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Case No: CL-2023-000215

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/02/2024

Before :

MR JUSTICE JACOBS

- -

Between :

SOUTHEASTER MARITIME LTD	**Claimant**
- and -	
TRAFIGURA MARITIME LOGISTICS PTE. LTD. **mv "AQUAFREEDOM"**	**Defendant**

- -
- -

Charles Holroyd (instructed by **Hill Dickinson International**) for the **Claimant**
Timothy Hill KC and Michal Hain (instructed by **Schjødt**) for the **Defendant**

Hearing dates: 30th January 2024

- -

Approved Judgment

This judgment was handed down remotely at 9.30am on 8th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE JACOBS

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A: Introduction

1. The Claimant ("the Owners") in these proceedings is the owner of the vessel Aquafreedom ("the Vessel"). The Defendant ("Trafigura") contends that it was the charterer of that vessel. Both claim and counterclaim in these proceedings concern whether a 4 year time charterparty was concluded between the parties during negotiations in late January and early February 2023. The Owners contend that there is no real prospect of Trafigura resisting their claim for a declaration that no binding charterparty was concluded. Trafigura's case is that there is a real prospect of showing that a binding charterparty was concluded either on 30 January 2023, or 6 February 2023.

2. The Owners contend that whether a charterparty was concluded turns on the construction and legal effect of the written communications passing between the parties, and that the case is appropriate for summary judgment.

3. The evidence in the case consists principally of a bundle of written communications which passed between the parties. The communications were both by e-mail and WhatsApp messaging. In addition, there are three principal witness statements which have been served. On behalf of the Owners, witness statements have been provided by Mr Timon Karamanos-Cleminson, a partner in the firm of Hill Dickinson International which acts for the Owners. His principal witness statement provides a detailed chronological account of the communications exchanged between the parties. He has also served a short reply statement. On behalf of Trafigura, Mr Jeremy Biggs (a partner in the firm of Schjødt LLP) has provided a witness statement, much of which is based on information received from the chartering broker who was acting for Trafigura in the negotiations, Mr Tim Sorensen.

B: The facts

4. The Vessel is a 2022 built Suezmax oil tanker of 157,747 DWT. In late January and early February 2023, the parties conducted negotiations through Arrow Tankers P/S ("Arrow"), who acted as brokers for both parties. There is no dispute as to the messages which were sent by the parties in relation to the negotiation, and the following account is based on those messages.

5. The relevant individual brokers at Arrow were Mr Kenneth Hoeg (dealing with Owners) and Mr Tim Sorensen (dealing with Trafigura). On the client side, the relevant individuals were Mr Adamantios Lemos (for Owners) and Mr Anders Jensen and Mr Andrea Olivi (for Trafigura). For present purposes, it was accepted on both sides that although they were in the same broking firm, Mr Sorensen was acting for Trafigura, and Mr Hoeg for Owners. Accordingly, a message from Mr Lemos to Mr Hoeg, and which got no further, would not be a message to Trafigura.

6. The negotiations fell broadly into four phases, as follows:

   (1) Initial negotiations culminating in a "recap" circulated by Mr Sorensen at 10:55 on 30 January 2023 ("the recap").

(2) A sequence of exchanges through which the parties sought to agree further terms, ending with proposals made by Trafigura in its emails of 17:09 on 1 February 2023 and 06:41 on 2 February 2023.

(3) A hiatus of 4 days during which Owners failed to respond to Trafigura's proposals, despite being chased.

(4) Communications in the morning of 6 February following Owners' cancellation of a Teams call scheduled for 10:00 that morning.

Phase 1: The recap

7. The initial phase of negotiations, leading to the 30 January recap, began on 25 January 2023 in WhatsApp messages passing between the brokers. These led to a firm e-mailed offer on 26 January 2023 which came from the Owners, and which was then passed by Mr Sorensen to his principals at Trafigura.

8. In describing the e-mail and WhatsApp communications, I have sometimes, for ease of understanding, expanded abbreviations that were used. I have also followed the parties' approach of using London time. The e-mail containing the firm offer stated that the Owners were "pleased to offer firm as follows for reply 10.00 hrs London time tomorrow". The offer was for a 48 months charter with two 1 year extensions at charterers' option. It is apparent from a number of aspects of the recap that there were further terms which needed to be discussed and agreed between the parties. The offer also contained two "Subs" (i.e. "subjects") at the end of the e-mail. These clauses were as follows.

> "**Trading:**
>
> WW trade with exclusions to be agreed
>
> **Cargo:**
>
> Normal DPP / Crude – wording to be mutually agreed
>
> …
>
> **Terms:**
>
> As per previously agreed terms sub review both sides.
>
> Subs:
>
> Owners BOD subs latest 1 working day after all terms agreed.
>
> Charterers management approval latest 2 working days after all terms agreed."

9. With one exception, all of the above elements in the initial offer were later contained in the recap. The one exception was the "sub" concerning Owners BOD (i.e. board of directors) approval. In Trafigura's response to the Owners' firm offer, on 27 January, they deleted that provision. They commented: "As you know we are strongly against

owners subs". The Owners accepted this deletion without argument: stating in a subsequent e-mail "OK". The deletion of the requested provision for this "Owners sub" played a significant part in the argument of Mr Hill KC, on behalf of Trafigura, as to the effect of the "Charterers management approval" or "CMA" sub which remained.

10. It is not necessary to describe in detail the course of negotiations between the Owners' first firm offer on 26 January and the recap on 30 January. However, there are a number of features which are relevant to the parties' arguments as they developed.

11. First, it is clear that messages as to the negotiating position of the Owners were conveyed not only through e-mails, but also via WhatsApp messaging. Thus, Mr Holroyd on behalf of the Owners was able to identify a number of examples of positions communicated by WhatsApp which were then reflected in the e-mails that were exchanged between the parties in which the parties were seeking to reach agreement on outstanding matters.

12. A significant example concerned the charter rates. The recap on 30 January contained daily rates of US$ 33,400 for the firm 4 year period, and US$ 34,500 and US$ 35,400 for each of the two optional 1 year periods. Although these rates are contained in the recap, the prior e-mail correspondence had different rates, when the parties were putting forward different positions. Thus, in the final e-mail (dated 27 January) prior to the recap, Trafigura was offering rates lower than those contained in the recap, and Owners were asking for higher rates. Mr Holroyd was able to refer me to the point at which the parties reached agreement on rates. This was in a WhatsApp message from Mr Hoeg to Mr Sorensen at 9:48 am London time on 30 January (i.e. just under an hour before the recap was sent) in which Mr Hoeg says:

> "Have spoken to Adamantios Lemos just now and can do the following 33400/34400/35400. Best he will do."

Ten minutes later, again by WhatsApp message, Mr Sorensen said: "ok, confirm". This was followed by a thumbs up emoji from Mr Hoeg.

13. It was therefore these rates, communicated by WhatsApp and where agreement was reached in the WhatsApp, which were then included in the recap. There was no suggestion, at the time, by Mr Sorensen that WhatsApp was in some way an unofficial channel of communication, and that Mr Hoeg therefore needed to put his proposal and Mr Sorensen his acceptance into an e-mail. Indeed, earlier in the negotiations Mr Sorensen actually passed on to Mr Hoeg two screenshots of WhatsApp exchanges which Mr Sorensen had had with Mr Olivi. These were relevant for the negotiation of rates and terms.

14. A second example concerns the identification of the previous terms that were to be used and which were "sub review both sides". The question of what terms to use was discussed on WhatsApp between the brokers on 28 January 2023, but the discussion was inconclusive. The question of terms was raised by Mr Hoeg by WhatsApp at 10:04 on 30 January, shortly before the recap. It did not elicit a response at that time. At 13:53, Mr Hoeg told Mr Lemos by WhatsApp that Trafigura were suggesting that they should use:

> "the terms we had agree last time (June 2021).. this was on the fixture that was failed. ofc sub review".

15. There is no e-mail in the hearing bundle, prior to that WhatsApp exchange, in which Mr Sorensen tells Mr Hoeg by WhatsApp what terms Trafigura were proposing to use. Nor is there any e-mail subsequent to that exchange or prior to the time when, at 14:40 on that afternoon, Mr Hoeg e-mailed Mr Lemos stating:

> "ref telcon this is the terms/ recap we agreed last last when had below deal on subs..
>
> Trafi said offhand still looks good but they are reviewing trading and sanctions clauses..".

16. Accordingly, this illustrates how the important matter of the prior terms was first raised in a WhatsApp message between the brokers. Whilst it is true that the identification of the prior terms is not to be found in a later WhatsApp, it is also not found in a subsequent email either. It appears that they were identified as a result of informal communications between the brokers.

