 and till December 2021.*” This of course is 1,200 MT per calendar year.
69. The Defendant contends that these emails demonstrate an objective and common purpose of the contract including the fact that the volume of 1200 MT of wesos per year was merely a “*target*” which could (by definition) be hit or missed. The Defendant

contends that these documents amount to a prior concluded oral contract which was formalised in the written version of the 2018 Contract and as such are admissible as part of the factual matrix against which the formal written contract is to be construed (see *Electrosteel Castings Ltd v Scan-Trans Shipping* [2003] 1 Lloyd's Rep. 190 at [27] to [28]).

70. The Defendant also points to the fact that the pricing mechanisms in both the First 2017 Contract and the Second 2017 Contract were different. In the former case, the price was fixed expressly in the contract. In the latter, whilst the Defendant contends that the express written contract did contain an agreement to agree, that later agreement was recorded in an amendment to the Second 2017 Contract of 7 November 2017. This shows that the Second 2017 Contract was, like the 2018 Contract, an agreement to agree – the only difference was that price was later agreed in the former case, but it was not in the latter.
71. The Defendant acknowledges that this is a case where the parties in fact entered into a contract. Applying principle (v) in *Mamidoil* this may seem to point in favour of seeking to uphold the contract by finding a mechanism for the determination of the price of the balance of 800MT per year. However, there has been no part performance of the contract relating to the 800MT per year nor has the Claimant delivered the wesos or even tendered them for delivery. In those circumstances, the Defendant says that this should be treated (as regards the excess of the wesos over that for which a price was expressly agreed) as a case where no contract exists. The court does not need to strive to find a mechanism for determining price where there is no part performance or detrimental conduct to bring into the equation.
72. The Defendant contends that the natural and ordinary meaning of the words relating to price in the 2018 Contract was that, beyond 400MT per year, the price of the wesos was left open to be agreed. This construction is apparent from the use of the words “*open price*,” reference to a price that is “*to be fixed*” and the reference to the price fixing being in the future.
73. Further, the agreed timing of the mechanism for the fixing of the price, namely that it would be agreed in December of the previous year is consistent with the fact that most oranges in Greece would be produced in the high season (December to March). It would therefore make sense to fix both price and quantity shortly in advance of this.

74. The Defendant contends that Clause 3 of the contract, referring to the provision of free trucks “*according to the agreed volume & price of each year*” is a further indication that the contract did not contain an enforceable obligation for the sale of a fixed quantity. The reference to both volume and price being agreed each year is a clear indication that, whatever the “*target*” that the parties were seeking to meet, the parties were not in fact irrevocably committed to the sale and purchase of 1,200MT per year; rather both volume and price were to be subject to negotiation in the December of the year preceding the year of delivery.
75. Further, such construction is consistent with the terms of the contract which provide for agreement by December in the year preceding delivery. In other words, the contract provides the opportunity for the parties to plan for the production of the product and the use of it by setting a time frame consistent with the need to plan production and use of the product. The parties know where they stand if they have the obligation to negotiate on price by December but no fixed obligation whether to produce or to accept more than the product on which the price is actually agreed.
76. As the Defendant rightly points out, the Claimant has advanced alternative cases as to the price under the contract. That is not necessarily a criticism of the Claimant, though on the Defendant’s case, it is an indication of the weakness of any of the arguments that the Claimant contends. However, it has another consequence. If the Claimant is not able to demonstrate a contractual price, the Defendant asks how this could be anything other than an agreement to agree.

Discussion

77. The last point taken by the Defendant leads to the heart of the “agreement to agree” issue. Whilst the list of issues identifies this as a separate issue from the question of the contractual price, there is in reality considerable overlap between this and the second issue identified by the parties. If in fact, whether by conventional construction of the contract or by implication of terms, the Court reaches a conclusion as to the contractual price that the parties agreed, it must follow that this was a concluded agreement rather than an unenforceable agreement to agree. If on the other hand the Court is not able to reach any such conclusion, it will be left in the position of finding that there was no concluded contract because there is simply no way of the parties and therefore the Court knowing what amount had to be paid for the goods.

78. Putting aside this consequence (which of course leaves the determination of Issue 1 as a secondary matter which would flow from the determination of Issue 2), the determination of Issue 1 is simply relevant to the extent to which the court ought to strive to construe the contract so as to find an agreed term to be implied in this respect.
79. On this latter matter, I accept the Claimant’s contention that, where in any event a contract has come into existence, the Court should seek to give effect to the bargain that the parties believe they have entered into. This brings the court clearly into the territory of assisting the parties to preserve rather than to destroy their bargain – see principles (iv) and (vi) from the passage in the judgment of Rix LJ in *Mamidoil* cited above.
80. The evidence from the time of negotiation and execution of the 2018 Contract points clearly in favour of both parties intending to deal in 1,200 MT of wesos per year for three years. Whilst I accept that the use of the word “*target*” suggest that the parties were aiming for this figure rather than necessarily agreeing to it, the emails of 7 May 2018 and 8 May 2018, exchanged less than two weeks before the 2018 Contract was signed, indicate the clearest intention that a total of 3,600 MT wesos be bought and sold. The clear intention of the parties judged by the objective evidence that they intended to contract for a fixed quantity of wesos points in the direction of an intention to fix a price in respect of the product. As Ms Lahti put it in closing submissions, there is nothing in the language of the contract to suggest that the volume of 3,600 MT was in some sense an optional or a maximum price. Indeed, even the use of the word “*target*” in this context is perfectly capable of being seen as meaning an estimate rather than, as the Defendant would have it, simply a tonnage that the parties thought at the time might be the appropriate amount for delivery in due course.
81. The Defendant argues that the language of the emails is that the target of 1,200 MT per year being delivered in the second and third years was dependent “*solely*”⁸ on whether the parties could agree the price. In fact the sense of the emails is exactly contrary to that. Mr Lansbergen for the Defendant speaks in his email of 7 May 2018 of a “*yearly volume of 1,200 tons*” as though that was the fixed part of the contract and says, “*800 tons will*⁹ *be mutually agreed.*”

⁸ See paragraph 35(1)(b) of the Defendant’s skeleton argument

⁹ My emphasis

82. To the extent that the Defendant contends that the Claimant cannot bring a claim based on a contractual obligation to deliver any particular quantity because the use of the word “*target*” indicates no intention to agree any particular tonnage, I reject that argument. The Claimant is correct to argue that the use of the word in pre-contractual negotiations is not relevant to the subsequent question of the true construction of the written contract. Given the unequivocal words of that contract that the quantity of product is 3,600 MT, the entire agreement term at clause 16 of the 2018 Contract and the equivocal meaning of the word “*target*”, I agree that it is not open to the Defendant to argue from the use of that word that the contract intended to deal in anything other than 3,600 MT of wesos. In considering the *Mamidoil* principles, I am satisfied that I should treat the contract as evincing an intention to deal in the full quantity.
83. It might be added that the Defendant’s conduct after the 2018 Contract had been concluded was clearly consistent with the subjective belief on its part that it was obliged to take the additional wesos, not simply the base of 400 MT for which the price had been agreed. I have summarised above the evidence of Ms Hogan as to the Defendant’s attempts to find other destinations for the wesos when its contract with Döhler had been terminated. Such evidence of subjective intent after the contract had been concluded is not direct evidence of the intention of the parties judged objectively at the time of contracting, but does to some extent corroborate the evidence that, at the time of contracting, this was the contractual position that the parties were taking.
84. Nevertheless, the court must seek to engage with the contractual language and the relationship of the parties to determine whether, through the principles of contractual construction or implication of terms, it can conclude that a price was agreed. In particular, in considering the principle numbered (iv) above in the passage from [69] of Rix LJ’s judgment in *Mamidoil*, that “*where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out*”, the Defendant draws attention to the fact that the finding that part of the contract was binding because no price was agreed in respect of the wesos in excess of 400 MT per year does not destroy this contract, because it was binding (and indeed was performed) in respect of that element of the goods.
85. Put another way, in a severable contract where the court can determine the consequences of a contractual liability to deal with part of the subject matter of the

contract even if there is no contractual liability to deal in other goods referred to in the contract, the court need not strive too hard to find evidence of an agreement as to contractual price, since the failure to succeed in that effort does not destroy the parties' bargain, but rather simply limits it to that to which it can be shown there was true agreement.

86. In my judgment, it must be correct that the court need be less troubled by a finding that there was no agreement as to contractual price in circumstances where that finding would undermine part but not all of a bargain that the parties believed they had reached - to destroy rather than preserve only part of a bargain is better than destroying the bargain altogether. The central here is whether there was an agreement as to the price for the wesos beyond the 400 MT per year for which it is common ground a price was agreed.

ISSUE 2 – THE CONTRACTUAL PRICE FOR THE WESOS

The Relevant Law

87. Section 8 of the Sale of Goods Act 1979 provides:

“(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price.”

88. The authors of Benjamin's Sale of Goods (12th Edⁿ, 2023) point out at 2-046 the difficulty with the implication of a reasonable or market price where the contract provides a mechanism for agreeing the price.

“If the price is left to be agreed upon subsequently between the parties, there will ordinarily be no binding contract, on the grounds of uncertainty unless and until they later reach agreement on a price. Moreover, an agreement to leave the price open to further negotiation will normally exclude any inference that the price should be a reasonable price in accordance with the provisions of s.8(2). But, in accordance with the principle that the courts will endeavour to uphold bargains which the parties believe themselves to have concluded, especially in the case of executed or partially executed contracts, it may sometimes be possible either to infer an intention that at any rate a reasonable

price should be paid if no price is later settled or to have regard to other circumstances, such as the course of dealing between the parties. Where an approximate price has already been agreed, the inference that the sale shall be at a reasonable price near the sum or within the range mentioned may readily be drawn.”

