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Case No: 2012 Folio 936

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th January 2014

Before:

MR JUSTICE COOKE

- -

Between:

Glencore Energy UK Ltd	Claimant
- and -	
Cirrus Oil Services Ltd	Defendant

- -
- -

Robert Bright QC and Sandra Healy (instructed by Clyde & Co LLP) for the claimant
Stephen Kenny QC (instructed by Osborne Clarke) for the defendant

Hearing dates: 14th, 15th, 16th, 17th, 20th and 24th January 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE COOKE

Mr Justice Cooke:

Introduction

1. In this action the claimant (Glencore) seeks damages from the defendant (Cirrus Oil) for repudiation of a contract alleged to have been made on 4th April 2012 for the sale of 630,000 barrels (plus or minus 5% at Glencore's option) of Ebok crude oil at a price of DTD + $0.15 per barrel CFR Tema. DTD is industry shorthand for the index price of Brent crude oil on the relevant specified dates, which in this case were the 5 days following the bill of lading date.

2. Glencore's case is that the contract was concluded when a "firm offer" made in an email of 3rd April 2012 was accepted by a "good news" email from Cirrus Oil on the morning of 4th April 2012 in the context of negotiations which had been conducted between Mr Anthony Stimler for Glencore and Mrs Ivy Owusu for Cirrus Oil. Glencore's broker, Mr Edwin Obiri of Luxon Holding SA acted as an intermediary between Mr Stimler and Mrs Owusu, although there was some direct contact between the latter two.

3. Ebok is a young oil field in Nigeria with several different wells and reservoirs. Commercial production commenced only in December 2010. It is now common ground between the parties (although previously this was disputed) that Ebok crude oil is invariably produced and sold as a blend of oil from various wells or reservoirs within the Ebok field. The field is subject to a joint venture between Oriental Energy Resources and Afren Plc, with production controlled by Afren. The oil produced was sold on behalf of the joint venture by Socar Trading SA, which is the international trading arm of the Azerbaijan state oil company. It appears that the nature of the arrangement between Afren and Socar involved Socar purchasing the crude oil from Afren and selling it at the same price to its purchasers but receiving a marketing fee for doing so of something in excess of $0.25 per barrel.

4. Following the alleged email acceptance of Cirrus Oil on 4th April 2012 (the "good news email") Glencore purchased the relevant cargo from Socar, specifically for sale into Ghana, as the cargo was intended to be on sold by Cirrus Oil to Tema Oil Refinery ("TOR"). Very shortly after the "good news" email of 4th April 2012, it became apparent that TOR would not accept a blend of Ebok crude oil, insisting that the cargo should comprise oil only from one well – well 16 – an assay of which had been produced to it (together with two other assays), in circumstances to which I shall later refer. It is now common ground that it was not possible for oil to be produced solely from well 16 as the experts agree that "Ebok crude is a blend of several wells and cannot be physically separated". It is also accepted that Ebok crude oil "of normal export quality" necessarily therefore meant a blended cargo.

5. In short, the issues which arose at trial for decision were as follows:

    i) Was there a concluded contract between Glencore and Cirrus Oil on 3rd/4th April 2012 or were the arrangements then made "subject to contract" or to finalisation of further terms?

    ii) What was the identity of the buyer? If no buyer was identified then Cirrus Oil say there was no contract. If a buyer was identified, was it Cirrus Oil or its

parent company Woodfields Energy Resources Ltd ("Woodfields"), it being said by Cirrus Oil that Woodfields was the appropriate company for crude oil purchases, as opposed to purchases of refined products.

iii) If there was a binding agreement between Glencore and Cirrus Oil, was it induced by misrepresentation on the part of Glencore that Glencore was able to and intended to provide oil from well 16 to fulfil the contract?

iv) If there was a binding agreement not induced by misrepresentation, as it is common ground that Cirrus Oil refused to proceed with the contract, what damages are recoverable by Glencore? The issue between the parties here, on the basis that the loss falls to be assessed as the difference between the contract and market value of the oil, is the true open market value at the time it would have been delivered at the end of May 2012.

v) Does section 32.1 of the BP General Terms and Conditions for Sales and Purchases of Crude Oil (incorporated by reference in the "firm offer" email of 3rd April) operate to prevent recovery by Glencore of this measure of damages.

6. Before the trial began, Cirrus Oil conceded two defences that it had previously been running, namely a case based on "mistake" (abandoned on 6th January 2014) and its case that any oil contracted for was oil from Well 16 only and not a blend. Following the conclusion of the evidence and prior to closing submissions, Cirrus Oil abandoned its claim for misrepresentation. Each of these allegations was unsustainable. As already indicated in paragraph 4 of this judgment, the reason why the deal did not go ahead was the dispute as to the composition or quality of the crude oil to be supplied. On the basis of Mrs Owusu's evidence, Cirrus Oil's case was that there had been oral exchanges between herself, Mr Obiri and Mr Stimler to the effect that the oil supplied would come from Well 16 only rather than a blend of the constituent elements referred to in an email of 30th March 2012 to her which enclosed the three assays, two of which came from other sources. The first occasion when Cirrus Oil suggested that there was no binding contract was on 17th April 2012. The point as to the identity of the buyer only surfaced in September 2012 when Cirrus Oil mounted an application objecting to this Court's jurisdiction.

The evidence

7. The parties agreed that the issue as to whether there was a binding contract turned upon an objective construction of the emails of 3rd and 4th April 2012, construed against the background of previous emails and exchanges and the factual matrix of what was reasonably known to both parties. The misrepresentation issue would have turned upon the evidence of the three witnesses in relation to two telephone conversations on 2nd and 3rd April: the first being between Mrs Owusu and Mr Obiri and the second being a tripartite conference call between Mrs Owusu and Mr Obiri and Mr Stimler. I would have had to decide whose evidence I accepted in relation to the conflict between them.

8. Mrs Owusu's evidence was inconsistent with the documents and was so improbable on the point that I would have had no difficulty in rejecting it and accepting that of Mr Obiri and Mr Stimler. This has some bearing on her evidence in relation to

conversations with Mr Obiri about the identity of the buyer of the crude oil, where, once again, there was a dispute about what passed between them. Her evidence on this was again not susceptible of belief, running counter to the documentary record and to commercial probabilities in circumstances where I find Mr Obiri to be an honest, capable and competent man with no reason not to pass on to Mr Stimler whatever Mrs Owusu told him on the subject. I found Mrs Owusu to be an argumentative witness who sought to make a case rather than give evidence of fact, particularly in relation to the identity of the buyer of the Ebok crude oil and her understanding of the use of "Cirrus" to describe a group consisting of two companies of which the parent was Woodfields. Mr Obiri's references in evidence to the "Cirrus group" were made in the context of the case as put by Cirrus Oil ("if you want to call it that") and do not really assist Cirrus Oil on this point. In the event of conflict between the evidence of Mr Obiri and Mrs Owusu, I unhesitatingly accepted the evidence of the former.

9. On the question of market value, the parties adduced evidence from their respective experts, namely Dr Holdaway and Ms Elizabeth Bossley, whilst Glencore relied on market information obtained by it in relation to the sales of oil from this relatively new field, which was not in the public domain or available to the experts before disclosure by Glencore. The last issue is simply a question of construction of the BP General Terms and Conditions.

The Background

10. Mr Obiri acted as a consultant to Glencore in accordance with a Service Agreement concluded between Glencore and Mr Obiri's company, Luxon Holding SA. Glencore engaged Luxon to advise and assist Glencore in identifying commercial opportunities in supplying crude oil and sales of oil products to third party companies in Ghana and to assist, on request, in connection with operational and logistical requirements relating to any transactions concluded as a result of the consultancy services. Luxon was not to represent itself as being Glencore's agent without Glencore's prior written approval. The services were to be provided on an exclusive basis in respect of crude oil and oil products in Ghana. Remuneration was to be on a case by case basis and recorded by way of an addendum to the Service Agreement. There was an agreement in October 2010 which was renewed on 1st October 2011. Although Luxon was not formally Glencore's agent, Mr Obiri was Glencore's eyes and ears in Ghana and was regarded by Mrs Owusu as the first point of contact for any deal with Glencore.

11. Mr Obiri and Mrs Owusu had known each other for some fifteen years. They had known each other socially, through their respective families, prior to any professional contact. Mr Obiri had been involved in financing and trading in the oil industry for about eight years and his first contact with Glencore was sometime in 2009, with involvement in Ghanaian business in 2010. Mrs Owusu joined Cirrus Oil in September of 2009 as a risk manager and became general manager of the commercial department in November 2009, before becoming its chief executive officer in 2010. In January 2011, she was appointed a non-executive director of Woodfields. On her evidence, she had authority to bind both Cirrus Oil and Woodfields. Emails originating from her referred to her as chief executive officer of Cirrus Oil at a Cirrus Oil email address. Cirrus Oil was 100% owned by Woodfields (previously known as Cirrus Energy Services Ltd until it changed its name on 15th January 2011). Woodfields had no other subsidiaries.