17. A third example is when, on the afternoon of 30 January after the recap had been sent, Mr Hoeg forwarded three WhatsApp messages that he had received from Mr Lemos in relation to whether Kazak origin cargo could be loaded. One of those messages said: "it is understood that vessel allowed to load kazak origin oil loading cpc provided it is not sanctioned business". This language was then included in an email, sent by Trafigura, on the morning of 31 January.

18. Another example is a sequence of messages on 1 February, where Mr Lemos passed information relevant to the Vessel's CII rating to Mr Hoeg. The CII rating was relevant to a clause (described below) which was then under discussion. Mr Hoeg then sent it to Mr Sorensen asking him to pass it to Mr Jensen. This was then done.

19. Thus, whilst it is true that (as one might expect) the WhatsApp messaging between the two brokers, both of whom worked for the same broking company, included some exchanges where the language was informal, the above examples show how it was also used to convey relevant contractual information. There is nothing in the correspondence which suggests that it was somehow impermissible to use WhatsApp, or indeed to use informal discussion between brokers, as a means of communicating such information. Indeed, the WhatsApp communications are generally businesslike. They contain information which, prior to instant messaging, brokers and clients might have passed on in telephone discussions.

20. Secondly, the Owners' first offer, and the recap, referred to the "previously agreed terms". There is nothing in the exchanges prior to that recap which identified what those previously agreed terms were. The discussion on 28 January was inconclusive, and Mr Sorensen did not respond to Mr Hoeg's questions ("Terms? What to use?") at 10:04 on 30 January. It was only after the recap had been sent that, as Mr Hoeg told Mr Lemos, the Trafigura side had proposed terms that had been used "last time (June 2021)" on a "fixture that was failed". This is a point of potential relevance to the question of whether the recap contained a concluded contract.

21. Reverting to the chronology: the recap was circulated by Mr Sorensen at 10:55 on 30 January. There is no dispute as to the accuracy of the recap (i.e. as to its accuracy in describing what had or had not been agreed between the parties at that point).

22. The recap began: "I'm pleased to recap our sub fixture as flws:" and it contained the various provisions, to which I have referred, emanating from the original offer. It included the important provisions upon which much of the parties' argument focused.

> "**Terms:**
>
> As per previously agreed terms sub review both sides
>
> **Subs:**
>
> Charterers management approval latest 2 working day after all terms agreed."

23. It was common ground at the hearing that there was a linkage between the two provisions. I consider that it is clear that they are linked and envisaged the following sequence: a review by both parties of the previous terms (which, as I have said, had yet to be identified by the parties at the time of the recap); agreement on the terms ("after all terms agreed"); and then charterers' management approval latest 2 working days after agreement on all terms. Mr Hill suggested that the intermediate stage of agreement on all terms was not in fact required: if the parties were not able to agree, then the previously agreed terms would be applicable as the default position. I reject that argument. It is inconsistent with the parties' clear agreement, which specifically refers to "after all terms agreed". This moment is used as the important trigger moment for the 2 working day period permitted for charterers management approval to be communicated. On Trafigura's argument, it would be difficult if not impossible to identify the event that triggers the 2 day working period.

24. Albeit not identified at the time of the recap, it is common ground that the parties did, shortly after the recap, identify the "previously agreed terms" which were to be used for the purposes of the review and agreement of "all terms". These were a comprehensive set of terms agreed "on subjects" between Trafigura and other owners in June 2021, some 18 months earlier. This was for a different vessel, the Aqualegend, with a different owning company albeit under the same management as the Vessel.

Phase 2: Negotiations between the recap and 06:41 on 2 February 2023

25. The recap was circulated at 10:55 on 30 January 2023. A few hours later, the brokers (communicating by WhatsApp) negotiated in relation to permission to load Kazak origin oil from the CPC terminal. As previously described, Mr Hoeg at 13:02 forwarded to Mr Sorensen three WhatsApp messages that he had received from Mr Lemos in this regard. He was thereby communicating Owners' position on that point. There was no objection by Mr Sorensen that this had been done by WhatsApp, nor any suggestion that it was necessary for Mr Hoeg to put the point in an email.

26. By the afternoon of 30 January, the previously agreed terms had been identified by Trafigura, and it is clear that they were being reviewed on their side. At 07:06 on 31 January 2023, Trafigura emailed saying that the previous terms "looks ok", but

suggested changes to the trading range, cargo clause and sales clause. Trafigura's email included the wording concerning Kazak origin oil CPC that had been discussed via WhatsApp the previous day.

27. Owners responded at 13:25 that day on an accept/except basis and set out their own proposals under the heading "Additional Unisea Comments" for amendments/additions to the previously agreed terms. These included amongst other things a different drydocking clause from that in the "previously agreed terms". The drydocking clause in the draft contained an error or omission. The material part provided as follows:

> "On each occasion Owners shall propose to Charterers a date and geographical region/port on which they wish to drydock the vessel, <u>not less than before such date</u>, and Charterers shall offer a voyage to such geographical region or port for such periodical drydocking …" (emphasis supplied)

There was an omission of any specified period of time from the underlined words. This omission was not immediately spotted by either party, but was later identified by Trafigura as described below.

28. The "Additional Unisea Comments" also included the insertion of clauses known as CII, EEXI and ETS clauses. The reply witness statement of Mr. Karamanos-Cleminson explains these clauses, and the regulatory background.

(1) From 1 January 2023, all vessels of 5,000 GT and above were required to collect information in order to measure and report their annual operational carbon intensity indicator ("CII") rating. A vessel's CII rating can be affected by charterer's employment orders. A drop in CII rating can affect a ship's marketability and lead to owners being required to submit and implement a corrective action plan.

(2) From 1 January 2023, all vessels above a certain tonnage were required to measure their energy efficiency (Energy Efficiency Existing Ship Index – "EEXI") and to verify it against the required EEXI for the vessel. It was expected that a large part of the global fleet might be required to implement technical ship modifications in order to comply with the EEXI regulations.

(3) New rules in relation to the EU Emissions Trading System ("ETS") entered into force on 5 June 2023. The European Commission is preparing to adopt implementing and delegated acts in order to extend the ETS to shipping with effect from 1 January 2024. The ETS operates on a mandatory 'cap and trade' basis; a cap is set on the greenhouse gases which an affected party is allowed to emit. Within the cap, companies primarily buy allowances on the EU carbon market, but they also receive some allowances for free or trade allowances with one another. Each year, affected companies must surrender enough allowances to fully account for their emissions, otherwise fines will be imposed.

29. Mr Karamanos-Cleminson's evidence was that these regulatory developments were well known in the industry, and that they had been widely discussed in symposia. There was no responsive evidence from Trafigura which disputed his description of the background. Furthermore, in the e-mail discussions of the proposed clauses between

the parties, there is no suggestion that Trafigura that did not understand what these clauses were seeking to address. Mr Hill submitted that the court should not pay regard to this evidence, because it was contained in a reply statement to which there was no permission to respond. He also indicated that there was a dispute about it, albeit that no evidence had been submitted which identified the dispute. I did not consider that either of these points had any substance. Trafigura had a sufficient opportunity to respond to this evidence, if they had wanted to do so. Furthermore, it is scarcely surprising that there is a changing regulatory background in the context of the environmental impact of shipping including oil tankers. It is also obvious that parties, who are proposing to enter into a long-term charter of an oil tanker which might last for 6 years, will wish to give some thought to possible industry changes, as part of the "review" of prior clauses for which the recap expressly provides. I consider that the aspects of the regulatory background described in Mr Karamanos-Cleminson's evidence are relevant factual matrix, albeit (as the discussion below shows) this is not a decisive or particularly significant point in relation to the conclusions which I reach.

30. The Owners having identified these new clauses, the parties then proceeded to discuss and negotiate about them. It is noteworthy, contrary to an argument now advanced by Trafigura, that no point was taken at the time that – because the earlier agreed terms for the charterparty in June 2021 had not included CII, EEXI or ETS provisions – it was impermissible for the Owners even to raise these points in the context of the review and agreement contemplated by the relevant clauses of the recap. There is nothing in this argument for many reasons. There is nothing in the language of the recap which limits the points which either party could raise following their review and then seek to agree, or that precludes either party from seeking to include a clause which is not to be found in the June 2021 prior agreement. In any event, since I conclude (below) that no binding contract was concluded in the 30 January recap, it necessarily follows that there was no contractual obstacle to a party requesting new clauses in the agreement that was under negotiation.

31. Reverting to the chronology: at 14:25 on 31 January 2023, Trafigura replied saying that the CII clause would be a problem. They proposed completely different wording, and said that they said they were reverting on the rest. Paragraph d of Trafigura's proposed CII wording provided that "From 1 January 2023, the Owners shall comply with their obligations set out by the Regulations".

32. Owners replied at 18:36 that day on the CII clause. The Owners' response proposed an additional sentence ("Charterers agree to return the vessel to Owners with no less than C rating"). It also stated, with reference to paragraph d, that since the trading pattern of the Vessel was out of their control, they could only undertake to comply as far as they were able and for things under their control.