89. On the other hand, as the Claimant emphasises, the courts are well used to determining what is a reasonable price where there is a contractual obligation to do so. My attention is drawn for example to Benjamin at 2-047 which states:

“...The reasonable price of goods for the purpose of this subsection is usually ascertained by reference to the current market price at the time and place of delivery, even although some other figure (e.g. the cost of production) may also be in a sense “reasonable.” But the market price may not be the sole or conclusive test. This was made clear in Acebal v Levy (1634) Bing 376 where it was said that a reasonable price:

‘...may, or may not, agree with the current price of the commodity at the port of shipment, at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor, or with reference to the price at other ports in the immediate vicinity, or from various other causes’.”

90. As to the implication of a term that the price be a “*market price*,” again such a term could not be implied if it were inconsistent with the express terms of the contract. If a contract does not contain any definition of “*open market value*” or any indication of the basis on which it is to be ascertained, it may be difficult for the court to find an implied term, the more so where determining those matters is “*a matter of judgment*” - see *Gillatt v Sky Television Ltd* [2000] 1 All ER (Comm) 461 at p.470B.
91. If the court is concerned with the argument that the parties shall use their best endeavours to agree the price (one of the Claimant’s alternative arguments), the Defendant draws my attention of the judgment of the Court of Appeal in *Morris v Swanton Care and Community Ltd* [2018] EWCA Civ 2763, where the court considered an option to extend a share purchase agreement “*for a period of 4 years from Completion and following such further period as shall reasonably be agreed...*” Gloster

LJ said at [28] that the difficulty with this term was that “*it presupposes that there is such a thing as a reasonable period which everyone could equally recognise as being reasonable, rather than the different commercial interests and different perspectives involved in any extension of the Earn-Out Consideration. Moreover, the court would have to identify some objective benchmark for determining the reasonable period without reaching an alternative subjective view or descending into the commercial fray; but that is not possible. [29] Accordingly, I accept Mr Zellick’s submission that, at most, the agreement was reasonably to agree a further period. On a true construction of the words used, the parties intended to leave the issue of any extension to the period to be agreed. This necessarily meant that either of them would be free to agree or disagree about that matter and they would need to reach agreement between them. The consequence was that that provision of the agreement was void for uncertainty, albeit that the SPA in other respects was a binding agreement.*”

The Claimant’s Case

92. The Claimant’s primary case is that the contract contains a contractual price which was the same as the invoicing price, namely €1,600/MT (adjusted for Brix). This was the price at which the wesos would be invoiced throughout the contractual term, the difference between that and the actual price being reflected through the adjustment mechanism of free trucks. The actual price for the first year (€1,350/MT) was agreed for the first year but beyond that the price was to be fixed at the latest by December in the year preceding the period in which deliveries were to commence. In the absence of such agreement, the contract contained a fall back position, namely the figure of €1,600/MT.
93. In advancing this argument, the Claimant lays particular emphasis on the evidence that is referred to above to the effect that the parties intended to contract for the sale of a total of 3,600MT of wesos. The court should strive to give effect to that intention by finding that the contract expressly provided for the price by the mechanism referred to above.
94. In the course of his evidence, Mr Papadimitrakopoulos put the case slightly differently. He maintained that the contractual price was in fact always €1,600/MT, albeit that he conceded that the effective price was lower because of the free trucks mechanism. Whilst he stated this to be the position under the Second 2017 Contract he also asserted

that the contractual position was the same under the 2018 Contract. Equally, Professor Koutoupis was of the opinion that the provision of free trucks was not part of the contractual mechanism relating to the price but was rather an adjustment outside of the strict contractual terms but by which the seller might encourage the buyer to deal with it.

95. Given that the proper construction of the contract is of course not a matter simply of the subjective opinion of one of the parties and given that the 2018 Contract speaks of a fixed price for 400 MT but an open price for the balance, it is unsurprising that counsel for the Claimant did not pursue this interpretation in closing submissions. It need not trouble me further.
96. The Claimant advances a series of alternative cases if this primary case is rejected.
97. The first alternative is that the contractual price was a reasonable or market price. The Claimant contends that, for reasons identified above, it is clear that the parties intended the contract to have contractual effect for the full amount of 3,600 MT of wesos referred to. The mechanism for modifying the price reflects the fact that, as the experts both recognise, FCOJ is a commodity with a fluctuating market price.
98. The experts were able to agree a correlation between FCOJ and wesos. As they state in the joint memorandum, *“the price of orange pulp wash is roughly 70% of the price of orange juice concentrate.”* This same mechanism of calculation was said to be the price that the Claimant would contract for with the Defendant in a board meeting of the Claimant on 29 August 2016, where it is recorded,

“Mr Kaden proposed to contact Citrosuco in order to discuss cooperation on orange by products (cloudy, pulp wash). Price would be set on the mechanism of (i) 70% of market price of FCOJ (ii) free volume on top of contracted volume in order to reach requested price.”

Whilst the Claimant does not contend that this minute records any agreement between the parties or “crossed the line” in a manner that allows the court to base a finding of an agreed contractual price in consequence, the minute is relied on as evidence of an understanding as to the reasonable or market price.

99. Further, the experts have been able to agree the market price of wesos (60 Brix) at various times between 2018 and 2021 as set out above.

100. The idea of the open price referred to in the contract being a reflection of the reasonable or market price is consistent with the evidence that wesos is a commodity with a fluctuating market price but one that is capable of identification with reasonable certainty. The Claimant makes the point that, in *Mamodial*, Rix LJ stated at subparagraph (viii) of [69] that “*an express stipulation for a reasonable or fair price will be a sufficient criterion of the courts to act on.*” Based on this material, the Claimant contends that the court can find an implied term of an agreement to pay a reasonable (or a market) price.
101. As a second alternative, the Claimant contends that it is an implied term of the contract that the parties will use reasonable endeavours to agree a price, pursuant to a common intention to trade in the full 3,600 MT referred to in the contract. Since the price is predictable by reference to a percentage of the price of FCOJ, a traded commodity in respect of which the market price can be identified, the court has an objective yardstick to measure the parties’ endeavours - in effect an agreement to a price based on anything other than 70% would not be reasonable.
102. As a third alternative, the Claimant invites the court to consider whether, if clause 5 of the Contract is unenforceable as an agreement to agree, the application of clause 17 of the contract allows for severance, leaving the contractual price to be either the invoicing price or a reasonable price pursuant to Section 8 of the Sale of Goods Act.
103. The Claimant points out that the mere fact that the contract refers to an “*open price*” and a price “*to be fixed*” does not necessarily mean that there is no mechanism in the contract for fixing the price.

The Defendant’s Case

104. The Defendant’s starting position is to criticise the Claimant for placing emphasis on the evidence of pre-contractual negotiations. As Lord Hoffman put it in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, “*The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.*”

105. The Defendant thus argues that the pre-contractual negotiations cannot be relied upon in the manner contended for by the Claimant as evidence relevant to the construction of the contract.
106. The Defendant contends for the relevance of such negotiations to two issues:
- a. First, it places particular emphasis on the word “*target*” in the email of Mr Kaden on 5 May 2018, as an indication that no fixed volume had been agreed.
 - b. The previous contracts entered into by the parties show a differing approach to price in which either (as in the First 2017 Contract) there was a fixed agreed price or (in the Second 2017 Contract) there was an agreement to agree a price and that the price subsequently was agreed. In neither case was the factual matrix similar to the position here where there was, on the Defendant’s case, an agreement to agree a price but no subsequent agreement thereto.
107. Turning to the contractual language itself, the Defendant starts with the phrase “*open price*” as referred to in clause 5. That can only mean that the price is left open, in contrast to the “*fixed*” price provision for the 400MT per year, with an aspiration to fix the price for the 800MT by December of the year preceding delivery. Thus the Defendant contends that the express words of the contract provide no support for a finding of an agreed price.
108. The Defendant rejects the Claimant’s first argument that the contract contains a fall back mechanism by which, if a price is not agreed, it reverts to the agreed figure of €1,600/MT. There are several difficulties with this:
- a. The pricing mechanism expressly supposes that the price will be something other than €1,600/MT since it provides through the free trucks provisions for the difference between the “*open price*” as agreed and the invoice price.
 - b. If in fact the price of €1,600/MT was a fall back position, there would be no incentive to the Claimant to agree any figure other than this, which would both render the mechanism to agree some other price pointless and would defy business commons sense.
 - c. The provision of a fallback mechanism would be inconsistent with the volume being described as a “*target*” since it would render the target figure in fact a fixed volume for delivery.

109. As to the Claimant's first alternative case, that the contract price was the reasonable or market price at the time when the price was to be set, that is to say, December of the year preceding delivery, the Defendant contends that this is not supported by the express words of the contract. If the Defendant is right on its construction of the express terms of the contract, there is no contractual price at all beyond the first 400MT per year. In so far as it might be argued that there was an implied term to this effect, the Defendant says:

- a. This would be contrary to the express provisions of Section 8 of the Sale of Goods Act 1979, which would impart an implied term as to the price being a reasonable price only where the contract does not fix the manner in which the price is to be agreed. But the contract here expressly reserves the price to the agreement of the parties so no such term could be implied.
- b. A term to be implied that the contractual price would be the market price would again be inconsistent with the express wording of the contract to the effect that the price was to be agreed by the parties.
- c. In any event, a term that the price was to be the reasonable price or the market price would be too uncertain. The phrase "*reasonable price*" simply ignores the fact that there is no definition of the term reasonable. In the absence of some criteria that could be applied, no one could know how the price was to be set. The phrase "*market price*" is, as Professor Koutoupis readily accepted during cross examination, a matter of the exercise of judgment by an expert. There is no mechanism in the contract for arbitration or other methodology for determining the market price. That leaves the parties in the position where they cannot know what the relevant market price is, the more so where issues about packing, transportation, duty and exchange rates are not fixed and will alter the price.
- d. As the Claimant points out, the context of these comments in *Gillatt v Sky Television* cited above as to the difficulty of ascertaining open market value in a case where value was to be determined by an independent expert gave rise to the potential difficulty that the Court would substitute its own judgement for the valuer. That particular problem does not arise on the 2018 Contract since there is no provision for expert valuation. However, this makes the difficulty of

construing the meaning of open market value no less easy. In *Gillatt* it would have been open to the Court to hear evidence as to what a valuer would have considered to be open market value. The only problem on the facts of the case was the lack of context as to what open market value in fact meant. That problem arises equally acutely, if not more so, where, as here, the court cannot look to a body of independent expertise to determine what might be considered to be the market price but must itself determine that issue. If there is no evidence from which the Court can determine the basis of finding a market price, it can be no more satisfactory a guide to the court carrying out the task and a corresponding difficulty of how the Court is to go about assessing the market price arises.