12. Mr Obiri and Mrs Owusu would be in contact approximately weekly to discuss general topics such as the market and business prospects. Between June 2011 and January 2012, four contracts were concluded between Glencore and Cirrus Oil for the sale of gas oil and gasoline. Mr Obiri was the initial point of contact for this business. There were only two end users of crude oil in Ghana, namely TOR and the Volta River Authority. The latter ran a power station with much more limited requirements than TOR. Mr Stimler was an experienced crude oil trader at Glencore, who, after a two year break, resumed in February 2012.

13. On 14th June 2011 Glencore sold 60,000-70,000 metric tonnes of gas oil to Cirrus Oil, described in the contract as "Cirrus Oil Services". The relevant individuals involved at Glencore and Cirrus Oil were Mr Prempeh and Mrs Owusu respectively. There were to be seven deliveries between July and September 2011. On 20th October 2011, the same parties, through the same individuals, concluded a spot contract for the sale of 6,000-8,000 MT of gasoline. The indicative offer was made in an email from Mr Prempeh, naming the buyer as "Cirrus Energy Ltd", which was corrected by Ms Afua Addae (copied to Mrs Owusu) to "Cirrus Oil Services". On 24th November 2011, a term contract for the sale of 70,000-76,000 MTS of gas oil was concluded, with eight deliveries between January and March 2012 with "Cirrus Oil Services". On 19th January 2012 a spot contract for the sale of 4,000 metric tonnes of gasoline was concluded between the same parties through the same individuals. The indicative offer sent by Mr Prempeh again referred to the buyer as "Cirrus Energy Ltd". The response from Ms Addae, copied to Mrs Owusu counter offered a lower price of $67 per metric tonne in order to "finalise" and "lock into this deal", without on this occasion any correction of the name. This was followed by a confirmation from Mr Prempeh to Ms Addae, copied to Mrs Owusu, with a changed laycan. The formal, long form contract for this gasoline transaction then identified the buyer as "Cirrus Oil Services". As is common in oil trading, the usual pattern of business was the conclusion of a transaction by email agreement on the main terms with a formal contract with more detailed terms to follow, usually days but sometimes weeks, later.

14. In November 2011 Mr Prempeh and Mrs Owusu had been in negotiation for a Bonny crude oil cargo which was offered by email to Mrs Owusu with the buyer identified as "Cirrus Oil Services Limited". She changed this to "Woodfields Energy Resources Ltd (our parent company)" in an email in response but the deal did not materialise. Mr Obiri was not involved in discussions for this possible deal in Bonny crude oil although he was the initial point of contact and was aware that some discussions were taking place. He was not copied into any of the email correspondence. On his evidence, he had only dealt with Cirrus Oil in the past when Mrs Owusu approached him with a request for a crude oil proposal in February 2012, without informing him expressly of the identity of the company that would enter into any contract that resulted.

15. According to a press article, on Cirrus Oil's website, on 25th May 2011, "the Ghana National Petroleum Corporation (GNPC) … successfully lifted a total of 994,691 barrels of Jubilee crude oil … GNPC with the assistance of Vitol and Woodfields Energy Resources (formerly Cirrus Energy Services) successfully marketed the cargo on the best available commercial terms". Glencore had been involved in a bid to lift this crude oil in 2011 but at a time when Mr Stimler was not involved and, on his

evidence, he regarded Glencore's competitor as Vitol rather than any local company, so that he would not have focussed on the name "Woodfields Energy Resources" which meant nothing to him.

16. Mrs Owusu's evidence was that Woodfields was the parent company in "the Cirrus group" which consisted simply of Woodfields and Cirrus Oil. The two companies had their own accounts and decision making structures and Cirrus Oil did not have authority to bind Woodfields as such. Nor did it conduct Woodfields' business. At paragraph 14 of her witness statement, she said that the business relating to the bulk distribution of refined petroleum products was and always had been run by Cirrus Oil. This involved purchasing petroleum products in bulk for storage and onward sale to a range of customers. The business relating to crude oil was run by Woodfields and such oil was only purchased from a supplier to satisfy the specific need of a purchaser. Woodfields would not take delivery of the crude itself, seeking to make a profit on the purchase and sale. In this context, she referred to sales and purchases of crude oil by Woodfields between May 2011 and April 2012. There were two purchases from Vitol which were on-sold to TOR, a further sale to TOR and a sale to Volta River Authority. At paragraph 19 of her statement she said that, so far as she was aware, Cirrus Oil had never purchased crude oil and all purchases of crude oil had been conducted by Woodfields. She stated that the distinction between Cirrus Oil and Woodfields was always clear in her mind in the context of crude oil and product purchases.

17. Reference was made by Mrs Owusu to the "Cirrus Group website". This however turned out to be the website of Cirrus Oil, with only three references to its parent company Woodfields. The website refers to Cirrus Oil being licensed as a "bulk oil distributor which had constructed and commissioned two state of the art petroleum terminals in Tema and Takoradi which had the capacity to handle gas oil, gasoline and aviation fuel". Mrs Owusu is referred to as the chief executive officer and the "vision" of Cirrus Oil was expressed as being "a leader in oil trading, storage and distribution in the west African sub-region and beyond", whilst the "mission" and "strategic objects" referred specifically to premium petroleum products. A photograph of the terminal shows the name "Cirrus" on the side of the storage tanks. The website refers to activities in oil products, bunkering, truck loading, storage and terminal services. World oil prices were given for crude oil and natural gas. There is nothing on the website that indicates usage of the terminology "the Cirrus group" nor anything which would alert any viewer to the fact that Cirrus Oil would not trade in crude oil itself. "Woodfields Energy Resources" was also referred to as a leading Ghanaian trading and bulk petroleum products distributing company.

18. Cirrus Oil also relied upon the licensing arrangements by the Ghana National Petroleum Authority since Cirrus Oil was licensed as a bulk distributing company and a petroleum products export company whilst Woodfields was licensed as an oil trading company and a bunkering company. I was not much helped by the licensing arrangements since it was Mr Obiri's evidence that a licensed bulk distributing company such as Cirrus Oil could purchase crude oil as well as refined products.

19. The evidence of Mrs Owusu and Mr Obiri as to their exchanges in relation to the activities of Cirrus Oil and Woodfields prior to February 2012 can be summarised as follows.

20. In her witness statement, Mrs Owusu did not suggest that she had ever told Mr Obiri before March 2012 when she was interested in purchasing crude oil, that such purchases were to be made by Woodfields, as opposed to Cirrus Oil. However in her evidence under cross-examination, she maintained that she had told him this on many occasions and that he could have been in no doubt on the subject.

21. Mr Obiri's evidence was that all the prior transactions in which he had been involved with Mrs Owusu were with Cirrus Oil. They were for gasoil and gasoline. He knew of Woodfields because of the loss of the GNPC business to it and Vitol. He had never made use of term "the Cirrus group" as such, nor ever heard it used. He did not know of the exact relationship of Cirrus Oil to Woodfields, save that they were affiliated. He knew there were separate companies which owned the terminals and traded in crude oil and refined products but did not know which did which. He knew generally of oil licensing arrangements and that the bulk distributor's licence allowed the import of crude oil and refined petroleum products by the licensee.

22. Although his evidence was inconsistent about whether he knew the name Cirrus Energy Services Ltd, he was clear that he did not know that Woodfields was the same company which had changed its name. As at April 2012, the only company with the Cirrus name of which he knew was Cirrus Oil. He would not have looked at the Cirrus Oil website to gain information one way or the other. He would not have known whether it was Cirrus Oil or Woodfields which had the tie to TOR.

23. Mr Stimler's evidence was that when he first had dealings with Mr Obiri and through him with Mrs Owusu, he relied on Mr Obiri and Mrs Owusu to identify the buyer with whom he was dealing. He only ever heard the names "Cirrus Oil Services" and "Cirrus" and knew nothing of any company called Woodfields or Cirrus Energy at all. He did not really think of a possibility of "Cirrus" being part of a group of companies and treated "Cirrus" as an abbreviation of "Cirrus Oil Services". As far as he was concerned, subjectively, the buyer was a company called "Cirrus" with further wording following, but it would have been no great surprise had another company been put forward as the buyer. Mrs Owusu's email address identified Cirrus Oil and a reader would consider this was the company for which she worked and acted in the absence of any contrary indication.

