Neutral Citation Number: [2017] EWHC 1734 (Comm)

Case No: CL-2016-000539

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2017

Before :

THE HONOURABLE MRS JUSTICE CARR DBE

- -

Between :

VITOL S.A.	**Claimant**
- and -	
BETA RENOWABLE GROUP S.A.	**Defendant**

- -
- -

Mr James Watthey (instructed by **Clyde & Co LLP**) for the **Claimant**
Mr Richard Sarll (instructed by **Alberto Pérez Cedillo Spanish Lawyers & Solicitors**) for the **Defendant**

Hearing dates: 27 and 28 June 2017

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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.

.....

THE HONOURABLE MRS JUSTICE CARR DBE

Mrs Justice Carr :

Introduction

1. This is a contractual dispute between Vitol SA ("Vitol"), a major oil trader, and Beta Renowable Group SA ("Beta"), a manufacturer of biofuel products. Vitol agreed to buy and Beta agreed to sell and deliver 4,500 metric tonnes ("mt") of a type of biofuel (ISCC-EU T2 UCOME (Used Cooking Oil Methyl Ester)) ("the biofuel").

2. Vitol claims that in breach of contract Beta indicated in early to mid-June 2016 that it would be unable to provide the biofuel in accordance with its obligations. Vitol accepted such repudiatory and/or renunciatory breach by failing to nominate a vessel (by midnight on 27th June 2016). It also sent a notice of contractual termination by email of 7th July 2016. Vitol trades in US dollars and claims US$651,240, based on losses calculated by reference to its hedging activities, alternatively US$351,830.25, based on market value, by way of damages.

3. Beta accepts that it acted in renunciatory breach of contract as alleged but denies that Vitol accepted that breach by failing to nominate. That failure was a mere oversight; in any event the failure did not amount to clear and unequivocal conduct conveying to Beta that Vitol was treating the contracts as at an end. Instead, Vitol's failure to nominate relieved Beta of its obligation to deliver. Vitol should have terminated contractual relations in good time by accepting Beta's renunciation, which it did not do. As Beta puts it, Vitol "*only has itself to blame".* In any event, Vitol is not entitled to damages based on hedging losses, and its claim to damages based on market value is over-stated.

4. These proceedings were issued on 5th September 2016. On 20th January 2017, upon Vitol withdrawing its application for summary judgment dated 24th November 2016, Blair J directed that the claim should proceed under the pilot for the Shorter Trials Scheme (see CPR PD51N). There has been a 2 day hearing on 27th and 28th June 2017, with limited disclosure and witness evidence. The total costs of the action on Vitol's side are estimated to be approximately £125,000 (excluding VAT) and on Beta's side £63,000 (excluding VAT). This judgment has been handed down within 10 days of the conclusion of the hearing.

The parties' dealings

5. On 20th November 2015 SCB & Associates ("SCB") issued a broker confirmation note referring to Vitol's agreement to sell 4,500mt of biofuel at a price of €812.50/mt fob Bilbao during the period 15th to 28th February 2016 in Vitol's option. The note recorded the main terms which had been agreed, and stated that the parties were to "*promptly exchange their own documentation".*

6. The terms of agreement were subsequently varied by consent. By Amendment#1 dated 19th January 2016 the price was reduced (to €807.50/mt) and the shipment window changed to 24th to 31st March 2016 (because Beta was unable to deliver during the contractual lifting period). By Amendment#2 dated 10th March 2016 the shipment window was changed to 16th to 30th June 2016 (for the same reason).

7. SCB issued Amendment#3 dated 20th November 2015 but sent on 16th March 2016 ("Amendment#3"), reducing the price again, now to €793.50/mt. Amendment#3 stated:

> *"….We encourage Seller and Buyer promptly to exchange their own documentation though it is understood by all parties that no term may be altered from the below agreement without express permission of contract parties.*
>
> *…..*
>
> *Lifting/loading/delivery:*
>
> *……*
>
> *FOB Bilbao loading during the period in buyers' option 16th – 30th June 2016*
>
> *Price:*
>
> *……..*
>
> *EUR 793.50/metric ton*
>
> *…….*
>
> *Sustainability Clause:*
>
> *……..*
>
> *ISCC Certified*
>
> *UK Double Counting*
>
> *Default 83% GHG*
>
> *……"*

8. On 7th June 2016 Vitol sent Beta 4 contract documents (backdated to 20th January 2016) ("the Contracts") for Vitol to purchase and for Beta to sell and deliver in 4 tranches as follows:

   a) Contract 5289640: 1,700 mt for delivery fob Bilbao;

   b) Contract 5289640 (Part 2): 1,200 mt for delivery fob Bilbao;

   c) Contract 5289640 (Part 3): 924 mt for delivery fob Bilbao;

   d) Contract 5289640 (Part 4): 721 mt for delivery fob Bilbao.