- e. A contractual term of payment of the “*reasonable or market price*” would be unworkable since the price needed to be fixed in order to calculate the relevant number of free trucks. The Claimant simply could not perform the contract by delivering the relevant number of free trucks if there was no certainty as to the contractual price.
 - f. This is not a contract which can be saved by reference to some kind of arbitration provision. As Rix LJ pointed out in the sub-paragraph numbered (x) from his judgment in *Mamidoil-Jetoil* at [69], “*The presence of an arbitration clause may assist the Courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.*” There is no such mechanism here.
110. As to the second alternative case, that there was an implied term that the parties would use reasonable endeavours to agree a price, the Defendant contends that such an agreement is not enforceable, relying on the judgment in *Dany Lions v Bristol Cars* [2014] 2 All ER (Comm) 403 at [20], where Andrews J, as she then was, described such an agreement as unenforceable due to such an obligation lacking the necessary certainty. Since the parties were clearly at liberty in their negotiations to disagree about what was a reasonable “*open price*” in the absence of some mechanism for fixing the price being provided for, the proposed contractual term was incapable of providing the certainty necessary for it to be a term of the contract. The Court could only avoid this

uncertainty by entering the commercial fray to determine what was the use of reasonable endeavours, exactly what is deprecated in *Morris v Swanton*.

111. On the third alternative case, that of severance, the Defendant contends that this is simply a backdoor attempt to fashion an enforceable price, which is in fact expressly contrary to the terms of the contract.

Discussion

112. I start by dealing with the relevance of the parties' precontractual negotiations and statements. I accept the Defendant's argument that these are generally of no relevance to the construction of the contract. However, I do not accept that they are of no relevance to how the court approaches that task, for the simple reason, identified above, that the earlier negotiations of the parties demonstrate a clear intention to contract which in turn is a factor for the court to have in mind when seeking to construe the parties' bargain in a way that gives effect to their intention. As I indicate above, I bear in mind the description in the email of 5 May 2018 of a "target" of 1,200 MT per year but taken in the round the emails clearly point to a common intention that about 3,600 MT be delivered over 3 years. It follows that the pre-contractual negotiations are admissible evidence of the intention to contract for the delivery of 1,200MT of wesos per year even if they do not in themselves assist on the issue of whether this was nevertheless an agreement to agree.
113. However I agree with the Defendant's argument that the express terms of the contract provide no support for there being an agreed price of €1,600/MT.
114. First, the reference to "open" price is a clear contrast to the "fixed" price for the first 400 MT. There is simply no basis for concluding that the word "open" means anything other than a price to be fixed by agreement between the parties by the mechanism set out in the contract, namely the parties agreeing the price by the latest in the December of the year preceding delivery.
115. Second, the argument that the invoicing price represents a fallback provision where the parties cannot agree on a price reflects neither what the parties intended nor the natural meaning of the language used. The terms of the 2018 Contract set up a mechanism by which there is an adjustment between the invoice price and the actual price. That is clear from the terms for the price of the first 400MT. If the parties had intended the "invoicing price" to be anything other than the price on the invoice, there would have

been no reason to set the price at €1,600/MT when the agreed price for the first 400 MT per year was €1,350/MT. The very fact of setting an agreed price for that quantity but a different invoicing price is an indication that the invoicing price is not intended to be the true price for the goods. I agree with the Defendant that neither the express terms of the contract nor any argument as to an implied term lead to the conclusion that a figure that is stated for invoicing purposes is actually intended to be the true price per tonne to the Defendant.

116. Third, in so far as it might be suggested in accordance with Professor Koutoupis' evidence that the free trucks mechanism did not bear on the price, I do not accept this. It is clear from the terms of the contract that the free trucks mechanism referred to in the contract is not simply an optional process that the Claimant can operate, but rather is central to the price. Subject to whether the price is agreed, the contractual obligation of the Claimant is to supply 800 MT of wesos plus whatever additional volume is necessary to render the price of the total supply that which the parties have agreed by way of price. Indeed, the position of counsel for the Claimant in closing submissions was that provision of the free trucks was not optional for the Claimant – the amount of free trucks to be delivered flows inexorably from the price as the contract anticipates would have been agreed as indicated earlier. Thus I reject the suggestion that the contract can be treated as a contract for sale of the wesos at the fixed price of €1,600/MT with an option to provide wesos so as to reduce the effective price.
117. I am fortified in this conclusion by the Defendant's argument as to the business efficacy of a term that the price of €1,600/MT was a fallback provision if no other price could be agreed. As the Defendant points out, such a construction would give the Claimant no incentive to negotiate on price, since it would be entitled to what, on the available evidence, would have been a very good contractual price indeed, so long as no other figure was agreed. Such a construction would be to deny business efficacy to the agreement since it would create a situation in which one party was incentivised not to negotiate on the price when the contract expressly anticipated that negotiations on the price would take place.
118. It follows that, on the true construction of this contract, the contractual price is as follows:

- a. For the first 400 MT per year, a price of €1,350/MT, invoiced at €1,600/MT but with free trucks being provided to reduce the effective price to €1,350/MT
 - b. For the balance of 800 MT per year, a price to be agreed by the parties by December of the year preceding the delivery year, invoiced at €1,600/MT, with the provision of free trucks to achieve the effective price as agreed by the parties.
119. The effect of this is that the Claimant would achieve a fixed income for the first 400 MT, (400 MT x €1,600/MT = €640,000), even though the Claimant would have to deliver more than 400 MT through the “free trucks” mechanism to achieve that fixed income. For the balance, if a price was agreed, the obligation was to deliver a further 800 MT plus free trucks as necessary, giving a guaranteed income of 800 MT x €1,600/MT x 400 MT = €1,280,000), but again with the potential obligation (depending on the agreed price) to deliver more than 800 MT through the “free trucks” mechanism. However if no price was agreed there was no enforceable contract relating to the balance of 800 MT because there would have been no effective price to determine the Defendant’s contractual entitlement to free trucks.
120. As to the first alternative argument that a term as to the price being the reasonable or market price is to be implied, I am not persuaded that, by any of the tests for the implication of terms, such a conclusion can be reached.
121. In so far as the contractual terms expressly include a mechanism for determining the price, namely the agreement of the parties, such a term would not be implied under the Sale of Goods Act 1979.
122. I accept that if no term as to the contractual price is to be implied, the contract will fail (in part) as an unenforceable agreement to agree. It must follow that to imply some term will be liable to give the contract business efficacy. However, there is no basis for the implication of the particular terms sought.
123. Further, both terms lack precision for the reasons identified by the Defendant. The contention for the price being reasonable supposes that the court can determine what is reasonable. However, what is reasonable inevitably depends upon the circumstances in which the parties find themselves. For example, a reasonable price for a quantity of wesos in Brazil may not be the same as the reasonable price in Greece. The very fact of

the express term that price be agreed would allow either party to pursue its own commercial ends in negotiating the price, but those ends may be very different.

124. The contention for the market price provision in the alternative suffers from the difficulty of definition of the price. It is correct that Ms Hogan acknowledged that she had used the price of €1,180/MT in her exchanges with Mr Carmo in November 2018 as to the effect of the contract. That correlates with a figure given by Mr Apa in his report as the market price for pulp wash with a quality of 60 Brix in December 2018 as the lower end of the range (in fact the figures are €1,180 to €1,365). I accept that the variability in Brix level is not a bar to a finding of a market price, since there is a well recognised formula for conversion from one Brix level to another. But that is only one factor in the ultimate price. In any event, the evidence of both experts acknowledges the variables in particular:
- a. Packing costs;
 - b. Transportation costs;
 - c. Duty;
 - d. Exchange rate variations.
125. The Claimant's alternative argument about market or reasonable price is to contend that this is a product whose price is based on a product for which there is market price, namely FCOJ. The evidence is that the price of wesos is around 70% of the price of FCOJ, as Mr Apa himself asserted. However the difficulty with this approach is that the price of wesos is clearly not affected only by the price of FCOJ. That may give a suitable basis for estimating the likely price, but the reality will clearly depend on a series of other factors, including the general state of supply and demand in the wesos market, the remaining shelf life of the product and the likelihood that parties will only contract if they have a history of working together. All of these factors create uncertainty in the price of wesos.
126. Turning to the second alternative argument, an obligation to use reasonable endeavours to agree, neither the contract nor any surrounding circumstances indicate that the price that the parties should endeavour to agree was to be a reasonable price. Such a term would need to be implied, but I agree with the Defendant's contention that such a term is too uncertain to be properly implied into the contract. The difficulty in implying such

a term is clearly flagged up by the judgment of Andrews J in *Dany Lions v Bristol Cars*. How is one to judge whether the parties have used their reasonable endeavours to agree the price if there is no definition of the basis on which the price is to be determined? The Claimant responds to this difficulty by asserting that, in the context of a contract for the sale of goods, the concept of “reasonable price” is well known and that one could therefore have a term that the parties use reasonable endeavours to agree a reasonable price. But such a term would fall foul of the same problem as that identified in respect of the first alternative argument. There might be genuine disagreement about what is a reasonable price. The Claimant is not able to identify a sufficiently clear basis for implying that particular test as to how the price is to be determined without identifying a way of determining what amounts to a reasonable price.