24. I heard no evidence from Mr Prempeh or Ms Addae but on the basis of the evidence I did hear with regard to past history and negotiations and on the basis of the contemporary documents, I conclude that:

    i) Mrs Owusu could not have told Mr Obiri that all crude oil deals for which she made enquiries or which she negotiated were to be with Woodfields as buyer. If she had, he would have recalled this as an important distinction and passed it on to Glencore. Moreover, if she had ever told him this, it would have appeared in her witness statement as a matter of considerable importance. She was unable to identify the occasions on which such conversations occurred and I conclude that this evidence was fabricated to support Cirrus Oil's case.

    ii) Neither Mr Obiri nor Mr Prempeh had any idea that there was any rigid separation of the types of business done by Woodfields and Cirrus Oil or that there was any restriction on Cirrus Oil trading in crude oil, nor on Cirrus Energy Services Ltd/Woodfields trading in refined products. When dealing

with Mrs Owusu or Ms Addae, both looked to them to identify the purchaser if it was different from the name that was put forward or the name that had been used previously.

iii) At the time when enquires were made for crude oil in February 2012, as a result of the four previous successful deals with Cirrus Oil, Mr Obiri saw it as his only "client". In the absence of any information to the contrary, it was natural for him to assume, and he did assume, that, as Cirrus Oil was the only contracting company in deals in which Mrs Owusu had been involved with him, this company would be the buyer. When Mrs Owusu contacted him, he thought of her as representing Cirrus Oil.

iv) If Mrs Owusu had ever identified the company for whom she was acting as Woodfields in relation to crude oil deals generally or when approaching Mr Obiri in relation to such deals with Glencore, he would have recalled that and would not have made the assumption that he did. He would also have passed that on to Glencore.

v) The natural and obvious meaning for the use of the word "Cirrus" after January 2011 was as an abbreviation for "Cirrus Oil", not as a reference to Woodfields or to a "group" consisting of the two companies.

The Negotiations from February 2012 onwards

25. On 13th February 2012 there is an email from Mr Obiri to Mr Stimler stating that "Cirrus Oil Services, one of our clients in Ghana, is looking for crude proposal for TOR for 600,000 barrels March 15-20 delivery. Kindly revert on grade and premium over Dated Brent." The heading to the email was "Cirrus Crude for TOR".

26. Mr Stimler's response was to say there was nothing available in March but deliveries in early April were possible, although a list of optimal grades sought by the buyers would be useful. Mr Stimler's only knowledge of the identity of the prospective buyer came from Mr Obiri. In my judgment, taking the view that I do of the conscientious character of Mr Obiri, it is self-evident that, if Mr Obiri had been told in clear terms that Woodfields, as opposed to Cirrus Oil, was to be the purchaser of all crude oil purchased by Mrs Owusu or had been told expressly that it was to be the buyer of this prospective cargo, he could not have sent his email in the form he did. It specifically identified the company with which he was most familiar. A further email from Mr Obiri to Mr Stimler dated 27 February refers again to " Cirrus Oil" looking for crude oil.

27. There followed attempts by Mr Stimler to interest Mrs Owusu in a Brass River cargo of crude oil and on 28th February 2012 Mr Stimler sent Mr Obiri an indication in relation to such a cargo, referring to the seller as "Glencore" and the buyer as "Cirrus". This was passed on by Mr Obiri to Mrs Owusu who in turn passed it to Ms Addae and others. On 29th February an effort was made to interest Mrs Owusu in a cargo of Bonny Light or Brass River crude oil and once again, the buyer was referred to as "Cirrus" in an email between Mr Stimler and Mr Obiri, probably passed on to Mrs Owusu once again. On 7th March however, Mr Stimler tried again with a cargo of Antan crude with a proposal "subject to contract", naming the seller once again as "Glencore" and the buyer as "Cirrus". This was passed on to Mrs Owusu. Nothing

however materialised from any of these attempts to provide crude oil for delivery into TOR.

28. In my judgment, these constant references to "Cirrus" as the buyer could not reasonably have been understood by either Mr Obiri or Mrs Owusu as referring to Woodfields. It was Cirrus Oil's case that the reference should be understood as a reference to the Cirrus Group and not to any individual company at all, whilst the reference to "Glencore" should also be understood as referring to the Glencore group, as opposed to any particular Glencore company. The actual identity of the buyer was not of huge importance to Glencore if payment was to be by letter of credit, but, as Mr Stimler said, Glencore had experience of Cirrus Oil as a party which was capable of producing the necessary financial instrument to make payment and the most obvious and natural meaning of the expression "Cirrus", in the light of past transactions which had taken place, was a reference to Cirrus Oil, just as the most natural and obvious meaning to be ascribed to "Glencore" was a reference to the company which had concluded the prior four transactions. Whilst the words "Cirrus" and "Glencore" were, in a sense, generic, if a company was being referred to by that name as it had to be for a contract the company referred to could only be that which had been involved in the prior trading with the words "Glencore" and "Cirrus" as part of its name.

29. On 28th March 2012 Mrs Owusu sent Mr Obiri an email under the heading "Crude for delivery into TOR" in the following terms:

> "Following up on our discussions with TOR, we would want both an FOB quote and CFR quote for the term deal that we have with them.
>
> Let's quote on either blends or medium crudes. At least four crudes would be good with the size of 600k bbls. They have expressed interest in Coco as well as Oluwi (Gabon right?), Okwuibome, Agbami, Ukpokiti, Akpo.
>
> Ninety day LC from BL if loading is in Nigeria or somewhere close since a longer journey will eat into the credit days.
>
> Please give me some very sharp prices so we don't drag this out with a long negotiation in order not to lose steam."

30. Mr Obiri passed this on to Mr Stimler stating that he would provide "indicative pricing levels" and asking Mr Stimler to let him know if there was a deal to be done. Mr Stimler replied by saying that he would revert with something comprehensive on the following day because there was a lot to explain about all of the grades of oil referred to, a message which Mr Obiri passed on to Mrs Owusu. It appeared from the evidence before me that many if not all of the grades of oil referred to were blends. Each of these emails was entitled "crude for delivery into TOR".

31. By a further message on the same day, Mrs Owusu asked Mr Obiri: "Do you urgently have Ebok or Okwuibome?" In an SMS message from Mr Obiri to Mr Stimler that day, the former referred to the first email enquiry of that day as being from "Cirrus" and asking if the grades referred to were technically doable, saying that TOR had specifically asked for Ebok or Okwuibome. Again he said he would get indicative

pricing. Mr Stimler said he was trying to get Ebok and Coco for May and would revert the following day. In response Mr Obiri asked if Mr Stimler had any rough ideas on pricing for 90 days FOB and CIF TOR, saying that, in its own world, TOR would be looking at DTD plus 1 USD CIF Tema on 90 day terms.

32. On his evidence, the reference to "Cirrus" in this text message was made on the basis of Mr Obiri's assumption that the buyer would be the same company with which Glencore had previously transacted, namely Cirrus Oil, although Mrs Owusu had not specifically told him that this would be the case. In her email she had referred only to "we".

33. In another email exchange with Glencore the same day relating to a shipment under the term contract for gasoil, Mrs Owusu stated that she "personally" wanted to "let Glencore know that for Cirrus, this relationship with yourselves is a long term one". In the context of the existing contracts, the word "Cirrus" could only refer to Cirrus Oil and not, as Mrs Owusu maintained in cross-examination, to Woodfields or to the "Cirrus group".

34. On 29th March there were further SMS exchanges between Mr Obiri and Mr Stimler about Ebok which now appeared to be one of the two crudes preferred by TOR. Mr Obiri said that "they" wanted pricing on Ebok OSP - the official selling price, to which Mr Stimler demurred, saying that the seller for Ebok was Socar and that OSP was artificially low for tax reasons and any sale would be DTD related.

35. On 30th March Socar sent Glencore an email setting out the expected composition of the blend of the cargo of Ebok crude oil which could be sold, attaching three assays relating to the three constituent parts. An oral indication of price was given which enabled Mr Stimler to make a proposition to Mrs Owusu. On the same day, Mr Stimler sent Mr Obiri an email asking him to pass on "quality information on the grade to TOR". He attached the three assays for the three constituent streams of cargo which were to be blended and stated the following:

> "The expected composition of the blend is as below (with relevant assays attached) although we would be offering cargo specs as "normal export quality"."

He then set out the proportions of the three constituent parts and continued:

> "As far as a CFR indication (not firm yet) is concerned, we could offer to Cirrus as follows:
>
> "Volume: 600-650mbs+5% Sellers option
>
> Grade: Ebok of normal export quality, Nigeria.
>
> Price: Dtd + $0.55/bbl (plus fifty five cents per bbl) CFR Tema
>
> Loading 1-10/6 with arrival in Tema consistent to loading
>
> Laytime: 36+6 Shinc
>
> Pricing: 5 quotes after B/L

Payment: 90 days after B/L with full L/C opened no later than 12 days prior to loading

GTC's: BP CFR 2007

Inspection: 50/50

Law: English, High Court

…"

36. It will be noted that the CFR indication was of an offer to "Cirrus". Since Mr Stimler had heard of no other company than Cirrus Oil (from as far back as 27th February), there is no doubt, as he said in evidence, that when he referred to "Cirrus", subjectively he was referring to Cirrus Oil. This message was received by Mr Obiri on Friday evening when it appears that he was in South Africa. He passed this on to Mrs Owusu within a matter of ten minutes under the heading "Ebok grade quality and indication of offer – TOR". Mrs Owusu's response was to say that she would chase TOR with this "asap".