33. At 08:58 on 1 February 2023, Trafigura reverted on the other issues as well as on the CII Clause. On the CII clause, they wrote "ok so our proposed clause with following added at the end"; they then amended Owners' proposed new sentence to read "Charterers agree to <u>make reasonable endeavors to</u> return the vessel to Owners with no less than C rating" (emphasis supplied). They did not address Owners' reservation about paragraph d.

34. Various comments were given on other clauses. For example, in relation to the ETS Clause, where Trafigura wrote "delete. We do not have such clause agreed with anyone as of today to my knowledge".

35. Owners responded to this message at 12:01 on 1 February 2023. The parties referred to this last substantive email as "Owners' Last". Owners' Last contained various comments by the Owners in capital letters. As described below, Owners' Last is an email which is important to the parties' arguments. There was no immediate "clean" acceptance by Trafigura of the positions taken by Owners in that e-mail. However, some 5 days later, after certain intervening developments, Trafigura purported to accept it and thereby (on Trafigura's case) brought the negotiations on terms to a conclusion by finally agreeing all terms. There is a substantial issue as to whether Owners' Last was in fact capable of a simple acceptance. There are also issues as to whether, even if so capable, there had been an intervening counter-offer, thereby rejecting Owners' Last, which would destroy the ability of Trafigura to rewind the clock and accept Owners' Last.

36. In relation to the CII clause, Owners wrote "DELETE MAKE REASONABLE ENDEAVOURS TO". Various other points were also made in Owners' Last relation to other clauses, and I discuss below parts of the email which are of particular relevance to the issues identified in the previous paragraph.

37. Trafigura's response came in two e-mails sent on 1 and 2 February. Neither of those e-mails purported to be a clean acceptance of Owners' Last. The first e-mail (at 17:09 on 1 February) addressed everything except CII, on which Trafigura said that it was reverting. The second email (at 06:41 on 2 February) addressed the CII. It was again not a clean acceptance of Owners' proposed terms.

38. The Owners drew attention to the following features of the two e-mails sent in response. When describing them, I also include my conclusion on the question of whether, in the context of the points raised, there could be a clean acceptance and, even if so, whether there was a counter-offer that made a subsequent acceptance impossible.

39. *(1) Trading area.* In relation to the "Trading area", Owners submitted that the position had become confused. On 31 January, Trafigura had proposed certain wording. On the same day, Owners had responded saying that they could accept with the usual disclaimer "subject to Owners approval which not to be unreasonably withheld". Trafigura had then responded: "where will this be added sorry". In Owners' Last, Owners wrote "DELETE". Trafigura was not clear as to what was being proposed. Hence, they asked: "so delete owners amendment then?" in an attempt to clarify the position. Trafigura was therefore requesting a response from the Owners before agreeing to the "DELETE" suggestion of the Owners, since they did not understand what it meant.

40. In my view, this point – taken on its own – would not prevent a clean acceptance of Owners' Last. It would have been possible for Trafigura to accept Owners' proposed deletion. Moreover, there was no rejection of Owners' proposed deletion. The question: "so delete owners amendment then" was no more than a request for clarification of the position which Owners were taking. This particular point did not feature in Mr Holroyd's oral argument.

41. *(2) Clean Petroleum Products* (or "CPP"). The background here is that Trafigura wished to include a clause permitting carriage of CPP. The Owners

42. declined and Trafigura had asked: "how come". Owners' response in Owners' Last was to explain that "this is a crude oil carrier trading dirty, not a new building". Trafigura's response in its email on 1 February 2023 at 17:09 was to ask: "but if clean up is at charterers' risk and expense is this not OK".

43. In my view, this goes beyond the Trading Area point. Trafigura were reiterating that they wanted this term included, despite Owners' unwillingness to include it. Whilst the point is not as clear as the position in relation to the CII clause discussed below, I consider that Trafigura's response did fall on the counter-offer side of the line, rather than simply being a request for information. However, I do not reach a final conclusion on this point, which was not referred to by Mr Holroyd in his oral submissions or in the relevant paragraph (paragraph 68) or his skeleton argument, albeit that it was referred to earlier (paragraph 21).

44. *(3) BIMCO Sanctions.* The background here is that the Owners had originally proposed a small amendment to a sanctions clause which was contained in the June 2021 charter, arising from the fact that the UK was no longer part of the EU following Brexit. Trafigura's original response was to say that the amendment was OK, but also to request "Trafigura's sanctions clause in attached terms" which they described as "a comprehensive clause". They also requested the consequent deletion of a BIMCO designated entities clause contained in the June 2021 charter. Owners' response in Owners' Last was to say: "We need to keep both please as per the previously agreed terms". In their 17.09 e-mail, Trafigura's response was to say:

> "the bimco clause was an oversight. We fix with Trafigura's sanctions clause. Can we please stick to this which is ou[r] standard practice".

45. In my view, this again falls on the counter-offer side of the line. Trafigura were rejecting the BIMCO clause that Owners wanted to include, and repeating their position that only Trafigura's clause should be included. Whilst it is true that their position was expressed politely ("please stick with this"), Trafigura were not here requesting any information. They were repeating their position, explaining it, and inviting the Owners to accept it. This is very typical in charterparty negotiations, which are usually conducted on an "accept/ except" basis whereby the points in issue are narrowed down. Although not preceded by the words "accept/ except", this was the nature of Trafigura's email as a whole, and in particular its response in relation to the sanctions clause. Again however, I do not reach a final conclusion on this point, which also was not referred to in Mr Holroyd's oral submission or paragraph 68 of his written argument.

46. *(4) Drydocking clause.* It is in Trafigura's response to Owners' Last that Trafigura identified the omission in the drydocking clause, which had failed to specify the minimum number of days' notice that Owners would be obliged to give Trafigura before drydocking. Owners had previously made no proposal in that regard, and therefore Owners' Last contained no figure. Trafigura now inserted 120 days.

47. Although Mr Hill described this as a small and insignificant point, it is potentially important when considering the question of whether the parties were actually agreed on

all terms, and the related questions of whether Owners' Last was capable of a clean acceptance and whether it was in fact accepted. When considering whether a contract has been agreed, the question is not whether the parties were very nearly agreed or whether outstanding points were relatively minor. The position here in relation to drydocking, in contractual terms, is that Trafigura was (unsurprisingly) not prepared to accept Owners' clause as it stood. It required the insertion of a minimum period of notice, and Trafigura therefore made a proposal of 120 days. Its change to the terms of the clause was marked in green (the colour of all its comments and proposed changes in the 17:09 email). In contractual terms, this was clearly a counter-offer: Owners' clause as it stood was not acceptable and was therefore altered. The next stage would be to see whether Owners agreed to the alteration. The question of whether they would be prepared to give 120 days, or perhaps some different period, had never been the subject of prior agreement. The developments over the next few days are described below, and it is unsurprising that Trafigura were pressing Owners to respond to the points which Trafigura had made in relation to Owners' Last. However, in relation to drydocking, the position is straightforward: Trafigura had rejected the existing draft without the addition of a specified number of days, and the parties were yet to reach agreement on the specified number of days. They never did reach agreement on Trafigura's 120 days proposal, because Owners never did respond to that proposal.

48. *(5) ETS clause.* The position in relation to ETS clause is that a lengthy clause had initially been proposed by Owners on 31 January 2023. Trafigura's response was to request that the clause should be deleted, explaining: "we do not have such clause agreed with anyone as of today to my knowledge". In Owners' Last, Owners said:

> "Ok, noted re the clause but emissions trading scheme costs and expenses are for charterers account. If this wording isn't ok then please provide wording reflecting that this is for charterers' account".

49. Trafigura's response was:

> "Would propose: It is understood between the parties that direct costs arising from charterers trading of the vessel under the EU ETS trading scheme shall be for charterers account. The parties agree to mutually agree a clause once an industry practice has been established before December 31 2023".

50. In my view, Trafigura cannot overcome two difficulties concerning Owners' Last and the response that they gave. In theory, in response to Owners' Last, Trafigura could have accepted the wording that Owners had originally proposed, and to that extent the proposal was capable of a clean acceptance. However, that was not what happened, and there was therefore no clean acceptance of Owners' proposed wording. Instead, Trafigura decided to take up the option of providing different wording to the Owners. The wording so provided was very obviously in the nature of a proposal ("Would propose"), and it therefore required consideration and a response from the Owners. Owners' request, in Owners' Last, for proposed wording addressing ETS, was simply not capable of clean acceptance. It called for a proposal, and a proposal was what was given. It is no answer, as Mr Hill submitted, that the proposal picked up points that Owners were interested in, and had indicated that they would be willing to accept. Thus, it is true that the Owners had asked that the proposal should reflect that ETS was for

Trafigura's account, and that Trafigura's proposal did reflect this, as well as including an additional sentence which to some extent reflected part of the Owners' proposed clause. However, the wording remained a proposal, and it remained to be seen – for example – whether the Owners would be willing to agree that the clause should be confined to "direct costs" as Trafigura proposed. In the event, the Owners did not respond and Trafigura's proposed clause was never agreed.