127. The Claimant’s third alternative argument, as to severance does not save the contract from the difficulty that this is an agreement to agree. If clause 5 of the contract is severed on the basis that it includes an unenforceable agreement to agree (which would be consistent with the terms of clause 17 on severance), the parties would be left with a contract that referred at clause 3 to the “agreed price.” Even without the terms of clause 5, the only proper construction of this contract is that the price was to be agreed as referred to in clause 3. Accordingly, even in the absence of clause 5 through severance, the contract contained a mechanism for determining the price, namely the agreement of the parties.
128. It follows that, whatever approach one takes and however hard one strives to establish a contractual term as to the price for the balance of 800 MT of wesos per year for which a price was not agreed, one is left with a contract where there is an agreement to agree on the issue of price. None of the alternative suggestions is capable of filling the gap. In consequence, in so far as this is a claim for the price of 800 MT of wesos per year, it cannot succeed.

ISSUE 3 – THE CLAIMANT’S CLAIM IN THE PERIOD PRIOR TO TERMINATION FOR THE CONTRACTUAL PRICE

Introduction

129. The remaining issues in the case are all academic given my finding on Issue 2. However to ensure that the parties have at least findings of fact on an important remaining issue, I deal with the other issues.

130. The Claimant claims in principle for the contractual price in the period prior to termination. I have not been able to find a contractual price so find no contract that could be enforced. Had I found there to be an enforceable contract, the first issue would have been whether the Claimant was entitled to the price for the period prior to termination of the contract, or is limited to a damages claim.
131. The claim for price is based on the terms of Section 49 of the Sale of Goods Act, which provides:
- “(1) Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.*
- (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.”*

The Claimant’s Case

132. The Claimant has delivered five invoices, two of which have been paid or the Defendant admits its liability to pay. The remaining three, relate to the supply of 800 MT of wesos in 2019. These have been invoiced in the sum of €1,600/MT, the invoicing price in the contract.
133. The Claimant accepts that section 49(1) of the Sale of Goods Act 1979 does not apply but relies on Section 49(2) contending that the obligation to pay the invoice within 7 days of the invoice date gives rise to the obligation to the pay the price under Section 49 because the invoices have been delivered.
134. In the alternative, the Claimant contends that it is entitled to the contractual price under the contract itself regardless of the terms of Section 49. This is pursuant to an implied term in the contract to the effect that, if the buyer refuses to give instructions for delivery, the vendor can issue a valid invoice which would then give rise to the obligation to pay. This term is said to be confirmed by the course of conduct under the First and/or Second 2017 Contracts and to be a standard industry term.

The Defendant's Case

135. The Defendant contends that, even if a price had been agreed for the 800 MT, the obligation to pay the price had not arisen because the goods had not been delivered to it. The Claimant cannot now purport to deliver the goods because the contract has been terminated and in any event it is not in a position now to tender the pulp wash. Accordingly there could be no claim for the contractual price even if one had been agreed.

Discussion

136. I am unpersuaded by the Claimant's argument as to its entitlement to the contractual price, whether under Section 49 of the Act or pursuant to a term to be implied into the contract:

- a. On the former, the contract does not provide a right to charge simply on the basis of having issued an invoice. Rather the contract provided for the buyer to give instructions for delivery under Clause 9. The failure to give instructions might amount to a breach of contract by the buyer but, absent property in the goods passing, Section 49 could not be relied on to maintain an action for the price.
- b. Ms Hogan's evidence, summarised above, does not give rise to an alternative contractual interpretation for the implication of a term. Rather it confirms that the start of the process for delivery and invoicing is the request for delivery. In the absence of a request for delivery, there is no basis for a finding that the Claimant's entitlement to price arose.

ISSUE 4 – THE CLAIMANT'S CLAIM FOR DAMAGES FOR LOSSES SUFFERED PRIOR TO TERMINATION

The Claimant's Case

137. The Claimant contends that, absent a claim for the price under the contract, it is entitled to claim damages on the conventional basis for a breach of contract by failing to give instructions for the delivery of the wesos during 2019. It contends that, pursuant to Section 50 of the Sale of Goods Act 1979, it is entitled to "*the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of*

contract.” This is not a commodity in which there is an available market. The Claimant sought to sell the wesos elsewhere but was unable to.

The Defendant’s Case

138. The Defendant contends there was an available market for resale of the wesos and that the Claimant would be entitled to only the difference between the contractual price (if one had been an agreed) and the market price.

Discussion

139. Again, given my findings on the absence of an agreed price, I do not consider that the Claimant has a claim in damages for breach of contract because the Defendant was not obliged to take delivery of the goods. That said, had it been so, I would have found that there was no available market. Accordingly, the Claimant (which, on the evidence, had produced the product during 2019 and therefore had incurred the costs in doing so) is entitled to recover the contract price less any sums earned in mitigation.
140. The Claimant attempted to resell the wesos but was unable to do so. Given the Defendant’s own evidence as to the difficulty of selling wesos especially on the spot market, I find no possible ground for a finding that the Claimant had failed reasonably to mitigate its loss and accordingly the Claimant would have recovered the contract price (whatever that may have been) without deduction for failure to mitigate, but with deduction for avoidable delivery costs.

ISSUE 5 – TERMINATION OF THE CONTRACT

Discussion

141. It is common ground that, if I find that there was no binding contract for the sale of 800 MT of wesos, the Claimant was not entitled to terminate the contract. Accordingly I do not need consider this issue further. However, if I were wrong on the contract price, I see no easy response to the Claimant’s case that, in light of the Defendant’s indication in the letter of 30 July 2020, it was in repudiatory breach of its obligation to accept the wesos and the Claimant was entitled to accept that breach which it did by the letter dated 25 September 2020.

ISSUE 6 – THE CLAIMANT’S CLAIM FOR DAMAGES FOLLOWING TERMINATION OF THE CONTRACT

Discussion

142. If the Claimant was not entitled to terminate the contract, clearly it cannot sue for damages for breach. If I am wrong on that, the Claimant contends that it is entitled to damages at least insofar as wesos that had been produced pre-termination would have been delivered post-termination. In this respect, the Claimant points to the event that it had produced the relevant wesos as set out at paragraph 45 of Mr Papadimitrakopoulos’ statement.
143. However the difficulty with this argument is that, if the contract terminated in October 2020, the Claimant cannot have produced wesos in reliance on a continuing contract in the high season for 2021, namely December 2021 to March 2022. The Claimant would then be limited to a loss of profits claim. Whilst the evidence points in the direction that wesos is cheap to produce, there is a lack of cogent evidence to allow me to reach any conclusion on what that loss of profits would have been.
144. On the rather limited evidence available, I would have found that the Claimant had produced wesos for the year to December 2020 and I would have allowed the price of that less a figure for delivery costs but again undiscounted by any factor for failure to mitigate given the lack of cogent evidence that the Claimant could and should have resold the wesos. However I would not have allowed any claim for damages for wesos for delivery in 2021.

CONCLUSION

145. It follows that I answer the issues set out above as follows:
- a. Issue 1 – An Agreement to Agree? In so far as the 2018 Contract did not specify the price for wesos beyond 400 MT per year, was the contract for the sale of wesos beyond 400 MT per year enforceable or rather unenforceable as a mere agreement to agree? **The contract was unenforceable as an agreement to agree.**
 - b. Issue 2 – the Contractual Price of the Wesos. If the contract was enforceable for the sale and purchase of wesos beyond 400 MT per year, what is the contractual price? **I cannot find an agreed price, hence the conclusion to issue 1.**

- c. Issue 3 – the Claimant’s claim for price in the period prior to termination. Is the Claimant entitled to claim the contractual price for wesos up to termination? **The Claimant is not. There was no enforceable contract for the sale of wesos beyond those purchased by the Defendant. If there had been, the Claimant would not have had a claim for the price.**
- d. Issue 4 - the Claimant’s claim for damages in the period prior to termination. Alternatively is the Claimant entitled to damages for non acceptance of the wesos prior to termination? **The Claimant is not. There was no enforceable contract for the sale of wesos beyond those purchased by the Defendant. If there had been, the Claimant would have been entitled to damages for non-acceptance. I would have calculated those without deduction for failure to mitigate.**
- e. Issue 5 - Termination of the 2018 Contract. Was the Claimant entitled to terminate the 2018 Contract on 25 September 2020 as a result of the Defendant’s repudiatory breach of the contract or was that termination itself a wrongful repudiation or renunciation of the Contract? **The Claimant was not so entitled.**
- f. Issue 6 – Damages for Termination of the 2018 Contract. If the Claimant was entitled to terminate the Contract, what damages is it entitled to claim as a result thereof? **This does not apply. Had it done so, the Claimant would have recovered damages for non acceptance, not reduced for any alleged failure to mitigate.**

APPENDIX 1 – AGREED DRAMATIS PERSONAE

Claimant:

Elisavet Giannoulidou	Witness for C. In 2016 worked for Biofreshland S.A. – a company affiliated with C - in Greece. In the past years has held the position of Head of the CEO Office in Orange Be Global, the main shareholder and holding entity of C.
Tim Kaden	Negotiated the contracts between C and D on behalf of C. Used to be co-director of C alongside Voula Makri.
Petros Kapasakalidis	Witness for C. Research and Development Director in the Research and Development company Hellenic Fruits Juices SA in Athens, Greece. Hellenic Fruit Juices is a Greek company which offer quality services and is affiliated to C.
Voula Makri	Used to be co-director of C alongside Tim Kaden.
Christos Papadimitrakopoulos	Witness for C. CEO of Orange Be Global Limited ("Orange Be Global") which is the holding entity and controlling shareholder of C. Founder and majority shareholder of Orange Be Global.
Mary Riga	Witness for C. Exports Manager at C dealing with industrial sales for C and its affiliated entities.
Orieta Tzani	Witness for C. Director of Pure and Natural by C BV ("P&N"). P&N is an affiliated entity of C and has warehouse and blending facilities in Venlo Holland.
Nikos Savinos	CFO, C

Defendant:

Mateus Carmo	Former Commercial Director of D. Responsible for the 2018 Contract within the commercial team at D after Dirk Lansbergen left in the summer of 2018.
Luiz Armando Figueiredo Jr	Witness for D. General Manager (Ingredients and Juice Latin America) at D since September 2019. Responsible for the sale of all ingredients globally, and the sale of orange juice in Latin America. Prior to that, had previously worked at D as Commercial General Manager from 2009 to 2014.