37. That same day she emailed TOR passing on the identical information which had been supplied by Mr Stimler to Mr Obiri as to the constituent elements of the blend but giving an indication of a price of DTD plus $2.55/bbl in place of the DTD plus $0.55/bbl put forward by Glencore. She concluded the email by saying that she would "come over on Monday in an effort to conclude". It is clear that Mrs Owusu was keen to conclude a deal with TOR speedily. There was nothing in the body of the email to indicate the party on whose behalf the indication was being made but there was an error in the email because, in giving the CFR indication to TOR she stated: "we could offer to Cirrus as follows". In copying and pasting the indication received from Mr Stimler through Mr Obiri, she had failed to change the word "Cirrus" from Glencore's indication to the word "TOR", as it should have been in her indication. Within a matter of minutes however, she had spotted the error and had sent a correcting email stating:

> "This should read *offer to TOR not Cirrus*."

The words "offer to TOR not Cirrus" were underlined, in italics and in bold type. There cannot therefore be the slightest doubt that Mrs Owusu's attention was clearly drawn to the word "Cirrus" in the Glencore indication, because of her failure to alter it in the first place and the need to correct it in her indication to TOR. If she had considered that any crude oil contract with Glencore should be with Woodfields, not with Cirrus Oil, this would have been the obvious moment to point this out to Mr Obiri and Mr Stimler, but she did not. On her evidence any contract with TOR would be made by Woodfields and any purchase from Glencore would be made by the same company. It is inherently improbable that, having made the correction that she did in the indication given to TOR, she would not then have corrected Glencore's reference to "Cirrus" if she thought it should have referred to Woodfields.

38. On Monday 2nd April, Mrs Owusu travelled from Accra to Tema to meet with the commercial representatives of TOR. Additionally a representative of Cirrus Oil, with technical expertise, met with the TOR refinery technical people. On Mrs Owusu's

evidence, she had two meetings with TOR that day, one in the morning and one in the afternoon, as borne out by the texts sent by Mr Obiri to Mr Stimler, reporting exchanges between him and her. The first of these exchanges between Mr Obiri and Mr Stimler referred to a conversation which Mr Obiri had with Mrs Owusu "a few minutes ago" when she was "at TOR". Mr Obiri said he would keep Mr Stimler posted. In a later exchange Mr Stimler asked if there had been any feedback to which Mr Obiri responded: "Nothing yet and she left there around 12 and will be back by 3 pm". Mr Stimler pressed for feedback which Mr Obiri assured would be given before close of business that day.

39. In a yet further text message from Mr Obiri to Mr Stimler, Mr Obiri cut and pasted messages between himself and Mrs Owusu. Mrs Owusu had texted him in the following terms:

> "TOR is interested, went back to Accra but heading back there now. Want to lock in."

Contrary to Mrs Owusu's evidence, she was telling Mr Obiri that she was keen to conclude the transaction. His response to her, which he also pasted in to his text to Mr Stimler, had been:

> "Cool. Anthony [Mr Stimler] on standby. Fingers crossed."

Mr Obiri concluded the message to Mr Stimler by saying he would let him know as soon as Mrs Owusu had returned to Accra. There were no email exchanges on 2nd April and as Cirrus Oil has abandoned its case on misrepresentation, the only relevance of any telephone or text exchanges between Mr Obiri and Mrs Owusu would relate to the identity of the buyer.

40. Overnight on 2nd/3rd April, Mr Obiri travelled to London for reasons unconnected with the proposed transaction. On landing at Heathrow at about 5 o'clock on the morning of 3rd April, he turned his Blackberry on and picked up a message on the Blackberry messenger service from Mrs Owusu, in which she informed him that she wished to make a counter-offer of DTD +0.15 per barrel CFR. Whilst this message was not retained by either Mrs Owusu or Mr Obiri, the latter's onward message to Mr Stimler was preserved by the latter: "Counter is CFR DTD + .15. Let's chat when you are in office." Mr Stimler responded by asking if this was a firm offer and after contacting Mrs Owusu via Blackberry Messenger, he passed on her response that it was not yet firm.

41. Early that morning, prior to the tripartite conference call, Mrs Owusu had contacted TOR about the potential sale to it of the Ebok crude, stating that the challenge was the price. She stated that she was pushing the traders down (which could only refer to Glencore) and had now moved from CFR of Dated Brent plus 2.554 to CFR Dated Brent plus 1.90. She said that in order for her aggressively to push them (Glencore) further, she needed to know if this was something that TOR was prepared "to lock into". Her aim was to try and get them (Glencore) to at least $1.75 above Dated Brent but "I will need your commitment to be able to go that route. I await your feedback so we can lock this in." Whilst it is apparent that Mrs Owusu was misleading TOR as to the prices which she was negotiating with Glencore (since Glencore had indicated

DTD plus 0.55 and she had tentatively countered with DTD plus 0.15), it is also clear that she was seeking to obtain a firm commitment from TOR.

42. Later that morning, at about 11 am (London time which was one hour ahead of Ghana time) Mr Obiri met with Mr Stimler following meetings with other representatives and there was a tripartite conference call between Mr Stimler, Mr Obiri and Mrs Owusu. There was a general discussion of the deal and the tentative counter of DTD plus $0.15 per barrel. As Cirrus Oil has abandoned its claim for misrepresentation, little now appears to turn on the terms of the conversation, save that there was enough confidence in the prospects for Mr Stimler to send the "Firm Offer" email shortly afterwards. Neither party had thus far made a firm offer, as had been made clear. Mr Stimler had never met Mr Obiri before that day and had not spoken to Mrs Owusu before either. On the evidence before me, no mention was made of Woodfields at any point during the call. At that stage, Mr Stimler knew that he had the option of agreeing a firm Ebok cargo from Socar and was confident that he would be able to make a firm offer that would meet Mrs Owusu's recently expressed price expectations. There was a general mood of optimism in the telephone conversation about future business deals.

43. Very shortly after the conference call ended Mr Stimler sent Mr Obiri an email under the heading "Ebok FIRM offer". It read as follows:

> "As discussed in an effort to get this wrapped up today as our first crude oil deal with Cirrus, we are willing to offer the following firm (until 6pm this evening) which should now be doable with TOR.
>
> Please revert soonest.
>
> Kind regards,
>
> Anthony
>
> <u>TERMS</u>
>
> Seller: Glencore Energy UK Ltd.
>
> Buyer: Cirrus …… (Full trading name)
>
> Grade: Ebok crude oil of normal export quality, Nigeria
>
> Price: Dtd + $0.15/bbl (plus fifteen cents per bbl) CFR Tema
>
> Vessel: To be acceptable to Tema (not to be unreasonably withheld)
>
> Loading: 29-31/5 with arrival in Tema consistent to loading
>
> Laytime: 36+6 Shinc
>
> Pricing: 5 quotes after B/L

Payment: 90 days after B/L with full L/C opened by Cirrus no later than 12 days prior to loading

GTC's: BP CFR 2007.

Inspection: 50/50 at load.

Law: English, High Court."

44. Mr Obiri forwarded this email under the heading "Ebok FIRM offer" to Mrs Owusu and she received it at about midday. In an SMS exchange, Mr Stimler told Mr Obiri that he had sent him an email with a firm offer and the latter shortly afterwards said that he had received it and sent it on to Mrs Owusu who was at TOR and was asking to be given 15 minutes (presumably for a response to the firm offer). A further text says that she was waiting for the managing director who had been stuck in traffic whilst heading to the TOR refinery. The technical representatives of TOR were said to be happy with the specification of the oil. The managing director was said to be good with the concept in principle, although Mrs Owusu, in evidence, denied that she had said that to Mr Obiri.

45. Mrs Owusu responded in an email later that day addressed to Mr Obiri and Mr Stimler. In this email she said that she was still at TOR waiting for the managing director and that "until he signs off, I cannot confidently tell you that it is done." She stated that she knew the 6pm UK time deadline had passed but asked for an extension until noon the following day. This email shows that Mrs Owusu had hoped to be able to say that the deal was done but could not do so until the managing director of TOR was prepared to agree on the onward sale to it. By asking for an extension of the deadline for acceptance, she recognised that an acceptance in the period previously mentioned would have been binding and needed an extension so that the offer could remain open for her acceptance.

46. Under the same heading as before, ("Ebok FIRM offer") Mr Stimler responded to Mrs Owusu (copied to Mr Obiri) saying that Glencore would "really like to conclude this tonight" but could "stretch our firm offer to 11 am London time tomorrow". Mrs Owusu expressed her thanks in response and promised an update if any news came in that night.