51. *(6) The CII clause.* The position reached in Owners' Last was that the Owners required an absolute obligation on the part of Trafigura to "return the vessel to Owners with no less than C rating". Prior to Owners' Last, Trafigura had proposed that this should be amended to read "make reasonable endeavours to return …", thereby reducing the nature of the contractual obligation. Owners' response in Owners' Last was: "DELETE "MAKE REASONABLE ENDEAVOURS TO"", thus requiring the absolute obligation.

52. In their response at 06.41 on 2 February 2023, Trafigura were not willing to agree to the absolute obligation. Their email said:

> "And ref CII please accept the following
>
> Our proposed CII Clause with following wording at end:
>
> 'Charterers agree to <u>make BEST endeavours to</u> return the vessel to Owners with no less than C rating'." (The underlined words were in green, denoting that these were changes proposed by Trafigura).

53. I have no doubt that this was, in relation to the CII clause (and therefore the proposed charter as a whole) a counter-offer. Trafigura in their submissions refer to a number of authorities, including the old decision in *Stevenson, Jacques & Co. v McLean* (1880) 5 QBD 345 where Lush J held that a particular telegram was, in the circumstances, "a mere inquiry, which should have been answered and not treated as a rejection of the offer". The basic principle in this area is, as stated in *Chitty on Contracts* 34th edition, paragraph 4-124, that the law distinguishes between a rejection and a mere enquiry or request for information made without any intention of rejecting the terms of the offer.

> "Whether the communication is a counter-offer or a request for information depends on the intention, objectively ascertained, with which it is made".

54. The position is well explained in *Cartwright: Formation and Variation of Contracts* (3rd edition)

> "Not every response to an offer is a rejection if it does not unequivocally accept the offer. It may be merely an inquiry, asking for further details of the offer, or even asking for guidance about whether the offer is final or whether the offeror might be willing to consider some variation to the terms of the offer. No doubt if the response is of this latter kind, particularly where the response sets out some particulars on which the offeree is asking whether the offer might be varied, it will be more difficult to

> show that it was only an inquiry and not a counter offer. However, whether it is a counter-offer or merely an inquiry depends upon the interpretation of the response—and here, as always, the question is how the addressee of the communication ought reasonably to have interpreted it."

55. In the present case, in relation to the CII clause (and indeed some of the other clauses to which I have referred), there was the usual ongoing process, in a charterparty negotiation, where each side was addressing clauses and wording proposed by the other side, with a view to narrowing differences. In relation to the CII clause, Trafigura were rejecting the absolute obligation, and trying to include a modified version: a best endeavours obligation, which is of course more stringent than reasonable endeavours but falls short of an absolute obligation. As *Cartwright* says, it is more difficult in such circumstances to show that it was merely an inquiry and not a counter-offer. I have no doubt that, in relation to this clause, an addressee of the communication would reasonably interpret it as a counter-offer rather than an enquiry. It seems to me to be very much in the vein of the usual back and forth between brokers in a chartering context such as the present, where (in my view) one would usually expect the parties to be putting forward counter-proposals rather than making enquiries. It seems to me to be a very long way from the factual context of the *Stevenson* case, albeit that the relevant principle established by that case remains.

56. Accordingly, having considered the various points relied upon by Owners, I have no doubt that, for the above reasons, Owners' Last was not capable of a clean acceptance at the time that it was sent, and that the counter-offers made in Trafigura's emails of 1 and 2 February 2023 would also mean that Owners' Last could no longer be accepted thereafter (even if it had been capable of acceptance in the first place).

57. These conclusions are important in the context of the parties' arguments summarised below, and I will return to them. They are not, however, determinative of the outcome of the application: in particular because I need to address Trafigura's argument that a binding agreement was reached in the recap, that the "review" and "management approval" provisions were conditions subsequent, and therefore that any dispute as to whether the parties reached agreement subsequent to the recap is a matter for arbitrators in accordance with the arbitration clause agreed by the parties.

58. I now return to the chronology of the parties' dealings.

Stage 3: The hiatus

59. The parties' exchanges between the recap and Trafigura's message at 06:41 on 2 February 2023 had been fairly rapid. However at this point it all went quiet on Owners' side. In view of my conclusions as to where things stood after Owners' Last, and the two responses from Trafigura as described above, the Owners are correct to say that the ball was obviously in Owners' court. The factual position is that they simply did not respond.

60. The documents show, and indeed I did not understand it to be disputed, that Mr Lemos was by now having second thoughts about dealing with Trafigura. His concern, or at least principal concern, related to Trafigura's conduct in relation to another vessel, the "Aqualoyalty", which Mr Lemos considered "outrageous" (as he messaged Mr Hoeg

in the morning of on 2 February), adding “Not sure wait [i.e. what] I want to do about trafi, having second thoughts”. It is clear (from paragraph 44 of Mr Biggs’ witness statement) that Mr Sorensen was aware that Mr Lemos was having second thoughts, and that the problem had originated with the Aqualoyalty.

61. Trafigura chased by email at 09:21 on 2 February as follows:

> “For the sake of clarity, we are of course willing and able to find a commercial solution on the pending terms and we wish to find common ground to both satisfaction. Please revert with owners feedback soonest, so that we can hopefully finalize terms today. if needed, we can have a quick conf call to finalize the few outstandings.”

62. This e-mail shows that no agreement had been reached by that stage, and it confirms that the ball was in Owners’ court: hence the request for them to revert with their feedback soonest. Similarly, in WhatsApp messages between Mr Sorensen and Mr Jensen in the afternoon of 2 February, Mr Jensen asked whether they could expect a counter soon. Mr Sorensen said: “well a counter or a f…k off”. There followed reference to the “Aqualoyalty”. As matters transpired, Owners did not send a counter but simply did not reply to the 09:21 e-mail.

63. At 20:12 on 2 February, Mr Hoeg forwarded to Mr Sorensen a set of WhatsApp messages between himself and Mr Lemos concerning the “Aqualoyalty”. In these messages, Mr Hoeg had written to Mr Lemos that Anders [Jensen] felt caught in between, and Mr Hoeg thought “in my view boils down to cape issue”. Mr Lemos’s final message in the series, forwarded to Mr Sorensen, said: “let me sleep on it and decide in the morning please”.

64. Trafigura chased again at 10:08 on 3 February:

> “Can we please check in with Owners on when they expect to revert on terms? From our perspective seems to only be minor things pending which we can hopefully mutually resolve between us.
>
> We are working very seriously on this deal as you know and would like to agree terms soonest possible in order to hopefully finalize soonest”

65. After this, the WhatsApp messaging between the brokers on that day showed, in summary, that nothing was moving forward, and Mr Hoeg suggested setting up a call on the Microsoft Teams platform. At 17:24 that day, Mr Lemos messaged Mr Hoeg by WhatsApp, saying “sorry about not proceeding trafi today, just don’t feel like I want to do this with them on this one”. This message was not passed on to Mr Sorensen. On 5 February, there was further discussion about a Teams call, and it was proposed that it would take place on 6 February. On 6 February at 09:04, Mr Hoeg sent an invitation for a Teams call at 10:00 that day.

Stage 4: Events on 6 February 2023

66. At 9:19 on 6 February, Mr Lemos messaged Mr Hoeg saying “not sure how to play the call today, after a lot of thought not there to do this with with trafi, will call you in a few min to discuss”. This particular WhatsApp message was not, however, passed to Mr Sorensen.

67. It is common ground that at around this time, the Teams call was cancelled by Mr Lemos. There is, however, a pleaded factual dispute as to whether (in relation to the cancellation of the call) Mr Lemos told Mr Hoeg on the telephone that Owners were withdrawing from the negotiations and whether Mr Hoeg passed this on to Mr Sorensen. The Owners accepted that this was not a dispute which can be resolved on a summary basis. For present purposes, Owners were prepared to assume that Mr Hoeg did not tell Mr Sorensen (in connection with the cancellation of the Teams call) that Owners did not wish to proceed.

68. It was at this point (shortly after the Teams call was originally due to have started) that Trafigura decided to accept an alleged offer made by Owners in Owners’ Last; i.e. their last substantive email proposal on 1 February 2023. At 10:08 Mr Jensen of Trafigura sent an email to both Mr Sorensen and Mr Hoeg (as well as Mr Olivi) as follows:

> “Tim and Kenneth
>
> Per discussion – we are very committed to this deal and have been making financial decisions on the back of the deal we have on subs. We have both been entering into hedges and have taken other financial decisions on the basis of having this deal on subs and cannot face a situation where owners decide to take a different view.
>
> Therefore, we can hereby confirm that we are now agreed on terms basis owners last. We will revert ref our CMA subs soonest possible.”