Corinna Hogan	Witness for D. Consultant to the commercial team for D. Responsible for the implementation of contracts. Joined as an employee in January 2013 as the Global Supply Chain Lead. Promoted to Demand Forecast & Supply Chain Manager in April 2016.
Dirk Lansbergen	Previously Commercial Director at Citrosuco (left in 2018). Negotiated the wesos contracts with C including the 2018 Contract.
Marc Clinckspoor	Quality Manager at Citrosuco in 2020

APPENDIX 2 – AGREED CHRONOLOGY

DATE	EVENT	REFERENCE
29.8.15	Minutes of (a) meeting of the Board of Directors ("BOD") and (b) Extraordinary Commercial Meeting at C (subject: Citrosuco Strategic Cooperation) Minutes of Extraordinary Commercial Meeting record (inter alia) " <i>Mr Kaden in reference to price determination said that he would work on a price mechanism that used to work in Citrosuco in order to adjust the price based on the volatility of FCOJ market price. As a rule price of Pulp wash is approximately 70% of FCOJ market price.</i> "	[E/541] (BOD meeting minutes) [E/542] (Extraordinary commercial meeting Minutes)
2.2.17	Minutes of (a) BOD Meeting and (b) Extraordinary Commercial Meeting at C (subject: Citrosuco Strategic Cooperation). Minutes of BOD Meeting record (inter alia): <ul style="list-style-type: none"> - Tim Kaden informed that Citrosuco is close to proceed to contract. They want at least a contract of 200 MT as trial - Important issues is blending % of pulp wash in final application. They start 10-15% blend and if it goes well it can increase to big volumes - If the trial goes well then the volume will increase. Potentials for up to 2-3.000 MT per year - Investment should be done by KSY side in order to increase production and reach requested volumes. 	[E/587] (BOD meeting) [E/588] (Extraordinary Commercial Meeting)
7.2.17	Email from Tim Kaden (C) to Dirk Lansbergen (D) offering " <i>some ideas for discussion,</i> " including: <i>"For prices if so called market price is \$3000,-FCA bulk FCOJ Brazilian PW should be around: US\$ 3000, - 65-70% = 1950-2100 x 12.2% D = \$2190 – 2356, - mt Duty paid Europe for 65 Brix Our idea would be subject final confirmation: EUR 1700,-DP for 60 Brix bulk ex Venlo But if we can make a 2 or 3 year agreement and or a blending agreement with your PW in Venlo, I have space for further price reductions."</i>	[E/589]
13.3.17	Contract KSYCITROSUCO24022017.24/2017 dated 13 March 2017 (the "First 2017 Contract").	[B/101-106]
20.5.17	Minutes of (a) BOD meeting and (b) Extraordinary Commercial Meeting at C (subject: Citrosuco Strategic Cooperation) Minutes of BOD Meeting and Extraordinary Commercial Meeting record (inter alia): " <i>... first contract runs smoothly. Customer is satisfied and wants bigger volumes...</i> "	[E/605] (BOD meeting) [E/606] (Extraordinary Commercial Meeting)

7.7.17	Contract KSYCITROSUCO07072017.51/2017 dated 7 July 2017 (the "Second 2017 Contract")	[B/107-112]
7.11.17	Addendum 1 to the Second 2017 Contract	[B/113-115]
10.4.18	Minutes of (a) BOD meeting and (b) Extraordinary Commercial Meeting at C (subject: Citrosuco Strategic Cooperation) Minutes of Extraordinary Commercial Meeting record (inter alia): " <i>Mr Kaden informed long-term contract of 1200 MT/year is confirmed and the price would be adjustable to Brix and product free of charge on top of 1200 MT/year in order to avoid volatility of market price</i> "	[E/769-769] (BOD meeting minutes) [E/770] (extraordinary commercial meeting)
2.5.18	Email from Tim Kaden (C) to Drik Lansbergen (D) providing: <i>"Together with a 3 years frame contract for abt. 4500 mt +/-10% and lets also develop a broad pricing scheme to it. Maybe: 1rd fix 1rd, having min and max, but open 1rd, open Always all needs to be fixed for 1 year, meaning that latest by December we have all 3 parts fixed for the following year. Ref price is average big brz market price for FCOJ: and good PW is 70% from that."</i>	[E/787]
5.5.18	Email from Tim Kaden (C) to Dirk Lansbergen (D) with the subject " <i>fixing of the balance of contract + a new 3 years contract</i> " and providing: <i>"Hi Dirk, pls read and reconfirm if ok... 2. 3 years frame contract for abt. 3600mt for 2019-2021 1rd fix: at EUR 1350,-mt net/Invoice price will remain EUR 1600,-mt, difference in price will be always adjusted with free trucks 2rd at open price to be fixed for 1 year, meaning that latest by December we have all 3 parts fixed for the following year. Other terms remain unchanged and free truck mechanism remains after the total volume fixed in each year. Target per year is 1200mt per year of which 400mt is fixed and 800 mt is open."</i>	[E/791]
7.5.18	Email from Dirk Lansbergen (D) to Tim Kaden (C) responding to the email set out above and providing: <i>"Tim, we confirm indeed as follows: ... We indeed also agree on 3 year frame contract of 3600 tons for delivery starting in January 2019 and till December 2021. This is 1200 ton per each calendar year. Of this 1200 ton each year 400 ton is priced fixed at 1350€ net price DDP in Ghent in drums. 800 tons will be mutually agreed between the parties latest by</i>	[E/791]

	<i>December 31, preceding the start of the calendar year under delivery. The seller has the right to calculate the price with free trucks. Free trucks are part of the total yearly volume of 1200 tons.”</i>	
7.5.18	Email from Dirk Lansbergen (D) to Corinna Hogan (D) setting out the rationale for the deal with KSY <i>“Rationale for the deal with KSY the following: 1. We need good quality wesos as our quality is very unreliable 2. We are short in wesos overall and can sell more, so buying makes sense 3. We are very short in solids this coming season so buying wesos makes sense as it can help the overall solid situation 4. We blend COJ into the Doe blend to help improve the product, without the Greek wesos we would have to blend more FCOJ (has a cost and is short in supply) 5. We have the wesos bulk business with one and this is a given. We cannot change much the formula as it works well and actually our quality performance has been much better since we used the Greek wesos in the blend. 6. Price wise with 1,19 as the exchange rate this Friday price is OK in \$ terms, especially is you consider it is in drums and delivered and there are no duties to be paid and is 60 Brix base. Just for you file in case somebody asks.”</i>	[E/790]
8.5.18	Email from Corinna Hogan (D) to Wilson Alexandre Garcia (Supply Chain – Planning & Control at D) and others at D stating: <i>“As an FYI: Dirk bought a 3 year Wesos frame contract with KSY. 1200mt per year with more or less equal monthly proportions. Mainly we can use it stretch the Döhler Blends with roughly 30%. f you have any more questions about it let me know. But for now this can be added to your L&S calculations for next season.”</i>	[E/807]
16.5.18	Email from Corinna Hogan (D) to Wilson Alexandre Garcia (Supply Chain – Planning & Control at D) stating: <i>“Hi Wilson, Target per year is 1200mt of which 400mt is fixed at EUR 1350,-mt net (@60 Brix) and 800mt is open.”</i>	[E/805-806]
18.5.18	Addendum 2 to the Second 2017 Contract	[B/116-118]
18.5.18	Contract KSYCITROSUCO18.05.2018.44/2018 (the "2018 Contract") This Contract is the subject matter of the current dispute between the parties. The Contract is dated 18 May 2018 but it was not signed by the parties until later [E/903]	[B/119-123]
18.5.18	Email from Corinna Hogan (D) to Mary Riga (C)	[E/838]