47. On the morning of 4th April, Mr Obiri, who had returned overnight to South Africa, sent a text to Mr Stimler saying that "the vibes are warm but she is only heading there now." On Mrs Owusu's evidence, she returned to TOR's offices on the morning of 4th April. In her statement she said that during meetings that morning she was given oral confirmation by TOR that they agreed the price for the Ebok (at DTD plus $1.65/bbl). She said she understood this to be confirmation that the price was agreed in principle but that the deal remained subject to contract. Once she had this transaction with TOR confirmed in principle, she responded to Mr Stimler to confirm that TOR had agreed to the cargo, sending an email at 10.45 on 4th April. This email was addressed to Mr Stimler and copied to Mr Obiri and other Cirrus Oil representatives. It read as follows, under the heading "Re: Ebok FIRM offer":

> "Anthony and Edwin. Good news! TOR has agreed to the June cargo. Will revert on the fine tuning of the contract terms so that it's back to back with ours which will be with TOR."

48. Mr Stimler's response was as follows:

> "That is indeed very good news. I will revert with operational contacts shortly so that we can get everything in place. Many thanks for this business transacted and look forward to a lot more in the future between our two companies."

49. She replied at 11.20:

> "Absolutely. TOR also wants me to bring them a term proposal on Ebok or other similar crude …"

Mr Stimler's response was then to ask for the "full trading name of your company so we can start the process rolling".

50. Whilst irrelevant for the purpose of construing the exchanges between Mr Stimler and Mrs Owusu, it also noteworthy that at 10:02 on 4th April (Ghana time) Mrs Owusu had sent TOR an email thanking TOR "for the award of the June 1-10 Ebok crude delivery into TOR at CFR Dated Brent plus $1.65". The email went on to refer to bringing a term contract for this and subsequent cargoes and a letter to be sent detailing the terms forming the basis for the contract.

51. The SMS exchanges between Mr Obiri and Mr Stimler on 4th April following the "good news" email discuss a future term contract and the need to ensure the smooth running of the instant deal. Mr Stimler later asked whether Mrs Owusu would revert with the name of the counterparty and operational contracts which he had requested in his email and was told that Mr Owusu needed to close the term deal with TOR and was waiting for feedback but that the counterparty name would be sorted out at latest by the following day.

52. It was at about 5.57 that afternoon that Ms Addae first raised the issue as to whether the 650,000 bbls of Ebok came from well 16 which was one of the constituent streams referred to in the earlier emails, of which an assay had been provided. The immediate response from Mr Stimler was to repeat the information previously given about the blend in the same terms as given on 30th March.

53. On 5th April Mr Stimler emailed Mr Obiri under the heading "Ebok contract" asking for details of the counterparty and operational contact so that the formal contract could be sent, pointing out that Glencore closed that night for the Easter break and needed to get the document out for "compliance" purposes. This was forwarded to Mrs Owusu who responded by saying that her contract with TOR had to be back to back so it was not simply a question of signing off on Glencore's form. Mr Obiri asked Mr Stimler to send his draft in order to sort out the back to back contract details. Mr Stimler responded at 11:55 on 5th April by sending Mr Obiri and Mrs Owusu a formal contract said to be "our standard contract for these types of transactions". He advised Mrs Owusu to incorporate all its pertinent contents in her own contract with TOR. The formal contract referred to the buyers as "Cirrus Oil

Services", to the product as "Ebok blend crude" and, in the quality clause to "Ebok blend crude oil – of normal export quality as made available at the time and place of loading".

54. Mr Stimler's evidence was that he put the name Cirrus Oil Services into the draft after checking with his African Products colleagues, which presumably included Mr Prempeh, as to the name of the company that they had previously dealt with. Mrs Owusu's response was to raise an issue on the use of the word "blend" in the draft. She raised no issue with regard to Cirrus Oil as the contracting party.

55. On 10th April, following Easter, it appears that a draft contract was produced between Woodfields and TOR based upon the contract provided by Glencore to Cirrus Oil.

56. Over a period of time it became plain that TOR would not accept the blend of crude oil referred to in the emails exchanged between Mr Stimler, Mr Obiri and Mrs Owusu as "Ebok crude of normal export quality" despite Glencore's production of an Haverly Synthetic Model of a composite assay representing the combination of the three constituent parts of the blend as stated in the emails. TOR refused to accept this blend, maintaining that it would only accept crude conforming to the assay for well 16, one of the constituent parts. Whatever may have been the position between TOR and Mrs Owusu, Mrs Owusu could have no justification for adopting this stance vis à vis Glencore and although she was caught in the middle and Glencore thereafter sought to do everything it could, without prejudice, to produce a cargo which would be acceptable to TOR, by producing another cargo to blend with the Ebok, the overall deal fell apart and on 2nd May 2012 Glencore purported to accept Cirrus Oil's refusal to accept the cargo as a repudiation of the contract allegedly concluded on 4th April 2012.

The Alleged Contract

57. There is no dispute between the parties as to the principles to be applied in deciding whether or not a contract had been concluded between the parties. I was referred to the decision of the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co* [2010] 1 WLR 753. Lord Clarke, delivering the judgment of the court said at paragraph 45:

> "45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

58. Lord Clarke at paragraph 49 also approved the following statements of principle set out in the judgment of Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole ... (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed ... (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled ... (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty … It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge [at page 611] 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so called 'heads of agreement'."

59. I have no doubt that the "Firm offer" email was intended to be capable of acceptance with a binding contract thereby concluded. It was expressly a "firm offer" as appears twice in the email itself. Mr Stimler referred to it as "our first crude oil deal with Cirrus" which he wanted to get "wrapped up today". Not only was it specifically a "firm offer" but, in the body of the email it was expressed to be "firm until 6pm that evening". A deadline was thus imposed for acceptance following which the offer would lapse if not accepted. The email set out all the main terms necessary for a contract to be concluded and also general terms and conditions which were to be the 2007 BP General Terms and Conditions for CFR sales. The buyer was named as "Cirrus …….. (full trading name)". Notwithstanding evidence of subjective intention or an individual's construction of the email, in my judgment this could not reasonably be read as a request to nominate a buyer, failing which the offer could not be accepted. It identified the buyer as a company which had "Cirrus" as the first word in its name, making it clear that the offer was being made to that company in its full trading name.

60. In the context of all the prior exchanges between Mr Stimler, Mr Obiri and Mrs Owusu, I have no hesitation in concluding that the "good news" email was a clear acceptance of the "Firm offer" which had been made by Mr Stimler's email of 3rd April. In the context of the exchanges between the parties, Mrs Owusu had made it

clear that conclusion of the deal with Glencore (on her tentatively counter offered price of DTD +0.15 as contained in Glencore's "Firm offer" email) depended on TOR's acceptance of a deal with her. TOR's acceptance, as reported by her, was therefore the expression by her of her acceptance of Glencore's offer. The offer which was firm until 6pm on 3rd April had been extended till 11am on 4th April in order for Mrs Owusu to conclude matters between herself and TOR so that the deal could be wrapped up between her and Glencore. Her response before the extended deadline of 11 am, at 10.45 am, stating that TOR had agreed to the June cargo and that she would revert on the fine tuning of the contract terms could only mean that there was acceptance of the main terms set out in Mr Stimler's firm offer.

61. In my judgment it is clear that the parties intended to conclude a binding contract before the extended deadline of 11am on 4th April. The evidence before me established that both parties were keen to "lock into" or "wrap up" the deal for delivery of the cargo into TOR. Both Mr Stimler and Mrs Owusu saw good profits in the transaction for themselves (approximately $5.65 per barrel for Glencore and $1.50 per barrel for "Cirrus"). The terms proposed by Glencore in the firm offer were comprehensive. Subject only to the question of the full name of the buyer, all the main terms were clearly set out and the detailed terms of BP's CFR 2007 General Terms and Conditions were incorporated. When Mrs Owusu replied, the only "good news" that she could be imparting, following the wait for her to agree terms with TOR was that TOR's agreement meant her agreement. The response of Mr Stimler to that email, referring to "this business transacted" and her affirmation of that by the word "absolutely" confirm the conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded as essential for the formation of legally binding relations, whether or not all the details had been completely tied down and whether they expected some further "fine tuning" of the detailed terms.

62. As expressed in the *Pagnan* decision, it is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. They are "the masters of their contractual fate". There is no room, on these exchanges, for any suggestion that the deal remained "subject to contract". With what is referred to in capitalised terms as a "FIRM offer" an express deadline which is extended in order to allow agreement to be reached between Cirrus and TOR, the "good news" email can only be read as an acceptance prior to the deadline of the main terms put forward with the only reservation expressed about the need for "fine tuning" of detailed contract terms to ensure back-to-back correspondence with the detailed contract terms with TOR. Whether Mrs Owusu "jumped the gun" in her email to TOR on 4th April talking of the "award of the Ebok crude delivery" at 10:02, what she was telling Mr Stimler was that the deal was now done for both the Glencore/Cirrus leg and the Cirrus/TOR leg. Given the practice of the market and the prior practice of the parties, the conclusion of the transaction by email was exactly what was intended by both with a formal contract, with further negotiated detailed terms, to follow.