69. Mr Lemos subsequently referred to this in correspondence as a “stunt”. I do not need to decide whether that is an accurate description. However, for the reasons already given, it was not possible for Trafigura to accept Owners’ Last on 6 February 2024, as they purported to do.

70. The final paragraph of the e-mail did however, correctly, recognise that agreement on terms was the trigger for the lifting of the “CMA” (i.e. Charterers Management Approval) sub (i.e. “subject”).

71. Prior to the subject being lifted, however, the following occurred. At 10:27, Mr Hoeg forwarded to Mr Sorensen three WhatsApp messages that he had exchanged with Mr Lemos about Trafigura’s email. These ended with Mr Lemos writing “please clarify to them we are not on subs as we haven’t agreed terms”. Mr Sorensen forwarded the messages to Mr Jensen at 10:39.

72. At 10:41, Mr Hoeg forwarded to Mr Sorensen two further WhatsApp messages that he had exchanged with Mr Lemos about Trafigura’s email. These were instantly passed

on to Mr Jensen by e-mail at 10:42. The first was from Mr Hoeg and the second from Mr Lemos:

> "Hoeg: thanks.. in their view basis the last email they believe terms are agreed now
>
> Lemos: Not sure how they can say that as they were "reverting" on some things for the last rounds. In any case don't want to have a disagreement on technicalities but we dont agree the terms and arent there to do the business".

73. Mr Sorensen's reaction, expressed on WhatsApp to Mr Jensen, was:

> "It's going as bad as it could".

74. At 10:49, Trafigura (by Mr Jensen) sent an email purporting to lift their CMA subject, stating:

> "We hereby lift all subs and fully fix the deal"

75. These events, unsurprisingly, gave rise to a strong reaction from the Owners. A number of messages were sent by e-mail.

76. At 11:02 on 6 February, Mr Hoeg emailed Mr Sorensen. This set out Mr Lemos's reaction to the first e-mail in which Trafigura had purported to accept Owners' Last:

> "spoke to owners.. he is very surprised to see this message as he consider we are not agreed on terms hence not ready to proceed.
>
> if need be he can discuss later today.."

77. At 11:45, Mr Sorensen sent the following e-mail to Mr Jensen (and Mr Olivi) as well as Mr Hoeg:

> "See below verbal comments from owners. the message shared with anders on whatsapp, are not official messages in response to your last, so what I suggest we do, rather than just poke the situation further is to address the verbal comment 'that we are not agreed on the terms" to do what I consider the correct approach is to address it along flwg lines:
>
> "we understand verbally from the broker, that owners do not consider us agreed on terms. We were of the understanding that by accepting owners last on terms, that full terms have been mutually agreed, but if there is confusion on this, we suggest that the broker recap the terms agreed for both parties review, to align if we or owners have missed anything. we remain committed to do the deal, so appreciate owners efforts to address any outstanding they deem us still to have on terms. if so required, we are available for both conf calls and potential physical meetings to address any concerns owners might have in finalizing this deal.

> Pls cfm yr agreement""

78. At 13:13, Mr Sorensen sent the following further message to the same recipients:

> "ref telcon, I suggest we re-write yr message slightly lifting subs along flwg lines:
>
> qte
>
> We consider that by accepting owners last on the few outstanding terms, that we are fully fixed on all terms and are hereby happy to lift our CMA subjects.
>
> Please confirm receipt.
>
> We ask the broker to send a clean recap for both parties approvals."

79. Mr Sorensen then proceeded to prepare a clean recap containing the terms which he was saying had been agreed. The recap was sent to Trafigura at 15:54 on that day. In view of the fact that agreement had not in fact been reached on all terms (as I conclude above), it is not surprising that Mr Sorensen appears to have had some difficulty in reflecting the final exchanges in a clean recap. For example, the clean recap included sub-paragraph (d) of the CII Clause, which Owners had said that they could not accept as drafted. It also included Trafigura's proposed ETS clause, to which the Owners had never expressed their agreement.

80. At 22:41, Mr Lemos emailed Mr Hoeg:

> "Appreciate you were asked to draw this up but to be clear we have not agreed these terms and there is no mutual agreement on terms and no definitely no deal done. I fail to understand how they can try to warp the facts and expect to force us into something that has not been agreed and not been put on subjects."

81. On 9 February, Mr Lemos sent a longer email to Mr Hoeg (and to which Mr Hill referred in the course of his submissions):

> "I am fully aware that Trafigura pushed Tim to send a recap in an effort to have something to support their stunt to unilaterally declare terms agreed when they knew full well we had not agreed terms and then say that the ship is on subjects, which it was not since terms were not agreed by both sides, just to go on and lift subjects minutes later.
>
> Charterers cannot just one sidedly put a ship on subjects declaring terms are agreed when clearly they were not ever agreed by us. This is evident from the correspondence upto Monday morning and the fact that a MS Teams meeting was scheduled by Arrow for Monday morning to discuss terms but when I cancelled the meeting they moments later unilaterally

> declared them agreed which was clearly not the case. How could anything be interpreted to be agreed when they were asking more than once from Thursday for us to come back on terms so that we could get them agreed and a teams meeting had been arranged to discuss this on Monday?
>
> I also note from your message that they still are asking for a meeting or call to discuss terms which also supports that terms were and are not agreed.
>
> So to summarise, the ship never went on subjects since all terms were not agreed by both sides which was necessary for the ship to go on subjects as per the recap. Any insinuation that Owners are trying to back out of a fixture is totally incorrect as the ship has not been clean fixed and there is no cp".

C: The parties' arguments

Owners submissions

82. In summary, Mr Holroyd on behalf of the Owners submitted as follows.

83. Trafigura has no real prospect of succeeding on its case that a binding charterparty was concluded either on 30 January 2024 or on 6 February 2023, or indeed at any other time.

84. There was no concluded charterparty on 30 January for two separate reasons. The effect of the subject concerning "Charterers' management approval" was that such approval was a condition precedent to a binding contract as clearly established by the decisions in *Nautica Marine Ltd v Trafigura Trading LLC: The Leonidas* [2020] EWHC 1986 and *DHL Project and Chartering Ltd v Gemini Ocean Shipping Co Ltd: The Newcastle Express* [2022] EWCA Civ 1555. It was also a condition precedent to a binding agreement that the parties should reach agreement on all other terms, including those which were to be "sub review both sides". It was only once such terms were agreed that the time period for Charterers' management approval would begin.

85. There was no concluded contract on 6 February either. There are multiple reasons why the sending of Trafigura's two emails on 6 February 2023 did not give rise to a charterparty (or any contract), each of which is sufficient to defeat Trafigura's claim:

    (1) Before Trafigura purported to conclude the contract (by lifting its CMA sub at 10:49), it had been expressly informed by or on behalf of Owners (in the WhatsApp messages referred to above) that Owners did not wish to proceed.

    (2) The basis on which the parties were negotiating (as agreed in the recap) was that Trafigura would not be entitled to lift its CMA sub until all of the terms had been agreed. All of the terms had not been agreed; thus the purported lifting of the sub was ineffective.

    (3) Owners' Last had not contained an offer capable of acceptance in any event; hence Trafigura's purported acceptance of it was ineffective.

(4) Even if Owners' Last had originally contained an offer capable of acceptance, the offer was rejected by virtue of Trafigura's emails of 17:09 on 1 February and 06:41 on 2 February and could no longer be accepted.

86. Even if all the terms had been agreed by 6 February 2024, there was no basis for an estoppel which would have the effect of precluding the Owners from deciding not to proceed on that date, and communicating that to Trafigura prior to their lifting of the CMA subject.

Trafigura's case

87. Trafigura contends, as a starting point, that this is not an appropriate case for summary judgment: the application is an invitation to conduct a mini trial. There are too many issues, including factual issues and difficult issue of law, to be resolved. However, in the event that the court may be more robust in its approach, they submitted as follows.

88. The CMA subject had to be considered in the context of the previous clause relating to "Terms". The words "as per previously agreed terms sub review both sides", on their proper construction, meant that the parties agreed to be bound even if there were further terms agreed. Accordingly, any requirement for agreement thereafter was a condition subsequent, not a condition precedent. It was for the arbitrators to decide whether or not there had been a subsequent agreement. In support of the proposition that the provision for review was a condition subsequent or a condition precedent to performance, Mr Hill relied principally upon *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The Pacific Champ)* [2013] EWHC 470 (Comm) (Eder J) and a decision of the Singapore Court of Appeal in *TopTip Holding v Mercuria* [2017] SGCA 64.