	<i>“Can you also please send the new 3 year frame contract to me?”</i>	
19.6.18	An unsigned copy of the 2018 Contract was sent by Mary Riga (C) to Corinna Hogan (D)	[E/838-846]
6.8.18	Addendum 3 to the Second 2017 Contract	[B/124-126]
5.11.18	Email from Tim Kaden (C) to Mateus Carmo (D) attaching the 2018 Contract and stating (inter alia) <i>“And these are the subjects we can discuss today - 800 mt PW fixing for 2019: defined with free trucks, proposed for fixing same like last time 830 mt with 8 free trucks”</i>	[E/903]
5.11.18	Mateus Carmo (D) sends a signed copy of the Contract (signed by both parties) to Corinna Hogan (D)	[E/903-908]
6.11.18	Email from Corinna Hogan (D) to Mateus Carmo (D) stating (inter alia): <i>“Please find attached the Greek Wesos summary overview. With the current (old) contract we still have stocks and more product is coming. We have more than enough product already to cover Döhler including a to sell until June 19. If the to sell does not happen we are over supplied in Greek Wesos already and don’t need any of the new Wesos contract because we don’t have the demand for it. I made a new price calculation and the current (old) contract averages out just below the Döhler price. I am checking with Ghent if we are using this Greek Wesos elsewhere for the moment too or only Döhler (whose contract is finishing in November).”</i> Mateus Carmo responds: <i>“If we are over stocked we should slowdown deliveries”</i> Corinna responds: <i>“We cannot slow down unfortunately as we have to take it in as per contract date. They cannot store for us. So I am taking in min per month (even extending slightly to Jan 19)”</i>	[E/909] [E/915]
26.11.18	Mateus Carmo responds to C about <i>“Extension of our current Pulp Wash contract”</i> stating <i>“we are in negotiations with the customer that takes the pulp wash and we hope to have good progress on the negotiations within the next two weeks”</i>	[E/1045-1046]
9.1.19	Email from Corinna Hogan (D) to Mary Riga (C) stating <i>“As Sven said we are full both in Gent and in the external warehouse. And we do not have any need for this product yet. Ideally I would like to stop orders for at least 2 month”</i>	[E/959]
10.1.19	Email from Corinna Hogan (D) to Mary Riga (C) <i>“Our problem is that we are really full and we cannot currently use your product anywhere. I would like to check the possibility with you to delay everything that is pending to deliver from March onwards only...”</i>	[E/966]

22.1.19	Email from Corinna Hogan (D) to Terminal Manager (D) <i>“Thanks for making the 17th also possible in Klosterboer. KSY will store the rest for us for a while. I will try and drag it out as long as possible. Hopefully we will have Döhler starting soon”</i>	[E/986]
22.1.19	Email from Mary Riga (C) to Corinna Hogan (D) stating (inter alia): <i>“You advised me that you wish to stop deliveries for 2 months. Currently we run high season in Greece & we need to secure productions now as it won't be possible for us to execute all the volume from summer crop”</i>	[E/998]
22.1.19	Email from Corinna Hogan (D) to Mary Riga (C) stating (inter alia): <i>“We do not want to start the new contract yet. First we will first finish the old contract - I understand we only have 400 mt fixed and this we can take until the end of 2019. There was no further volume fixed yet. We still don't have a demand for this unfortunately... - It's very likely that we will start taking the 400mt of the new contract only as of July 2019”</i>	[E/997]
9.4.19	Email from Corinna Hogan (D) to Mary Riga (C) stating (inter alia): <i>“I discussed with Mateus and we can take 2 trucks. Unfortunately we couldn't close a new contract in March with our customer so we still do not have a home for this product and cannot move it”</i>	[E/1058]
6.5.19	Email from Corinna Hogan (D) to Emmanuel Kountouris (C) stating: <i>“With regards to the contract volumes, we have a current contract with 400mt (of which two trucks have been received in Venlo), that runs until Dec 2019. Most probably we will only be collecting the balance later in the second half of 2019 as we are still full of stocks from the old contract and unfortunately volumes are not moving at all for the moment for us.”</i>	[E/1068]
13.6.19	Minutes of Ordinary General Meeting of Shareholders of C states (inter alia) <i>“The leaving of Mr Dick Landsberger from the Citrosuco company caused several problems in the execution of the contract between KSY and Citrosuco. The new Managing Director named Mateus Carmo seems keen, as Mr. Tim Peter Kaden claims...Therefore the Chair of the Meeting... suggested a new approach should take place in order for the contract to be executed and proceed to the next steps...”</i>	[E/1094]
18.9.19	Email from Voula Makri, CEO of (C) at the time, to Mateus Carmo of (D) stating:	[E/1122]

	<p><i>“...The important though is not this one FCOJ load of course but the 400 mt PW of 2019 that we have to finalize how to move; and since I have provided our PW contract to the financing institutions in the UK I talk with for review I just need to tell you, as I should base to our contractual terms¹⁰, that I will assign it for financing to one of those shortly.”</i></p>	
23.9.19	<p>Email from Mateus Carmo (D) to Voula Makri (C) stating (inter alia):</p> <p><i>“As explained, we are having no demand for the PW, and we are already lacking in storage space to take additional product. It seems that supplying you with NFC or FCOJ in exchange for the value of the contract can be a solution. I will be discussing with Tim this week...”</i></p>	[E/1121]
4.11.19	<p>Email from Mary Riga (C) to Mateus Carmo (D) (copying in Tim Kaden, C)</p> <p><i>“Following our telephone discussion after Anuga, I would like to summarize the main aspects of the forthcoming cooperation as a draft of the agreement before our next meeting in London so as in London to be able to finalize any details that might be needed in order to fine tune this new prospect of cooperation and proceed to the next step of its implementation....</i></p> <p><i>1) Cooperation details</i></p> <ul style="list-style-type: none"> <i>- The contract will be between Citrosuco and the entity KSY Solutions</i> <i>...</i> <i>- The Contract Validity shall Start Nov 2019 Ends Oct 2022</i> <i>- Product to be sold to final customer: FCOJ with addition of PW...</i> <i>- Price of final offered product will be approved by Citrosuco and will be calculated each time according to formula that will be presented. The final price is based either on the final requested price of the customer or by the FCOJ price offered by Citrosuco. In general there will be a joint price formula calculation that should be approved by both sides. Examples of the formula shall be sent and further analysis could be done during the meeting.</i> <i>-</i> <i>- Operational issues</i> <i>...</i> <p><i>ii) KSY Juice Blends UK shall invoice and deliver the PW according to current contract</i></p>	[E/1151-1152]

¹⁰ Sic

	<i>KSYCITROSUCO18.05.2018.44/2018 to Citrosuco...</i>	
13.11.19	Meeting between C and D in London	[E/1151] Papadimitrakopoulos/35 [C/159]
21.11.19	Mary Riga (C) emails Corinna Hogan (D) (copying Tim Kaden, C, and Mateus Carmo D) <i>“The free trucks will be delivered along with the loads of the variable volume of 2019. We will send you planning. Deliveries will be within December 2019 to February 2020”</i>	[E/1149]
10.12.19	Email from Elisavet Giannoulidou Provata of Orange Be Global, on behalf of C, to Mateus Carmo (D) summarising items to be discussed in upcoming meeting in Vienna: <i>“1. Conclude on the variable price contract KSYCITROSUCO18.05.2018.44/2018 in order to proceed to invoicing and delivery for the variable part of the contract for 2019. According to the contract the variable price should have been defined in December 2018. According to the market records the price on December 2018 of FCOJ should be 2.000-2.300 USD/MT at 65 Brix DDU Gent. Based on the minimum level of 2000 USD the variable price of the pulp wash should be 1450USD/MT (or 1305 euro/MT) for a production of 60 Brix. The calculation may be find in the attached scenario No1. Based on the higher level of 2300 USD the variable price of the pulp wash should be 1667USD/MT (or 1501 euro/MT) for a product of 60 Brix. The calculation may be find in the attached scenario No3... 2. Conclude on the variable price of the contract KSYCITROSUCO18.05.2018.44/2018 for the deliveries of 2020 as according to the contract the variable price should be finalized on December 2019. Taking into consideration a market price of 1650 USD/MT at 65 Brix DDU Gent the variable price of pulp wash should be 1196USD/MT (or 1077 euro/MT) for a product of 60 Brix. The calculation may be found attached in Scenario 2...”</i>	[E/1187]
12.12.19	Email from Corinna Hogan (D) to Mateus Carmo (D) stating (inter alia) <i>“The other 800mt are not priced and we didn’t agree to take them. What will happen in 2020? Do we need to take the 400 mt again?”</i>	[E/1157]
12.12.19	Meeting between C and D in Vienna	Papadimitrakopoulos/44 [C/161]

16.12.19	Email from Mary Riga (C) to Corinna Hogan (D) stating: <i>“We have 3 more trucks on the way. Rest we could hold in Greece in our factory at Sparta. We aligned this also with Mateus in order to find a way to do this, as Venlo’s warehouse is getting limited”</i>	[E/1192]
17.12.19	Email from Corinna Hogan (D) to various people at D stating (inter alia) <i>“What to do this year with the KUSD-525? Currently we are not using this product anywhere (As we no longer have a contract with Döhler). But Mateus is looking at options with KSY to improve the situation.”</i>	[E/1165]
17.12.19	Email from Elisavet Giannoulidou Provata of Orange Be Global, on behalf of C, to Mateus Carmo (D) and various people at C <i>“... I would like to thank you for the meeting and the open and friendly discussion we had last week. Kindly allow me to summarise briefly the points that we discussed and agreed: 1. Conclude on variable price of the contract KSYCITROSUCO18.05.2018.44/2018 in order to proceed with invoicing and delivery for the variable price part of the contract for 2019: We agreed to take a minimum price of 1400 USD and a maximum price of 2300 USD that would make an average price of 1850 usd/MT. Based on that the variable price of the Pulp wash should be appr 1341 USD/MT (or 1201 euro/MT) for a product of 60 Brix. Kindly confirm the above price in order to be able and proceed with the invoicing of the variable volumes. 2. Conclude on the variable price of the contract KSYCITROSUCO18.05.2018.44/2018 for the deliveries of 2020 as according to the contract the variable price should be finalized on December 2019: We could work on the same way and finalize on a second step the price of the variable product or alternatively define it now at the current level taking into consideration a market price of 1650 USD/MT at 65 Brix DDU Gent the variable price of the pulp wash should be 1196USD/MT (or 1077 euro/MT) for a product of 60 Brix. 3. Deliveries of stock (including also product free of charge) in the warehouse of Greece and Holland and relevant insurance procedure and policy: Kindly mind that the free product could be delivered from January to April 2020. The product of 800MT of the variable price is currently in Greece and as it was discussed due to insufficient space in Venlo and in your warehouses we propose to keep it in Greece and ship it according to your instructions. The volume of 800MT as it was discussed should be invoiced within 2019, due to</i>	[E/1204-1205]