63. When Mrs Owusu said that she would "revert on the fine tuning of the contract terms so that it was back-to-back" the terms to be agreed with TOR, she was not making the acceptance subject to such agreement but giving notice of the likelihood that she would wish to negotiate about the detailed terms to be found in the BP General Terms and Conditions. There could be no going back on the main terms which, in a spot contract of this kind, were clearly and sufficiently set out and agreed.

64. The fact that no issue arose as to the identity of the buyer until September 2012 in the context of a contest as to this Court's jurisdiction is indicative in itself. Mr Kenny QC says that the subtlety of the legal point that a buyer had to be identified before any contract could come into existence might readily escape Mr Stimler and Mrs Owusu, given the way in which oil deals are often concluded. This ignores the principle that the parties are "masters of their contractual fate" if they are capable of being identified, even if the identity is not clearly spelt out. Once it is plain that Mrs Owusu and Mr Stimler intended by their exchanges to constitute a binding contract (with fine tuning of some details to be negotiated later) the only issue is the identity of the companies which were parties to the deal they concluded by email.

65. As to this, there is in my judgment, no real difficulty at all. I have already found that "Cirrus" as a term is most readily referable to "Cirrus Oil", rather than to "Woodfields". Of the two companies, Cirrus Oil was the company with which Glencore had previously concluded transactions. Glencore had never contracted with Woodfields. Cirrus Energy Services Ltd had changed its name to Woodfields back in January 2011 and at the time of the negotiation of this crude oil transaction, there was only one company in existence whose name began with "Cirrus". In the "FIRM offer" email, Mr Stimler named the seller as Glencore Energy UK Ltd and the buyer as "Cirrus … (Full trading name)". Regardless of any subjective intention on Mr Stimler's part, an objective reading of that reference leads to the clear identification of the buyer as a company whose name begins with the word "Cirrus". The use of the expression "Cirrus … (Full trading name)" requires the email to be read as naming the buyer, not as a company in the Cirrus group, but a company, the name of which includes the word "Cirrus". In the light of the past transactions with Cirrus Oil as the buyer, the parties must be taken as referring to that company in the firm offer and good news acceptance emails. It is highly significant that, in accepting the transaction, Mrs Owusu did not suggest Woodfields or any other name other than "Cirrus … (Full trading name)".

66. Whilst the reference to "Cirrus Oil Services" in the draft formal long form contract produced by Mr Stimler subsequently merely confirms his subjective intention, the process of thought by which that name was put in confirms the objective reading of the email as referring to that entity. Nowhere in the email exchanges between the parties is there any reference to "the Cirrus group" even if that term was used in Ghana, as Mrs Owusu said in her evidence. It was not a term of which Mr Obiri had ever heard and it is an unusual term to apply to two companies where the parent company is Woodfields and the subsidiary Cirrus Oil. Although it is true to say that Woodfields had previously been called Cirrus Energy and individuals might loosely refer to "Cirrus" at that time, without distinguishing between them, once the name "Woodfields" (whether in its full or abbreviated form) appeared on the scene, it would not be natural to refer to the two companies together as the "Cirrus group" as opposed to the "Woodfields group".

67. Much more importantly however, Cirrus Oil's argument was less of a chicken and egg argument than a cart before the horse argument, because the firm offer email was plainly intended to be capable of acceptance by a company. The buyer, as delineated in the email must be an individual company which is capable of contracting and not a group, which is not. In these circumstances, "Cirrus … (Full trading name)" can only

mean as Glencore submits, a company which has "Cirrus" in its trading name. Only one company qualifies for this, namely Cirrus Oil.

68. There is nothing in the factual background or matrix which can impact upon this conclusion. Evidence was adduced as to what the individual witnesses understood by the phraseology used in various emails but this cannot affect the objective construction of the language used in the context in which it appears.

i) The fact that Woodfields had been publicly reported as having an involvement in crude oil trading in relation to the lifting of the Jubilee field cargo is of no assistance. Mrs Owusu did not even know whether Woodfields had acted as a principal in this transaction although Mr Obiri knew that Woodfields had been involved in the winning bid with Vitol.

ii) There was no knowledge of anyone at Glencore of the identity of the company which had supplied crude oil to TOR and an internal arrangement between Cirrus Oil and Woodfields would not in any event have been out of the question.

iii) Although, in the only prior negotiation before Glencore and Mrs Owusu relating to a crude oil transaction, Glencore had been informed that the buyer was to be Woodfields not Cirrus Oil, that was not something which occurred in the present case, as would be expected if it was not a company with the name "Cirrus" that was to be the buyer.

iv) Whilst Mr Stimler would have had no objection to Woodfields as a buyer and might well have agreed to the substitution of Woodfields, had that ever been requested, the email acceptance made no suggestion of any change to the identity of the buyer as put forward in the firm offer email of "Cirrus … (Full trading name)". Where objection had been raised to the name of the buyer put forward by Glencore in any prior transaction, a change had been effected, but nothing of the kind occurred here.

v) The licensing position takes the matter no further at all because of Mr Obiri's evidence on the subject to which I have referred earlier in this judgment. There was no known restriction on Cirrus Oil's ability to trade in crude oil.

vi) Mr Obiri's awareness that there were more than one company in what could loosely be referred to as "the Cirrus group", that Cirrus Oil and Woodfields were affiliated entities and that different companies were used for different purposes cannot impact upon the use of the terms in the emails constituting the offer and acceptance.

vii) The cross-examination of Mr Stimler about whether his firm offer was made to a company to be nominated does not advance matters either. Mrs Owusu was being asked to identify the full trading name of the Cirrus company in question but Mr Stimler was expecting the full name to begin with the word "Cirrus" as is plain from the email. The email identified a company beginning with that name, not Woodfields, which was the only other possibility.

Market Value

69. I have to determine the price that would be paid by a willing buyer to a willing seller for this cargo of Ebok crude oil of normal export quality with the expected composition set out in the email of 30th March from Mr Stimler and the assays referred to therein, on the basis of delivery at the end of May.

70. It is accepted that the best evidence of market value is constituted by arm's length deals actually made in the market. The last transaction effected effectively sets the benchmark.

71. Expert evidence was adduced pursuant to the order of the Court to assist in ascertaining the market value of the cargo but, as Ebok crude oil is a relatively new field, there are no publicly available figures for deals published by organisations such as Platts and Argus, as there are for many grades of oil. The experts therefore had some difficulty in assisting the Court, it being recognised that, in the absence of publicly reported figures for Ebok crude, one way of seeking to arrive at a market value is to extrapolate from the value of comparable grades of oil. This is what Cirrus Oil's expert, Ms Bossley, did.

72. Shortly before exchange of expert reports, however, Glencore disclosed documents recording the market intelligence that it had garnered on transactions in Ebok crude oil in the period around April/May 2012. This was necessarily hearsay evidence, since Glencore were not involved in any other deals in Ebok crude. Cirrus Oil complained about this evidence, contending that to give it any real weight would undermine the integrity of the evidential process because there was no way of testing the validity of the figures produced, particularly as, until trial, Glencore had refused to give the names of the individuals who had supplied the figures which had been recorded on a spreadsheet by Mr Stimler himself and Mr Hopkirk. The disclosed material showed the parties to the transactions in question and Mr Stimler's witness statement and Further Information signed by him revealed that the information came from market participants, without identifying the individuals concerned because, it was said, the information had been supplied in confidence. Whilst it was theoretically possible for Cirrus Oil to seek to check this information by asking those companies alleged to be involved in the transactions, the practicality or effectiveness of such an attempt, without any names, was obviously highly dubious.

73. Cirrus Oil complains that the material disclosed is one-sided, because it reveals low prices obtained by Socar over the relevant period. It submits that this material would never have emerged if it had not been helpful to Glencore. That, of course, does not impact on its accuracy. Disclosure was not ordered in relation to market value because, as a matter of case management, expert evidence was to be adduced on the matter and such disclosure was considered unnecessary and, to the extent that it related to other possibly comparable grades of oil, unworkable. In the light of the difficulties encountered by the experts however, and a request from Dr Holdaway to Glencore, the latter looked for its market tracker records on Ebok crude and produced a document which shows the following sales by Socar, by reference to the dates of lifting of cargoes and the FOB price in Nigeria:

    i) March 2012 – 500,000 bbls sold to Unipec at DTD - $4.70.

    ii) April 2012 – 950,000 bbls sold to Iplom on a frame term contract for which no price was available.

iii) May 2012 – 650,000-1 million bbls sold to Exxon at DTD -$5.25.

iv) July 2012 – 950,000 bbls sold to Exxon at DTD -$5.