89. Building on the proposition that the "review" clause was a condition subsequent, Trafigura submitted that the same conclusion must follow in relation to the CMA subject. This too was a condition subsequent. There is a realistic prospect of success on these points, which would produce the result that summary judgment should be refused. Trafigura did not itself seek summary judgment on this issue. The consequence of a final decision in Trafigura's favour at trial on the condition subsequent point would mean that issues as to whether either or both of those conditions subsequent were fulfilled were a matter for the arbitrators.

90. In his oral submissions, Mr Hill recognised that the decision in *The Newcastle Express* would ordinarily make it difficult for Trafigura to contend that, if the CMA clause stood alone, this was a condition subsequent. However, the CMA clause in the present case had to be viewed in the light of the "review" clause, which meant that agreement on terms was a condition subsequent. It also had to be viewed in the light of the parties' agreement to delete the "subject Board of Directors approval" clause that the Owners had proposed, but which Trafigura had rejected.

91. Accordingly, a contract was concluded on 30 January; and all issues arising out of subsequent conduct are for the arbitrators.

92. In the alternative, a binding charterparty was concluded on 6 February. On this argument, Trafigura submitted that Owner's Last was an offer capable of acceptance, that it had not been rejected by way of counter-offer, and was cleanly accepted by

Trafigura on one of two occasions. This occurred either around 10:08 on 6 February 2023, when acceptance of Owners' Last was communicated to Owners by Trafigura, or later in the day, at 10.49, when the CMA subject was lifted.

93. There was at that stage nothing to prevent Trafigura from lifting this subject. It was accepted that Trafigura had received the various messages from Mr Lemos, passed down the WhatsApp chain, before the subject was lifted. However, Mr Lemos's statement that "In any case don't want to have a disagreement on technicalities but we don't agree the terms and aren't there to do the business" did not amount to a withdrawal from the negotiations. There was a realistic prospect of showing that this should not be treated as an official statement of the Owners' position, since it was sent by WhatsApp not by email. In any event, the message was ambiguous and did not clearly withdraw from the proposed agreement. It was therefore open to Trafigura to lift the outstanding subject, and for the charterparty then to go unconditional and become binding.

94. Finally, Trafigura relied upon an estoppel. This was based on the parties' agreement not to have the Owners' Board of Directors approval subject, a term which was not acceptable to Trafigura. This agreement gave rise to an implied representation that the Owners would not withdraw pending Trafigura lifting its subject once the terms had been agreed within the meaning of the CMA subject.

D: Legal framework

D1: Summary judgment

95. In the context of the court's approach to summary judgment applications, I was referred to the well-known judgment of Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The court must consider whether the party has a realistic, as opposed to a fanciful, prospect of success. A realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. In reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial. The court does not have to take at face value and without analysis everything that parties say in their statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

96. In relation to issues of law or construction, Lewison J said:

> "On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence

> that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

97. In the *ICI* case quoted in this extract, Moore-Bick LJ said at [13]:

> "Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome".

D2: Construction of contracts

98. The parties' arguments, concerning the effect of the agreement set out in the 30 January recap, gave rise to an issue of construction; i.e. how to construe the terms of the recap, in particular the "terms" and "subjects" provisions at the end. As indicated above, it is not in dispute that the recap did accurately set out the parties' agreement at that stage. It was thus not suggested that there were some other terms, other than those set out in the recap, which had in fact been agreed.

99. Trafigura contends that the effect of the terms agreed is that there was a binding agreement between the parties. The Owners contend otherwise. The question in the present case – on Trafigura's first way of advancing its case – is whether or not, in the relevant factual context, the recap is to be interpreted as giving rise to a binding contract as at 30 January 2023.

100. It seems to me that this raises an issue of contractual construction which in substance is no different to the question which arises when the court is required to interpret the terms of a contract which was admittedly made. I did not understand either party to suggest that the principles of interpretation were any different to those which would normally be applied to issues of contractual interpretation.

101. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J. in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 34th edition paragraph 15-053:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been

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

102. This summary is a synthesis of the principles that have been authoritatively stated in a trilogy of Supreme Court decisions in the past 10 years: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

E: Discussion

E1: Was there a concluded contract on 30 January?

103. It is now very clearly established that, in the context of contracts for the employment of a ship, the making of an agreement on "subs" or "subjects" signals that there are pre-conditions to a contract which remain outstanding. The conclusion of a binding contract is dependent upon the agreement of the relevant party or parties to "lift" (i.e. remove) the subjects. This was explained by Foxton J in *The Leonidas* as follows:

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

> [53] While these general principles apply to contracts whether they pertain to the domain of land rats or water rats, there is a particular feature of negotiations for the conclusion of contracts for the employment of ships which should be noted. When the main terms for a charterparty have been agreed but the parties have yet to enter into contractual relations, this is generally referred to by shipowners, charterers and chartering brokers as an agreement on "subjects" or "subs", an expression which signals that there are pre-conditions to contract which remain outstanding. The conclusion of a binding contract in respect of such an agreement is seen as dependent on the agreement of the relevant party or parties to "lift" (ie remove) the subjects. The position is accurately summarised by the editors of Carver on Charterparties (2017) at para 2-031 as follows:
>
>> "The parties may agree the terms of a charterparty and one such term may be a condition precedent that unless and until the condition precedent is satisfied, no binding contract comes into being. In charterparty negotiations, such conditions precedent are often referred to as 'subjects' and the satisfaction of those conditions precedents is referred to as 'lifting the subjects'."
>
> (To similar effect see Wilford on Time Charterparties (4th Edition) para 1.11.)"

104. Foxton J's judgment in that respect was approved by the Court of Appeal in *The Newcastle Express* at paragraphs [34] – [36], where the judgment in *The Leonidas* was described as a "tour de force". In so doing, Males LJ quoted at [36] the following from the 7th edition of Wilford on *Time Charterparties*:

> "In practice, parties very often indicate that they do not yet intend to make a binding contract by saying that their agreement is 'subject to' conditions. To say an agreement is 'on subjects' means that it is not binding until the 'subjects' in question have been 'lifted'. Generally, only when all subjects are lifted does an agreement become a binding contract. At that point the ship is 'fully fixed'."

105. It is therefore clear that the effect of a "subject", such as the Charterers Management Approval (or "CMA") subject in the recap that I am considering, is to negative contractual intent. It thus has the same legal effect as when "subject to contract" forms part of contractual restrictions. It is not a condition subsequent, but rather is a condition precedent. In paragraph [37] of the Court of Appeal's judgment in *The Newcastle Express*, Males LJ said:

> "The use of a 'subject' in the context of charterparty negotiations is therefore well known as a device to ensure that a binding contract is not yet concluded, just as is the case with the term 'subject to contract' in other contexts".

106. Thus, as Males LJ went on to say at [38], an agreement "on subjects" leaves either party free to withdraw until the subject is "lifted". It provides commercial, but not legal, pressure on a party not to withdraw.

107. There is also authority that a "subject" requiring board/management approval operates the same way, even outside the shipping context. In *Goodwood Investments v Thyssenkrupp Industrial Solutions* [2018] EWHC 1056 (Comm) paras [32] – [33], Males J held that the principles which applied in relation to "subject to contract" also applied to a subject of board approval:

> "The meaning of that phrase is well-known. What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made."

He quoted in paragraph [32] an earlier decision of Lewison LJ as to the well-known meaning and effect of "subject to contract":

> "What it means is that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) each party reserves the right to withdraw until such time as a binding contract is made. It follows, therefore, that in negotiating on that basis [both parties] took the commercial risk that one or other of them might back out of the proposed transaction In short a 'subject to contract' agreement is no agreement at all".

108. Against this background, I consider that it is clear beyond any serious argument that the relevant subject in the recap ("Charterers management approval latest 2 working day after all terms agreed") is to be interpreted in accordance with the above authorities. It meant that there was no contract between the parties until the subject had been lifted. To adapt the words of Lewison LJ: an agreement "subject to Charterers' management approval" is no agreement at all.

109. This conclusion means that Trafigura's case can derive no assistance from an analysis of the effect of the previous provision: "As per previously agreed terms sub review both sides". As previously discussed, the "Terms" and "Subs" provisions work in tandem, and their effect is that the parties agreed upon a sequence of events: (a) review of the previous terms by both sides followed by (b) agreement on "all terms" which would be (c) the trigger for the start of 2 working days for Trafigura to lift the CMA subject. Since it is clear that there was no contract during the period of 2 days triggered by agreement on all terms, there can have been no agreement at any prior stage.

110. Mr Hill argued that one should start by considering the effect of the "Terms" provision, and that a conclusion that this did not give rise to a condition precedent (but to a condition subsequent) should infect the analysis of the CMA subject provision. I disagree with that approach. It is of course right that a contract must be considered as a whole. However, here the parties have agreed on a "subject" which, as the authorities (including the citations from *Carver* and *Wilford*) show, has a well-recognised meaning; namely that no contract has yet come into existence. In view of the parties'

clear agreement in relation to that provision, I do not see how the "Terms" provision can be used to produce a contrary result. Furthermore, the clear "subject" in the final clause affects all of the previous terms, including the review clause. *The Newcastle Express* shows that even an arbitration clause, in the context of a "subject" of the present kind, has no independent life. The same must apply for the review clause. Furthermore, there is in any event nothing in the language of the review clause which materially impacts on the ordinary meaning of the CMA subject.