9. The Contracts each provided materially:

"LIFTING PERIOD

16 JUNE 2016 – 30 JUNE 2016

(WAS ORIGINALLY FEBRUARY 15-28, 2016/THEN MARCH 24-31, 2016)

….THE BUYER'S OBLIGATIONS WITH REGARD TO THE TIMING OF LIFTING WILL BE FULFILLED PROVIDED THAT THE NOMINATED VESSEL ARRIVES AT THE LOADPORT AND GIVES NOTICE OF READINESS TO LOADPORT BY 24:00 ON THE LAST DAY OF THE LIFTING PERIOD.

NOMINATION/VESSEL/S

THE BUYER TO NOMINATE VESSEL ACCEPTABLE TO SELLER, LATEST 3 WORKING DAYS PRIOR TO VESSEL ARRIVAL AT LOAD PORT, SUCH ACCEPTANCE NOT TO BE UNREASONABLY WITHHELD.

PRICE

IS FIXED AT EUROS 793.50 PER METRIC TONS AIR.

PAYMENT TERMS

PAYMENT FOR THE PRODUCT SHALL BE MADE IN EUR BY TELEGRAPHIC TRANSFER IN IMMEDIATELY AVAILABLE FUNDS, WITHOUT ANY DEDUCTION, OFFSET OR COUNTER-CLAIM, AT THE COUNTERS OF SELLER'S DESIGNATED BANK, AS STATED IN SELLER'S INVOICE, 5 CALENDAR DAYS AFTER BILL OF LADING (THE "DUE DATE") AGAINST PRESENTATION OF SELLER'S COMMERCIAL INVOICE (FAX/PDF EMAIL COPY ACCEPTABLE) AND FULL SET(S) OF CLEAN, ORIGINAL BILLS OF LADING AND OTHER NORMAL ORIGINAL SHIPPING DOCUMENTS…

LIABILITY

NEITHER THE SELLER NOR THE BUYER SHALL BE LIABLE, WHETHER IN CONTRACT, TORT OR OTHERWISE, FOR ANY INDIRECT, PUNITIVE, CONSEQUENTIAL OR SPECIAL LOSSES, DAMAGES OR EXPENSES OF ANY KIND DIRECTLY OR INDIRECTLY ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE PERFORMANCE OF THIS CONTRACT INCLUDING BUT NOT LIMITED TO LOSS OF PROFIT, WASTED OVERHEADS OR LOSS RESULTING FROM THE SHUT-DOWN OR REDUCTION IN THROUGHPUT OF PROCESS PLANT……

> *THE CONTRACT CONTAINS THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SUPERSEDES ALL PREVIOUS NEGOTIATIONS, REPRESENTATIONS, AGREEMENTS OR COMMITMENTS WITH REGARD TO ITS SUBJECT MATTER."*

Each contract was governed by English law and provided for "any controversy, dispute or claim whatsoever arising out of or in connection with this contract or the breach thereof [to] be subject to the exclusive jurisdiction of the High Court of Justice in London".

10. It is common ground that under the Contracts:

    a) Vitol was obliged to nominate a vessel at the latest 3 working days prior to arrival at the load port;

    b) The carrying vessel was to arrive and provide NOR to load by 24:00 hours on 1st July 2016;

    c) Accordingly, the nomination of the time of loading and the performing vessel had to be made by 24:00 hours on 27th June 2016;

    d) Vitol was obliged to pay the price of €793.50/mt following delivery.

11. As for Beta's obligation to deliver the biofuel, however, Beta contends that it was not under an absolute obligation to deliver the biofuel between 16th and 30th June 2016. Instead it was a condition precedent to Beta's obligation to supply the biofuel for shipment that Vitol had first to nominate the time(s) for loading and the performing vessel(s). Absent such nomination, no obligation would arise. Vitol contends, by contrast, that Beta had an absolute obligation to deliver.

Vitol's hedging

12. In accordance with what Vitol says was its practice, Vitol hedged the Contracts against the risk of price fluctuations in the UCOME market by selling gasoil futures contracts at a fixed price of US$434.50/mt. The differential between the contract price for the biofuels and the gasoil futures contract price as at November 2015 was US$413.85/mt.

13. Vitol contends that such hedging was foreseeable. It is common practice in the biofuels market for purchasers to enter into hedging contracts for the sale and purchase of gasoil futures. Parties enter into gasoil, rather than biofuels, futures contracts because there is no biofuels futures market. By entering into a futures contract, the purchaser hedges the risk of price fluctuations in the UCOME market. The hedging contracts are an adjunct to trading in physical oil.

14. Beta denies the existence of any common practice whereby purchasers in the biofuels market enter into hedging contracts as alleged, or that there is any common practice whereby purchasers in the biofuels market enter into hedging contracts for the sale and purchase of gasoil futures. Further, a biofuels futures market exists, even if only in fledgling state. Vitol's hedging was not reasonably foreseeable to Beta at any

material time, either in terms of the specific hedging contract relied upon, or in more general terms.