74. This information was garnered at Glencore at about the time of the transactions in question, according to its normal practice. Mr Stimler's evidence was that the West Africa Crude market was very transparent as between participants and that the sharing of information was considered beneficial by the traders and major oil companies involved. Glencore maintained tracker information of a similar kind on all commercial grades of West African crude oil and the information was complied and used on an almost daily basis.

75. These "contemporary" records by Glencore, however, showed no prices after July 2012 until April 2013 and thereafter, when sales in the spring/summer of 2013 to Phillips 66, Shell, Exxon and Iplom revealed prices in the range of DTD -$4.60 to DTD -$3.60.

76. In October 2013, Mr Stimler sought further market information, contacting Mr Hack at Exxon. He was told of the following sales by Socar to Exxon with loading dates:

i) 22nd-30th December 2011: 700,000 bbls at DTD -$1.50 ex ship Rotterdam, equivalent to about DTD -$4.50 FOB Nigeria.

ii) 28th-30th January 2012: 1 million bbls at DTD -$2.20 CFR Rotterdam, equivalent to about DTD -$4.40 FOB Nigeria, or slightly less.

iii) 19th-21st March 2012: 1 million bbls at DTD -$2.50 CFR Rotterdam equivalent to about DTD -$4.70-$5.000 FOB Nigeria.

iv) 25th-30th May 2012: 650,000-1 million bbls at DTD -$3.00 CFR Rotterdam equivalent to about DTD -$4.807-$5.50, depending on the final shipping quantity and vessel used.

77. Whether the March cargo sold to Exxon was in fact the same March cargo that had previously been reported as sold to Unipec was unclear. The Ebok monthly production was of the order of 800,000-1 million bbls throughout 2012 but about 800,000-900,000 bbls in the period March-June 2012. It is therefore possible but uncertain whether Socar shipped 1.5 million bbls in March 2012. It seems to me on the balance of probabilities that a report of a sale to a Chinese buyer is sufficiently unusual for it to be unlikely to be inaccurate, although the overall quantities may not be correct. A sale of this kind, out of the ordinary run of things, would be more notable than others.

78. All the sales reported were by Socar. Socar had a monopoly on sales from the field itself and would not, on Mr Stimler's evidence, in the ordinary way, sell to a trader such as Glencore as it would reflect badly on its own marketing ability to sell to oil majors and refiners, if an intermediate trader could apparently make money by a purchase and on-sale. Mr Stimler was confident that the only reason he could obtain the cargo from Socar was because it was a first introductory sale by Socar into a new market, namely Ghana, with an agreed restriction preventing on-sale by Glencore to anyone other than TOR.

79. The evidence before me established that Socar was a "weak" seller or marketer. Because it took a marketing fee rather than profit on a sale, it had, perhaps, less incentive to push for the highest prices. It was strong in the Black Sea area but its sales of Ebok crude oil appear to have been to a limited market so far as can be judged from the information available. Whilst the buyers referred to might have on-sold to other majors or refiners, there is little reason why any such further buyer would be prepared to pay significantly more than the price at which the oil was obtainable from Socar absent special market considerations. Whether or not Socar was a weak seller, its prices did set the market.

80. There is evidence before me which shows that a company such as Statoil which sold two of the crude oil grades that Ms Bossley considered comparable to Ebok, namely the Norwegian crudes Heidrun and Grane, targeted its markets more effectively than Socar and that such markets were sophisticated and developed, whereas the Ebok market was immature. The main drawback of Ebok, as apparently perceived by TOR and by the experts was its high TAN number – the acidic element in its composition. The assumed Ebok blend gave rise to a figure of about 2.89mg KOH/g which is comparable to Heidrun, which is also comparable in API and sulphur figures. There are now refineries who specialise in refining high acid crude, particularly, it appears, in China and Canada. The experts considered that targeting these refineries might have led to higher prices but if the sale to Unipec is anything to go by, the prices to China were low in comparison to those obtainable for Heidrun according to Ms Bossley. No Heidrun was traded in April 2012 but the Norwegian norm price differential to DTD Brent was + $2.7 in May and + $3.7 in June. Dalia crude from Angola which Ms Bossley considered as the most comparable to Ebok in quality, traded at DTD -$0.21 in April, DTD + $0.72 in May and DTD + $0.37 in June, but its acid content was 1.50, as compared to the Ebok blend figure of 2.89. Grane traded at DTD -$1.65, -$2.15 and -$0.9 in April, May and June respectively. The May figures for the Norwegian norm prices as recorded therefore show DTD -$2.15 to DTD + $2.7. It is accepted by Cirrus Oil that if the cargo were to have been traded into Europe, as the Norwegian crudes essentially were, there would be a freight disadvantage as compared with the prices paid for these cargoes, namely a deduction of 90 cents per barrel into Rotterdam and 40 cents per barrel into the Mediterranean. Ms Bossley concluded that the market value of Ebok crude, by extrapolation, in April/May would have been in the range of DTD plus or minus $2 a barrel which is a wide range but reflecting the wide range of prices, as she saw it, in the comparable crudes, troubled as she was by the wide differentials between the Socar sale to Glencore, the Glencore sale to Cirrus Oil and the Cirrus Oil sale to TOR.

81. This evidence is however unpersuasive in the light of the actual prices obtained for Ebok and in particular the price obtained for the very cargo that Glencore would have delivered to Cirrus Oil if the deal had gone ahead. The Socar-Exxon deal with loading at the end of May, with 650,000-1 million bbls covers the same loading dates as those in the Glencore/Cirrus Oil transaction. In the context of the prices obtained from December 2011 to July 2012, the price cannot be seen as a distressed sale. Glencore and Socar cancelled their transaction on 4th May 2012, without cost to either party, following Glencore's acceptance of Cirrus Oil's repudiation on 2nd May. Glencore obviously took the view that it could not make a profit on the deal, even if Socar could have been persuaded to waive the Ghana restriction. Socar obviously considered that it could sell the cargo for as good a price as it had agreed with

Glencore. In fact it did better by selling to Exxon at DTD -$3.00 per barrel CFR Rotterdam equivalent (as I find in paragraph 88) to DTD -$5.44 FOB Nigeria, as opposed to the DTD -$5.50 per barrel FOB Nigeria at which it had sold to Glencore.

82. It is agreed between the parties that the market value that falls to be assessed is the international market value of the Glencore/Cirrus Oil cargo without any Ghana restriction. (With the Ghana restriction, the market value would be very low indeed if not zero, because there was effectively only one buyer, TOR, which had refused the cargo even with various other cargoes to blend with it, as suggested in without prejudice negotiations after 5th April 2012).

83. The price that TOR was prepared to pay was, it seems, based on its position that the cargo was to be composed from Well 16 alone. In an off the cuff view in re-examination, Ms Bossley suggested that the value of the blend would only be 50 cents per barrel less than the DTD + $1.65 that TOR was prepared to pay. This, in my judgment, is wholly unreal, given the refusal of TOR to take the cargo at all, even on any compromise basis suggested by Glencore after the event, with other cargoes to blend. The acid content was the stumbling block to any deal, as expressed by TOR, even though the various blending cargoes suggested would have reduced the acid element to something less than the Well 16 assay.

84. The price payable by Glencore to Socar is of limited assistance to me because it was part of a package deal with Socar involving the sale of a cargo of Akpo crude oil which Socar was keen to dispose of for its own account and had been hawking round the market for two weeks or so. Whilst Mr Stimler was reluctant to accept that he paid over the odds for the Akpo cargo, Socar insisted that he could only have the Ebok crude oil if he was willing to purchase the Akpo crude at the same time. He told Mr Obiri at the time that he had had "to sell his children" to obtain the Ebok oil. I find that the Akpo deal, with its on-sale, was always going to be loss making for Glencore and that the anticipated loss was of the order of $100,000-$280,000 although in fact the overall loss turned out to be of the order of $450,000 because of the ultimate buyer's inflexibility on the delivery dates and the need to effect a swap with Petrobras in order to overcome this difficulty. The impact that the package deal had on the purchase price paid for the Ebok oil by Glencore was not quantified by either expert but the price obtained on the substitute sale by Socar to Exxon suggests that it was not as large as might otherwise be thought.

85. Cirrus Oil submitted that the price obtained by Socar from Exxon could have been affected by knowledge of the price payable by Glencore on the aborted transaction, as the last known transaction which therefore set a benchmark. The July price, however, suggests that it was not much out of kilter. The Ebok OSP, even if considered as "artificially low" for tax reasons, was DTD -$5, -$5.25 and -$5.4 for April, May and June 2012. The price to be paid by Cirrus Oil was DTD + $0.15 CFR Tema (equivalent to DTD -$0.85 FOB Nigeria) but this price was based on what it hoped to get from TOR which seems to have been based on TOR's view of the Well 16 composition and its Gross Product Worth to it.