111. Even if the "Terms" provision had stood on its own, I would hold that agreement on terms was a precondition to a binding contract. The "review" provision appears in the contractual context of an agreement where both parties are to review previously agreed terms, but where – at the time of the recap – the previously agreed terms had not been clearly identified and agreed. In fact, there is no evidence of previously agreed terms between the present parties, albeit that (subsequent to the recap) the brokers later identified a contract involving a different ship and a different owning company as the relevant contractual terms. This was not therefore a case where the "review" provision contained an agreement that there should be a specific charter with logical amendments, and indeed it did not identify a specific charter at all. It is also the case that both parties, not simply one of them, was to carry out the review. Furthermore, the recap had other significant gaps which required agreement: the trading area exclusions were to be agreed, and the wording of the cargoes to be carried was also to be agreed. These matters are sufficient in my view to lead to the conclusion that this particular review position, in context, is to be interpreted in a similar way to "subject details" wording (see *The Junior K* [1988] 2 Lloyds Rep 583): i.e. that there is no contract until the details have been agreed.

112. That conclusion, as to how the review clause would be interpreted even in the absence of the CMA subject, is reinforced, in my view, by consideration of the factual matrix. The evidence of Mr Karamanos-Cleminson shows that this was a contract being negotiated in the context of an industry in which (unsurprisingly) there were ongoing regulatory changes, particularly in the context of environmental concerns. It is obvious in my view that parties, who were considering a charterparty of up to 6 years duration, would wish to review the terms which had been agreed in the unidentified "previously agreed terms", in order to assess what was now required. This would certainly be required in the context of the terms, later identified, which had been agreed some 18 months earlier, and where regulatory changes were in prospect or had been imposed in the intervening period.

113. There is nothing in either the *Pacific Champ* or the *TopTip* case which leads to any contrary result. As Mr Hill accepted in his oral submissions, neither of those cases establishes the proposition that where a contract is made on "previously agreed terms sub review both sides", such language has the effect that there is an immediately binding contract. In neither case was there a combination of clauses which are equivalent to the clauses which I am considering. Both cases pre-date the judgments in *The Leonidas* and *The Newcastle Express*, which are directly relevant to the "subject" clause, which itself has a relationship with the "review" clause. Neither case considers the relationship between such clauses. Moreover, the decision of Eder J on the relevant point was clearly obiter, since in that case Hyundai had established on a different ground that there was no contract between the parties.

114. Accordingly, there is nothing in the "review" clause which assists Trafigura's argument that the CMA subject clause is to be interpreted other than as a precondition to the existence of a binding contract. Indeed, for the reasons that I have given when considering what the position would have been if the "review" clause had stood on its own, I consider that this clause supports the conclusion that the recap did not contain a binding agreement.

115. The other main plank of Trafigura's argument, which sought to achieve the result that the CMA subject was a condition subsequent, was an argument based on the fact that, earlier in the contractual negotiations for the recap, the Owners had sought a "subject" of their own (board of directors approval) and this had been turned down by Trafigura and thus formed no part of the parties' agreement in the recap. Mr Hill submitted, in substance, that the interpretation of the CMA subject as a condition precedent would negate the parties' agreement that there was to be no Owners' subject. Such interpretation would have the effect of permitting the Owners, once terms had been agreed, to have a period of reflection (i.e. the 2 working days) in which to decide whether or not to proceed with the agreed terms, and to withdraw during that period if they decided that they did not want to proceed. However, the parties had agreed that the period of reflection was for Trafigura alone. Thus, the effect of giving what might be regarded as the usual (per *Leonidas* and *Newcastle Express*) condition precedent reading to the CMA clause would result in an opportunity for Owners to resile from the agreement, after the terms had been agreed. It was, however, clear from the rejection of the Owners' proposed subject that this was not intended. Hence, the relevant provision should be construed as a condition subsequent rather than a condition precedent.

116. I reject that argument. The approach to provisions such as the CMA subject in this case is now well established and well known, and both the *Leonidas* and the *Newcastle Express* cite leading textbooks in support of their conclusions. I see no reason at all to give the CMA subject anything other than its ordinary and well-established meaning by reason of terms which were under discussion, but not agreed, during earlier negotiation. I consider that this is an area where contractual certainty is important, and this has been provided under English law by the decisions to which I have referred. The approach to such clauses is clear; they preclude a contract coming into existence unless and until approval is given. There is nothing in the language which the parties have used in the recap, which is the relevant agreement to consider in order to determine the effect of that document, which produces or points to any different result. Applying ordinary principles of construction, a reasonable person would interpret the language of the relevant "subject" as to negate the existence of a binding agreement, until the subject is lifted.

117. Furthermore, I am not persuaded that it is permissible to look at the earlier stages of the negotiation, and in particular terms which were not agreed, in order to interpret the terms which have been agreed. Pre-contractual negotiations are generally inadmissible as an aid to construction, and I see no reason why that should be any different when considering the present argument by Trafigura; i.e. an argument that the terms of the recap give rise to a binding contract. Pre-contractual negotiations are regarded as unhelpful to the process of construction, and therefore do not form part of the admissible factual matrix.

118. Even if the terms not agreed could be considered relevant to the issue of construction, I think that it would be most undesirable if fine differences in the approach to such

widely-used "subject" clauses, were to develop by reason of particular clauses which were proposed for inclusion in a contract, but for one reason or another were not agreed. There is in my view a need for contractual certainty in this area, and it is provided by the *Leonidas* and the *Newcastle Express.* If parties wish to produce a different result, they can make the position clear by the language that they use.

119. Finally, I do not consider that the refusal to agree the Owners' subject leads to the conclusion that the CMA subject is to be read in a completely different way to the clauses in *The Leonidas* and *The Newcastle Express*. The premise of the argument is that the Owners are thereby achieving through this route the result which they failed to achieve by asking for the board of approval subject which they requested. However, the fact that there was no concluded contract is simply the ordinary consequence of the term that Trafigura itself wished to include. Moreover, Trafigura did put itself in a materially better position by refusing to agree the Owners' subject, and conversely the Owners did not obtain a benefit which they were seeking to obtain. It is true that, in practical terms, if Trafigura took its time, following agreement of terms, to decide whether or not to lift the subject, the Owners might have an opportunity to withdraw from the contract. However, there was nothing to stop Trafigura, if it was concerned at this possibility – which is the ordinary consequence of parties not having reached a binding agreement – from lifting its subject quickly, rather than waiting for 2 days. Indeed, since such a provision is inserted for Trafigura's benefit, Trafigura could probably waive it at any time, including in advance of agreement of terms. In either of these circumstances, the refusal to agree Owners' subject would benefit Trafigura: if the subject was lifted quickly or waived, then Owners would not have additional time to think about things.

120. Accordingly, I consider that the clear meaning of the relevant "subject" in the present case is to preclude the existence of a binding contract prior to the subject being lifted. There was, therefore, for that reason, no binding contract on 30 January 2023. I also consider that there was no binding contract until "all terms agreed", and that this would be the position even in the absence of the CMA subject. This is a second reason why there was no binding contract on 30 January 2023

121. In my view, the issues here raised are issues of construction, and I see no reason why they should not be decided in the context of a summary judgment application.

E2: Were "all terms agreed"?

122. The next way in which Trafigura puts the case is that a contract was concluded on 6 February 2023, at the point in time when the terms were (allegedly) agreed.

123. I have already addressed the facts in Section B above, and have concluded that the parties did not reach agreement on all terms on 6 February or at all. Since I have concluded in Section E1 above that the effect of the recap is that agreement on all terms was a precondition to the existence of a binding contract, it follows that there was never a binding contract between the parties; or, to put the matter more accurately in the context of a summary judgment application, there is no real prospect of Trafigura showing that there was a binding contract on 6 February 2023. Accordingly, this reason is sufficient in itself to enable the Owners' application for summary judgment to succeed.

124. I again see no reason why this issue should not be decided in the context of a summary judgment application. The effect of the recap is an issue of law. The question of whether agreement was reached depends upon a consideration of the e-mails exchanged between the parties.

E3: The effect of the WhatsApp messages sent to Trafigura prior to the lifting of the CMA subject.