	<i>financing purposes the 200MT should at least be paid according to the contract and the rest 600MT should be paid upon delivery of the product in Holland... 4. Cooperation between KSY Solutions and Citrosuco for the sales of FCOJ and PW blended product... ”</i>	
19.12.19	Email from Tim Kaden (C) to Elisavet Provata and Mary Riga (C) <i>“Spoke to Mateus, he is having big problems to introduce our needs, supply chain is totally against. Commercial is also not in favour as pricing is way too high for convincing someone to create even more stocks. Told him that we have also our pressures and that we need a reply and a constructive counter proposal from his side. Therefore he agreed to come with a proposal for short term (this year possibilities) Tomorrow...”</i>	[E/1184]
27.12.19	Mary Riga (C) emails Mateus Carmo (D) (copying Tim Kaden, (C): <i>“Unfortunately we haven’t received your counter proposal, therefore we will invoice as per present price level & once agreed we will adjust the difference. We will keep the product in Greece for you ...As per our meeting we would appreciate the payment of the 200mt at least.”</i>	[E/1204]
27.12.19	Invoice number 1970063 (200 MT, EURO 304,000) [part of 800 MT, 2019] Invoice Number 19700633 (558 MT, EURO 848,160) [part of 800 MT, 2019] It is common ground that these invoices are dated 27 December 2019 but D does not accept that they were sent to it on that date	[E/1210A] [E/1210B]
30.12.19	Email from Nikos Savinos (C) to Mateus Carmo (C) stating (inter alia): <i>“I would like to inform that on Friday we have invoiced and send to your accounting the invoices for the rest tones of our 2018 contract as discussed in our meeting and referred also to the mail of Mary below.”</i>	[E/1215A]
4.1.20	Email from Nikos Savinos (C) to Richard Stals (copying in Mateus Carmo), both D with subject “REQUEST PAYMENT CITROSUCO” attaching invoice 19700632 and stating: <i>“We would like to have an update about the payment date of the 200 MT invoice we have already sent to your accounting (find attached) as it was discussed to be paid on cash by your side.”</i>	[E/1224A-C]
7.1.20	Email from Mary Riga (C) to Corinna Hogan (D) stating: <i>“You are right that the fixed volume has been delivered. As per contract we have to proceed with the variable volume. Of course once price is confirmed we can issue a credit note accordingly.”</i>	[E/1296]

13.1.20	Mary Riga (C) sends D loading documents for “ <i>variable of first year</i> ” but no documents were attached. Corinna Hogan (D) responds stating (inter alia) “ <i>We (from CS SCM & logistics) are not taking in ANY variable contract volume right now. I have no confirmation from Mateus, since we don’t need this product and never agreed on a price. We will not be paying any of these invoices Please align with Tim and Mateus first before issuing loading documents and invoices to us.</i> ”	[E/1225]
13.1.20	Mary Riga (C) resends D loading documents, namely invoice no. 19700622, a Certificate of Analysis and a CMR consignment note. Her email states: “ <i>This also corresponds to the variable of the first year. The remaining volume of variable is stored in Greece.</i> ” (On 18 February 2020 C clarified that this invoice related to the 400 mt volume for 2020: See [E/1303] below) [The Particulars of Claim, paragraph 21 identifies this invoice as relating to part of the 400mt fixed volume for 2020 [A/2/9]].	[E/1226-1230]
14.,1.20	Email from Corinna Hogan (D) to Mateus Carmo (D) stating “ <i>FYI, I told Mary again that I am not going to do any intake or pay any of the invoices they keep sending. I will make a copy of the contract and send it to Renata from the legal department.. I’ll ask her if we are really liable for this volume. I do not think that we are.</i> ”	[E/1236]
17.1.20	Email from Mary Riga (C) to Mateus Carmo (D) (copying Tim Kaden, C) “ <i>... we consider important to meet you in Vienna in order to reach and¹¹ agreement for a few points in our cooperation.</i> <i>Main points are:</i> - <i>Price of variable 2019 shipments</i> - <i>Price of variable 2020 shipments</i> - <i>Smooth dispatch of fixed volume 2020 shipments</i> - <i>Customers & your approval to offer the blend... ”</i>	[E/1263]
4.2.20	Email from Corinna Hogan (D) to Mateus Carmo (D) “ <i>Here the summary for your KSY discussion with Tim Old contract:</i> <i>We are owed 8 FOC [free of charge] trucks</i> <i>2019 Contract:</i> <i>109mt Received (and paid) on PO 5700011886.</i> <i>294mt Received (and paid) on PO 5700012368</i> <i>TTL = 403mt @1600 €/mt @60 Brix</i>	[E/1265]

¹¹ Sic

	<p>+ <i>We are owed 3.5 FOC trucks to bring price close to 1350 € on average</i> <i>2020 Contract:</i> <i>400mt still to take in until Dec 2020.</i> <i>We have not taken anything in so far. We have not requested any trucks. We do not need to call off product yet we until Dec 2020 to take it. They have no right to just send us invoices.</i> [redacted section]”</p>	
11.2.20	<p>Email from Richard Stals (D, Responsible Treasury & Cash) to Mateus Carmo (copying Corinna Hogan) (both D) <i>“Maybe as additional information for tomorrows call: Please keep in mind that we also have some receivables open with KSY. They are not due yet, but it might be useful in case a netting would be an option.”</i></p>	[E/1275]
14.2.20	<p>Invoice 20700044 (21 MT, EURO 32,143.86) [part of 400 MT, 2020] Invoice 20700045 (21 MT, EURO 32,143.86) [part of 400 MT, 2020]</p>	[E/1317] [E/1320] [E/1496] [E/1497]
14.2.20	<p>Email from Mateus Carmo (D) to Nikos Savinos, the CFO of (C) stating: <i>“I have not authorized the issue of any POs yet, so these invoices cannot be paid. All fix price volume for 2019 calendar year has already been taken, and we will start issuing PO for the 2020 fix volume soon.”</i></p>	[E/1293]
17.2.20	<p>Extraordinary Commercial Meeting (C) records that <i>“Mr Kaden informed that the cooperation with Citrusuco reached a dead end. There is a lack of communication with the new management.”</i> Tim Kaden resigned as CEO of C</p>	[E/1287]
18.2.20	<p>Email from Nikos Savinos (C) to Mateus Carmo (D) (copying in Corinna Hogan, D) stating: <i>“...we are exactly on the same direction as we have only sent to you invoice related to the fixed part of the contract...Invoice 19700622 & 19700621 are both related to the fixed part of the contract for 2019...”</i> Corinna Hogan queries this stating “[t]here must be a misunderstanding. We took all of the 400mt fixed from 2019...” Nikos Savinos (C) responds ([E/1303]) stating <i>“Thank you for your prompt reply. I agree with you that the two invoices issued at the end of 2019 were not related to fixed part 2019 but we have started to execute the quantities of 2020 and is from this part of the contract...”</i></p>	[E/1292] [E/1303]
19.2.20	<p>Email exchange between Nikos Savinos (CFO, C) and Corinna Hogan (D) about delivery schedule and the 800 MT per annum</p>	[E/1302-1303]

	<p>Nikos Savinos writes: <i>“I am really sorry but this schedule cannot be approved from our side. I believe that we had discussed and agreed the execution of the fixed and variable loads in our last meeting with Mateus where we explained in details that the product is already produced and stocked on your behalf.”</i></p> <p>Corinna Hogan responds: <i>“The contract does not specify a time frame within 2020 when we have to take the goods. The proposed schedule is what we can comply with at this point. Additionally, we are not in a position to take any of the volume at variable price due to not existing demand”</i></p>	
20.2.20	<p>Email from Nikos Savinos (C) to Mateus Carmo (D) (copying in Corinna Hogan, D)</p> <p><i>“We have still pending the execution of the variable quantity of 2019 and the payment of the invoices that we discussed during our last meeting. For this reason we have requested also a next meeting in order to discuss not only the situation for 2019 but also how we should proceed in 2020. The goal should be to finish the loads of the fix price in order to proceed also to the execution of the variable price volumes of 2020... I would also like to add that during our meeting we would like also to discuss and finalize the sales opportunities that our team has in order to assist in the consumption of Pulp Wash and the execution of this contract.”</i></p>	[E/1305]
26.2.20	Meeting between C and D in Vienna	Papadimitrakopoulos/53 [C/162]
16.3.20	<p>Email from Corinna Hogan (D) to (inter alia) Luiz Figueiredo (D), Mateus Carmo (D) stating</p> <p><i>“As discussed attached the Greek wesos stocks... we currently have no use for this product mainly due to the lower Brix. And the fact that we don't have a contract with Döhler. We used to be able to blend 20% into the Döhler deliveries...”</i></p> <p>Various emails internal to D about ways to use the “Greek wesos” stocks including noting that a sale to Atlantica or blending it <i>“will be at a loss due to the high purchasing price.”</i></p>	[E/1335-1336] [E/1337-1338]
17-23.3.20	<p>D does not pay invoices 20700044 and 20700045 (part of the 400 MT for 2020) stating that these sums are to be netted off against sums C owes D. Corinna Hogan (D) explained to Nikos Savinos (C) that <i>“we did the intake of the product in SAP and issue the payments yesterday, but they are currently put on hold because of overdues from KSY”</i></p>	[E/1346-1347]
4.20	Email exchanges between C and D about the possible cooperation between them in relation to producing and	[E/1367-1368] [E/1389-1390]