86. Although Glencore did not produce Mr Hack to give evidence of the Exxon deals and the evidence of Mr Stimler of the reported deals is hearsay, it is in reality little different from the basis upon which experts usually opine – namely on reported prices for deals done. Provided that I am satisfied that Glencore's market intelligence is

essentially accurate, it is the best evidence of the market value of the Ebok crude in April-June 2012. I am confident that the deals, as reported, have been recorded accurately. Subject only to the question of quantities sold in March 2012, I am also satisfied that the deals, as reported, do essentially reflect the prices paid by the majors and refineries concerned, even if there is a little give and take in the netback calculations to the FOB Nigeria price. There is no reason to think that the prices reported are inaccurate, even if there is no way of verifying them. There is no reason to think that all of these transactions were subject to any special factors (such as a package deal, which diminished the price paid for Ebok). The overall position which emerges therefore is that of a crude oil which traded in January-July 2012 at prices between DTD -$4.40 and DTD -$5.50 per barrel. Despite Ms Bossley's reservations as to Socar's ability or desire to achieve the best price on-sale of Ebok, there is no evidence of any other sales at higher prices and there is no reason to think that Socar would not want to market the cargo at the best price obtainable, allowing for a discount for any introductory cargo entering a new market.

87. As Ms Bossley accepted, the market is what the market is and if there had been better trades available to Chinese refineries, the Unipec transaction indicates Socar's awareness of the possibility. The deals done by Socar must reflect the prices payable in the market at the time, regardless of any differential with crude oil grades that she regarded as comparable.

88. I conclude that the price obtained by Socar for Exxon for the lifting of this very cargo at the end of May illustrates the market value of the Ebok crude at the time and that the value on a Nigerian FOB basis could be assessed thus:

    i) The price was DTD -$3.00 CFR Rotterdam.

    ii) I accept the freight calculations made by Dr Holdaway, because they are tailored to the actual route and actual size of the cargo. The figure is $2.13 per barrel for freight to Rotterdam.

    iii) The port charges are those applicable to a Suez max vessel, namely $0.16 per barrel.

    iv) The Nigerian Maritime Authority dues amount to $0.15 per barrel.

    v) The FOB Nigeria price thus becomes DTD -$5.44 per barrel.

89. On this basis the CFR Tema market value, taking into account the agreed transportation costs (freight and port dues) of $1 per barrel and the Nigerian maritime Authority dues of 15c per barrel would be DTD -$4.29.

90. Whilst I do not consider that the sale price to Exxon was for a distressed sale, I do however consider that DTD -$5.44 as an FOB Nigerian price understates the position. Allowance must be made for:

    i) The effect of any knowledge of the DTD -$5.50 FOB Nigeria price payable by Glencore to Socar (itself a low price by reason of the link to the Akpo deal) in setting a benchmark.

ii) Its effect on diminishing the price paid by Exxon.

iii) The fact that this cargo was being offered 2-4 weeks later than usual by Socar, with therefore an element of pressure involved.

iv) The possibility of unreported sales by majors or refineries.

v) The Nigeria OSP which is conventionally regarded as being on the low side.

vi) The much higher price that TOR was willing to pay for the Well 16 cargo.

91. In the light of these matters, and doing the best I can with the evidence available, I find that the market value of the Glencore/Cirrus Oil value on an FOB Nigeria basis was DTD -$4.90 per barrel which equates to DTD -$3.75 CFR Tema.

92. I find that, on the balance of probabilities, the cargo quantity would have been 661,500 barrels as Glencore would have exercised its option to take the additional 5% on top of the 630,000 barrel figure (since it was making such a profit) and there was oil available to take, as shown by the contract quantity sold to Exxon.

93. The contract price was DTD + $0.15 per barrel CFR Tema, against which commission would have been payable to Mr Obiri. It was accepted by the parties that this should be deducted. In the light of the Service Agreement of 1st October 2010 and Addendum No. 5 to it I find that the commission payable to him would have been 12 cents per barrel, particularly bearing in mind that this was the introductory sale into a new market which it was hoped would lead to further business.

94. The difference between the net contract price of DTD + $0.03 per barrel and the market value of DTD -$3.75 per barrel is therefore $3.78 per barrel. The difference on a cargo quantity of 661,500 barrels amounts to $2,500,470.

Clause 32.1

95. Clause 32.1 of the incorporated BP 2007 General Terms and Conditions for FC Sales reads as follows:

> "32.1. Except as specifically provided in the Special Provisions or in Section 12.4, in no event, including the negligent act or omission on its part, shall either party be liable to the other, whether under the Agreement or otherwise in connection with it, in contract, tort, breach of statutory duty or otherwise, in respect of any indirect or consequential losses or expenses including (without limitation) if and to the extent that they might otherwise not constitute indirect or consequential losses or expenses, loss of anticipated profits, plant shut-down or reduced production, loss of power generation, blackouts, or electrical shutdown or reduction, hedging or other derivative losses, goodwill, use, market reputation, business receipts or contracts or commercial opportunities, whether or not foreseeable."

96. Cirrus Oil submits that the first effect of this provision is to exclude all liability "in respect of any indirect or consequential losses or expenses". It accepts that the meaning of such an exclusion is well established as referring to liability for all losses which fall within the second limb of Hadley v Baxendale (1854) 9 Ex Ch 341, namely unusual losses for which the defaulter could only be liable if made aware of the danger of them being suffered. Liability for loss within the first limb, namely that directly and naturally resulting, in the ordinary course of events, from the relevant breach of contract, is not excluded by such words as decided in *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyds Rep 55. Cirrus Oil submits that the effect of clause 32, however, is to exclude all liability for loss of anticipated profits, whether or not they can be seen as "indirect or consequential losses or expenses" within the second limb of Hadley v Baxendale.

97. Furthermore, Cirrus Oil submits that a claim made under section 50(2) and (3) of the Sale of Goods Act 1979 for damages for non-acceptance, on the basis of the prima facie rule that the loss is to be ascertained as "the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance at the time of the refusal to accept)", is a claim for lost profits. It is said that, in circumstances where Glencore terminated its contract with Socar without any liability at all and never took any delivery of any crude oil, the nature of its loss is a loss of the profit that it would have earned if the transaction had proceeded. The contrast is to be drawn between lost profit on the one hand and out of pocket expenditure, or physical damage caused by a quality problem with the cargo on the other.

98. I am unable to accept this submission. The contract price/market price differential is not a computation of lost profit. Lost profit is the difference between the total net cost to the seller of acquiring the goods and bringing them to market on the one hand and the net sale price that would have been achieved on the other. The difference between this measure of damages and the section 50 measure is illustrated by the different claims originally put forward in the Particulars of Claim by Glencore. The claim was first put on the basis of the difference between the net price payable by Glencore to Socar and the amount payable to it under its contract with Cirrus Oil. The alternative claim, which was the only one pursued at trial, was the claim based on section 50(2) and (3) of the Sale of Goods Act. The point is illustrated by a simple situation where the cost of the goods to the seller is £100, the on-sale price is also £100, and the market price at the time of the breach by the on-sale buyer is £50. If the buyer had accepted the goods, the seller would in fact have made no profit at all but, in accordance with section 50(2) and (3) of the Sale of Goods Act, the prima facie measure of loss is £50 because the seller is left with goods worth less than the contract price.

99. The measure of damage constituted by section 50(2) and (3) of the Sale of Goods Act was designed to compensate the seller for the loss of the bargain with the buyer by computing how much worse off the seller would be, if at the time of the breach, he had sold the goods to a substitute buyer. The measure constitutes both a ceiling and a floor to the loss claim on the assumption that the seller had gone out into the market and sold at the date of breach. Movement in the market thereafter is then excluded from the calculation on the basis that any change in the figures affected thereby is the result of the seller's own decision to play the market.

100. In my judgment, no-one who understood the way in which the Sale of Goods Act works, would refer to this measure of loss as "lost profits" or "loss of anticipated profits" and clause 32.1 cannot operate to exclude the loss claimed here.

101. If Cirrus Oil's submissions on this point were right, it would mean that Glencore could recover nothing in respect of Cirrus Oil's repudiation of the contract since it suffered no out of pocket losses at all. This is an unlikely and uncommercial result which would require extremely clear words, which are not to be found in this contract.

Conclusion

102. I find that Glencore's claim in damages against Cirrus Oil succeeds in the sum of $2,500,470. Interest runs on this figure from the date payment was due, namely 30th August 2012 at the appropriate rate for Glencore's borrowing, which I find to be US 3 month Libor plus 1%. I trust the parties will be able to calculate and agree the figure to the date when judgment is handed down, but if there is an issue I will make any necessary ruling.

103. Subject to any peculiar feature of which I am not aware, costs must follow the event. If there are any such matters, I will again make any necessary ruling but otherwise, the form of the order should be capable of agreement between the parties.