125. In view of my previous conclusion, the Owners' argument based on the WhatsApp message sent on 6 February 2023 is not critical to the determination of the case. However, for the reasons that follow, I reach the conclusion that Trafigura has no real prospect of success on the question of the impact of the WhatsApp message sent on the morning of 6 February 2023, prior to Trafigura lifting the CMA subject. Accordingly, even if my conclusion in E2 above were wrong, the Owners would be entitled to summary judgment on the basis that, prior to lifting the CMA subject, Owners had made it clear that they were not prepared to contract.

126. The critical message, and the one on which the parties' argument focused, was passed down the chain (from Mr Lemos to Mr Hoeg to Mr Sorensen to Mr Jensen) at 10:41 on the morning of 6 February. It was sent subsequent to Trafigura's email (at 10:08) in which they sought to accept Owners' Last, and said that they would revert on the CMA subs "soonest possible". It was sent before Trafigura actually lifted the sub at 10:49 that morning. The text of the WhatsApp was as follows.

> "Not sure how they can say that as they were "reverting" on some things for the last rounds. In any case don't want to have a disagreement on technicalities but we don't agree the terms and aren't there to do the business".

127. The Owners contend that this message, whether viewed on its own or in the context of what had happened over the previous days, made it clear that Owners did not wish to contract with Trafigura. In legal terms, its effect was to revoke any offer to contract on the part of the Owners that may previously have been made. Consequently, no contract was formed when Trafigura purported to lift its CMA sub at 10:49 on 6 February.

128. No case is advanced, and there is no evidence to suggest, that this message was passed down the chain by Mr Hoeg without authority. In any event, the message that Mr Hoeg had received from Mr Lemos was clearly important, and I see no reason why a broker in his position would not have authority to decide to pass such a message on to its counterparty. Indeed, in circumstances where Trafigura had indicated that it would revert on the lifting of the CMA sub "soonest", I can see that Mr Hoeg might have been open to criticism if he had not passed on the message. As it is, the message was clearly passed on to Mr Sorensen, and then to Mr Jensen. Mr Sorensen reacted by telling Mr Jensen: "It's going as bad as it could".

129. I reject as fanciful, and without any real prospect of success, the suggestion that the message should in some way be disregarded, or is somehow of less significance, because it came via WhatsApp rather than e-mail. There is nothing in the prior correspondence which indicates that messages, conveying the position of the Owners, could not be sent by WhatsApp, or that this was in the nature of an unofficial channel, and I have given examples of a number of messages where important points were

conveyed by WhatsApp. Furthermore, Mr Sorensen's immediate reaction was not that the message could be disregarded or was not of real significance, but rather that it was "going as bad as it could". The first and only suggestion, in the documents to which I was referred, that a WhatsApp message is not an "official" message, was in Mr Sorensen's e-mail dated 6 February 2023. However, neither Mr Lemos nor Mr Hoeg had said that the critical message was in some way unofficial or that this was not Mr Lemos's official position. Indeed, the message was consistent with other messages which Mr Lemos had sent to Mr Hoeg on 3 February ("just don't feel I want to do this with them on this one") and earlier on 6 February ("after a lot of thought not there to do this with trafi"). It is also of a piece with the Owners' failure to respond to messages about the contract over previous days. It is also clear from Mr Sorensen's 6 February email as a whole that it was concerned with the tactics which should now be deployed in order to deal with the very obvious problem that had arisen.

130. Furthermore, if the words in the critical message had been given orally, rather than by WhatsApp, I see no reason why they should have been disregarded. It is likely that, if given orally, there would have been a dispute about what exactly had been said. (Indeed, there is such a dispute in relation to whether, prior to this message, Mr Sorensen was told by Mr Hoeg that the Owners were withdrawing from the negotiations). The advantage of using WhatsApp to convey messages is that there is a record of what is said.

131. The important question, therefore, is what the message conveyed. I agree with Mr Holroyd's submission that this question should be approached objectively, by considering how a reasonable reader would understand the message. I also agree that it is relevant in this regard to take into account the background to the message. The relevant background includes, in the present case, the following matters. 5 days had passed since the Owners' last substantive engagement towards agreeing terms, in the context of a deal that prior to that time had proceeded very quickly. Owners had, since 2 February, failed to respond to Trafigura's emails seeking to progress agreement towards a fixture. A difficulty had arisen in relation to the "Aqualoyalty", and Mr Sorensen knew that Mr Lemos was having second thoughts about concluding the fixture for the Vessel. The Teams meeting scheduled for that morning had been cancelled by the Owners. There was then the development when Trafigura had purported to agree Owners' Last, and had indicated that it would revert with its CMA soonest. This had provoked Mr Lemos to say (in a message passed to Trafigura) that "we are not on subs as we haven't agreed terms".

132. In relation to the language of the critical WhatsApp, the parties were agreed that the first sentence was not well expressed. It is not necessary to try to analyse those words, but they clearly refer back to the negotiations which had taken place, and probably the question of who should be responding to whom. It is plain from this sentence, and from the earlier message which Mr Lemos had sent ("please clarify to them … we haven't agreed terms") that Mr Lemos did not think that Trafigura could do what they were purporting to do at that stage. The more important point, however, is that Mr Lemos was not interested in "the technicalities"; i.e. the matters in the first sentence (such as who should be responding to whom).

133. The more significant part of the message is the contrast with "the technicalities". Mr Lemos says two things. "We don't agree the terms and aren't there to do the business". I do not consider, contrary to Mr Hill's submission, that there is anything ambiguous

about this message. If a party says that he isn't "there to do the business", any reasonable recipient would understand that he is not prepared to contract. Indeed, the statement that "we don't agree the terms" is, in my view, not significantly different. In the context of the statement that they aren't there to do the business, those earlier words mean that the Owners were not willing to contract on the terms that had been under discussion. Even if (as Mr Hill argued) those words could be given a more limited interpretation (e.g. that they only concern the terms which remain outstanding and unagreed), the statement that they were not there to do the business meant that the Owners were walking away. It is therefore not surprising that Mr Sorensen should say that things were going as bad as it could.

134. Since there was no concluded contract at that time (for either or both of the reasons which I have previously identified), the Owners were entitled to walk away at that point. Having told Trafigura that they were not there to do the business, there was no effective offer, let alone agreement, in respect of which Trafigura could then lift its subject.

135. Accordingly, for this additional reason, the Owners are entitled to summary judgment, because there is no realistic prospect of Trafigura succeeding on its case that there was a concluded contract when it lifted the subject.

136. Mr Hill referred, in his submissions, to a number of messages sent by Mr Lemos after the critical message, including messages sent after Trafigura lifted the subject and Mr Sorensen then circulated the clean recap. Mr Hill submitted that that Mr Lemos had not focused, in those messages, on the question of whether Owners had withdrawn from the negotiations, but rather was making points concerned with whether agreement had been reached. He argued that this showed that the critical message could not be viewed as a withdrawal. I was not persuaded that these messages could be analysed in quite such a limited way. Mr Lemos's position throughout was that there was no agreement. He made that clear not only in the e-mails to which Mr Hill referred, but also in various WhatsApp messages sent to Mr Hoeg. He regarded Trafigura's conduct as a "stunt", as he said in his 9 February email. I do not consider it productive or relevant to explore the extent to which the approach of Mr Lemos (who is a businessman not a lawyer) was precisely the same legal analysis as that of Mr Holroyd. In my view, Mr Lemos's messages after the event, even if they do in some way depart from Mr Holroyd's legal analysis, do not impact upon how the critical message (i.e. the message sent by WhatsApp saying Owners aren't there to do the business) would be understood by a reasonable person. It also seems to me that the relevant background, described above, supports the conclusion that the message meant that the Owners were, quite simply, no longer prepared to contract.

137. This issue which I have considered in this section principally involves the analysis of the documents, and in particular the critical message sent by WhatsApp. I do not consider that it gives rise to any factual issues which can only be determined at trial. The argument based on the alleged "unofficial" nature of the message is fanciful and has no real prospect of success, for the reasons given. Summary judgment in Owners' favour is therefore appropriate, in view of the conclusions set out above.

E4: Estoppel

138. The estoppel argument advanced by Trafigura is directed at the question of whether the Owners could withdraw "pending Trafigura lifting its subject once terms had been

agreed within the meaning of the CMA subject". In view of my conclusion that terms had not been agreed, the estoppel argument does not assist Trafigura and therefore does not arise.

139. However, this is in any event a hopeless point. The Owners asked for an Owners' subject. Trafigura was not prepared to agree, and the Owners did not pursue their request. None of this said anything at all about the effect of Trafigura's CMA subject to which Owners were willing to agree, or as to whether or not the Owners would exercise a right to withdraw from a potential charterparty prior to it becoming binding. There was in my view no representation as alleged, and therefore no estoppel can arise. If Trafigura did indeed understand that their refusal to agree the Owners' subject had some impact on the ordinary legal effect of the CMA subject that they themselves wished to include, then this was simply a misunderstanding on their part of the legal position.

CONCLUSION

140. The Owners' application for summary judgment succeeds.