	selling a blended product (wesos and orange juice concentrate)	
1.4.20	Email from Corinna Hogan (D) to Mateus Carmo (D) and Luiz Figueiredo (D) <i>“What we need to understand is this: 1. What Wesos are they [C] trying to sell there and at what price? 2. The portion of the fixed volume 400mt per year priced at 1350 per ton? 3. Or the Open prices portion of 800mt per year, which we said we don’t need and want to buy from them. And if they are talking about this one, what price are they applying? We said that maybe we could agree with 200\$(mt).”</i>	[E/1391]
24-27.4.20	Email exchanges between C and D about the proposed co-operation in relation to the sale of a blended product. C provides D with a price breakdown, which proposes a price for pulp wash of US\$1,050/mt.	[E/1408-1409]
11.5.20	Email from Andrei Perjun (D) to Corinna Hogan (D) and others at D describing a meeting that day with C, stating: <i>“About their overdue invoices, I have just confirmed with Renanta¹² that they overdue amount is \$ 255,000... They aren’t paying this amount because, they consider that we should set off the balanced with an option of the contract of additional 800 tons (we didn’t agree the price).”</i> Email from Mateus Carmo in reply to various people at D stating (inter alia) <i>“[w]e will not buy the 800 tons! This has already been communicated to them. Just put this in writing to them.”</i>	[E/1460]
11.5.20	Email from Jarno Becarren (D, Product applications engineer specialist) to Luiz Figueiredo (D) stating (inter alia) <i>“[c]urrently we are indeed not consuming any Greek wesos.”</i> Luiz Figueiredo responds: <i>“Do you know if Medibel also accepts blends of our wesos with Greek? We have to find a home to this Greek product. Besides paying too much for, we could end up losing it entirely if not sold”</i>	[E/1465-1466]
12.5.20	Email from Andrei Perjun (D) to various people at C summarising the meeting on 11 May 2020, stating: <i>“With reference to the OPEN PRICE volume of 800 t of Pulp Wash, KSY cannot invoice Citrosuco unless we agree on the price”</i>	[E/1467]
13.5.20	Email from Marc Clinckspoor to various people in Citrosuco. <i>“Doehler : specific blend that allow lower Brix → so we use already approx. 20% Greek Wesos if we have call-offs”</i>	[E/1469]

¹² Sic

15.5.20	Email from Corinna Hogan (D) to Mary Riga and Nikos Savinos (D) stating (inter alia): “...we can proceed with the receipt of the outstanding fixed volume for 2020 to reach 400mt in total...With regard to the 800 mt unfixed volumes, as informed in Vienna during your visit, we do not need it because we don't have the demand. There is no price agreed and we decided not to take it. (Same as for 2019).”	[E/1475]
15.5.20	Email recording that D has communicated that it is not interested in the blending co-operation with C	[E/1476]
18.5.20	Nikos Savinos (C) responds to Corinna Hogan's email dated 15 May 2020 stating “Kindly mind what we have highlighted also during our meetings. For KSY the volume and the price is already agreed and not negotiable. KSY produced and invoiced the relevant goods at the price agreed on the contract.”	[E/1477]
18.6.20	Minutes of Ordinary General Meeting of the Shareholders Records (inter alia) that <ul style="list-style-type: none"> - “Mr. Tim Peter Kaden and Mrs. Stavroula incorrectly handled several matters with regard Citrosuco Company that lead the cooperation between the two companies to a dead end. Consequently, a problem arose.” - Tim Kaden and Voula Makri resigned as directors - Mr Papadimitrakopoulos (C) “suggested that director should take legal actions against Citrosuco company due to non-execution of the contract” 	[E/1499]
30.6.20	Email from Nikos Savinos (C) to Mateus Carmo (C) embedding a table setting out the product stored by C on D's behalf in Greece and Venlo. The tables contain information about production dates and expiration dates.	[E/1547-1548]
30.6.20	C sends D an email containing “the agenda that we would like to discuss form ¹³ our side” for a telecon between them. Includes as an agenda item “contract execution”	[E/1568]
1-7.7.20	Nikos Savinos (C) emails Mateus Carmo (D) about the 800MT for 2020. “ <i>You are kindly requested to revert to KSY this Friday 3rd July the latest for the free volumes that you request otherwise we will be forced to proceed to invoicing as we have done in the past and take into consideration the market price of FCOJ.</i> <i>Below you may find the relevant calculation:</i> 1. Market price of FCOJ at 2000USD/MT DDU 2. Price of FCOJ with duties 2244USD/MT DDP	[E/1600-1601] [E/1606]

¹³ Sic

	<p>3. <i>The relevant price for the PW should be the 70% of FCOJ price that is appr 1570 USD/MT DDP at 65 Brix</i></p> <p>4. <i>The equivalent at 60 Brix is 1450 USD/MT</i></p> <p>5. <i>The equivalent at 60 Brix in Euro is o 1293 Euro/MT at 60 Brix</i></p> <p><i>According to the above calculation the free product should be appr 154 MT. We request to receive from your side the delivery schedule taking into consideration that the free product should be produced and delivered during the high crop season as all these years of our cooperation.</i></p> <p><i>We are waiting for your confirmation in order to proceed to the relevant amendment in the contract as in the past.</i>“</p> <p>Mateus Carmo (D) responds stating (inter alia)</p> <p><i>“As previously communicated in different instances, Citrosuco will not take the 800 tons annual volume. The reason for that is both parties have not been able to agree on a price by December 2019.</i></p> <p><i>Please note that the contract does not state that the price for the 800 tons will be based on a market price as it has been suggested in your email. Therefore, any invoice related to the 800 tons will have no validity and will not be recognised by Citrosuco.”</i></p> <p>Nikos Savinos (C) responds stating</p> <p><i>“In clause No 10 the volume of the contract is stated clearly and it is 3600 MT, that is 1200 MT per year. And in clause No 3 it is clearly stated that the invoicing price is 1600 Euro.</i></p> <p><i>KSY cannot just agree not to execute the contract and it is obvious that despite our efforts the legal path is the only option.”</i></p>	
13.7.20	Email to D from RBS Resolve Business Solutions (Legal Department – Debt collection), on behalf of FIF Company UK Ltd, stating that the Contract had been assigned to FIF and seeking payment of unpaid invoices No. 19700632, 9700633, 20700044, 20700045 and 20700134	[E/1632-1633]
22.7.20	Email from Marc Clinckspoor to Luiz Figueiredo commenting on the relationship with the Claimant: <i>“Historically it seems there was a shortage on Wesos to deliver in 2016/2017.</i> <i>Recall that there was a large contract with Doehler to deliver a specific blend that Dirk sold with wider Brix-range (62 – 66).</i> ... <i>Quality wise , negative advise was given for dark color , defects , bitterness and low Brix (57). But due to shortage it was decided to purchase some volume that season only to accumulate the contract with Doehler</i>	(E/1690-1691]

	<i>Was never aware of extended contracts for a period of 3 years. Nevertheless if we could have continued with large volumes to Doehler , assume all actual volumes could have been blended already”</i>	
23.7.20	Email exchange between Luiz Figueiredo (D) and Tim Kaden (C) about the disputes between C and D	[E/1667-1668]
30.7.20	Letter from D’s (former) solicitors (Weightmans) to RBS Resolve Business Solutions responding to its email on 13 July 2020 stating (inter alia) “[o]ur client denies any sums are (or were ever) due to KSY under said invoices or at all...The correct position is that Citrosuco’s contractual commitment was/is limited to purchasing (and KSY’s commitment to supplying) 400 mt of product each year for the agreed price of €1350 (discounted from €1600), with agreement to purchase an additional 800mt each year subject to agreement on price by the end of the December preceding each contract year. In other words, in the absence of agreement on price, KSY has no obligation to supply, and Citrosuco no obligation to purchase the additional 800 mt.”	[E/1683-1687]
25.9.20	Letter from C’s solicitors responding to the above letter. States (inter alia): <i>“Your letter [Weightmans’ letter to RBS Resolve Business Solutions on 30 July 2020] clearly evinces your client’s intention not to comply with the requirements of the Contract and, in particular, to accept delivery of 1,200 MT during the remaining years of the Contract. Your letter therefore represents a repudiatory breach of the Contract on behalf of your client which is accepted by KSY</i> <i>“Breach of Contract</i> <i>2.1 In accordance with the terms of the contract KSY has made available the product for delivery. However due to a lack of demand for the product from your client’s customers your client has failed to take delivery of the product.</i> <i>2.2 For the 2019 contract year KSY has delivered and been paid for the first 400 MT in accordance with the terms of the contract. It has also made available for delivery the Remaining 800 MT of which 797 MT has been invoiced to Citrosuco under the following invoices [embedded table referring to invoices 19700632, 19700633 and 20700134]</i> <i>2.3 For the 2020 contract year KSY has delivered 126 MT of the first 400 MT. Whilst Citrosuco has paid for 84MT the following invoices remain outstanding [embedded table referring to invoices 20700044 and 20700045]</i> <i>2.4 KSY has acted in breach of the contract in:</i>	[E/1713-1717]

	<p><i>2.4.1 Failing to pay the invoices [numbers listed];</i></p> <p><i>2.4.2 Failing to agree the number of free trucks for 2019 and 2020;</i></p> <p><i>2.4.3 Failing to provide timely instructions for delivery of the Remaining 800 MT in 2019 and 2020; and</i></p> <p><i>2.4.4 Refusing to be bound by the clear terms of the contract as set out in our letter of 30 July 2020.</i></p> <p><i>2.5 As set out above our client accepts such repudiatory breaches and now treats the contract as at an end.”</i></p>	
26.10.20	Letter from D’s (former) solicitors (Weightmans) stating “We need to be clear that the termination is wrongful”	[E/1772-1774]