Performance of the contractual arrangements

15. On 1st June 2016 Beta (by Mr Santiago Viozquez Camara ("Mr Camara")) emailed Mr Matthew Wilson ("Mr Wilson") of Vitol (via SCB) as follows:

> *"There are some reason that lead us to ask you for the washout our actual contract to be delivered in June, although the main reason is that we have stopped production at our production plant and the majority of the workers have been fired. We are not able to produce biodiesel at this moment and we don't expect to start producing in a short-medium term.*
>
> *This decision has been taken mainly due to the high impact that we have suffered in our biodiesel national sales due to the uncertainty with the extension or extinction of the Spanish quota during this 2016……*
>
> *So taking all these, we have taked (sic) the hard decission (sic) to stop our biodiesel production indefinitely at least until we get better chances to enter again market.*
>
> *We sincerely appreciate all the efforts you have made when delaying the deliveries although finally it has been impossible for us to meet it so we understand that is better to get an agreement in order to wash out the contract. We apologies (sic) for it…."*

16. By the term "*washout"* Mr Camara meant bringing the Contracts to a complete end. On 2nd June 2016 SCB indicated to Beta that Vitol was prepared to "*washout the contract"*, or at least to look at a proposal.

17. Following a request from Mr Wilson for an urgent update, on 14th June 2016 Beta sent its proposal, which was for a "*tolling agreement"* involving the delivery of batches of only 500mt. It made clear that Beta was struggling to remain solvent and looking for an alternative way to deliver 4,500mt of ISCC-EU T2 UCOME to Vitol. It was not going to be able to deliver the biofuel between 16th and 30th June 2016. It included the following:

> *"If we add to the current situation of production plans, completely paralyzed, with the employment situation of BETA, which, as once proposed, the sector crisis has cost us the loss of the entire production staff (except operators of plant maintenance) with a dire financial situation, the best proposal that we can offer to VITOL right now, - including our know-how (technology production) + know how (skill market UCO) + production capacity, as long as we have a sustainability short to medium term- is this:….."*

18. The proposal concluded with the paragraph:

> *"Here are roughly the offer, which could articulate a framework agreement, picking all generalities and clauses, leaving different batches to deliver and logistics collected from private agreements."*

19. The covering email from Beta to Mr Wilson referred to the proposal and stated that it was looking forward to hearing from him.

20. The parties then corresponded further:

a) on 14th June 2016 Mr Wilson stated that Vitol would need to know the price urgently "*seeing as though we have an agreement in place currently*". He added that Vitol "*reserve all of our rights with regards this matter"*;

b) on 15th June 2016 Beta responded, including the following:

> *"Just try to explain, that after our conversations with Starsupply, and after explaining them the circumstances we are living here in BETA (the production is paralyzed without staff to produce, nor any financiation and not feedstock secured). We understand that VITOL was interested in a long term tolling agreement with BETA, giving us the possibility to restart the production. We were working to show you our alternatives…based on what we understood, always from the respect we show you….*
>
> *Not that we have clarified both VITOL and BETA positions through a new conversation with starsupply, we understand that although you may be interested in a tolling agreement with BETA, you are now focused in working with us to find a solution to our actual contract.*
>
> *Please let us mature our solution to the previous contract conflict, we will keep you updated as soon as possible…";*

c) on 17th June 2016 Mr Wilson emailed Beta:

> *"Hello, we need an update on this cargo TODAY please.*
>
> *I appreciate you have told starsupply next week but I think we have been patient enough and have waited almost 2 weeks.*
>
> *The tolling we are very interested in, but this is a separate issue to the current one.*
>
> *We would like to know when the cargo is available to load in june – we are happy to listen to proposals for amendment on price/lifting dates/parcel size.*

> *Again I must stress we REQUIRE that you fulfil our contractual obligation to supply us the cargo as agreed. We reserve all of our rights in relation to this matter."*

21. Beta responded by email on the same day making it clear that Beta would be unable to provide the biofuels in accordance with the Contracts:

> *"We realize that we have to find a solution to June cargoe, although our actual situation is not easy for us and does not give us too many possibilities. Our goal is to continue with our UCOME activity but the truth is that we have suffered a lost since las[t] 4Q of 2015 that have led us to this undesirable situation."*

22. Beta asked Vitol to consider the new conditions. They included a tolling agreement with Vitol providing finance to Beta and accepting delivery of 750-1,000mt per month.

23. At 15:43 hours on 27th June 2016 Ms Heidi Vennekens ("Ms Vennekens") of Vitol emailed Mr Camara referring to the Contracts and going on to state:

> *"To date you have delivered 0 MT relating to Contract 5289640 and have indicated that you will be unable to do so within the lifting period.*
>
> *As you should be well aware, you have a contractual obligation to deliver the full 4500 MT specified under the Contracts and failure to comply with your obligations will be in breach of contract entitling us to terminate and/or claim damages against you. Please be advised accordingly.*
>
> *We continue to reserve all of our rights, under the contract and at law."*

24. Time for nomination by Vitol of vessels to perform the Contracts expired a few hours later, at 24:00 hours on the same day.

25. On 29th June 2016 Mr Camara responded:

> *"We are aware about this undesirable situation and we also know that you have your rights under the contract and law.*
>
> *In addition to this, at the begginning (sic) of June We communicated to Starsupply that we weren't able to deliver because we stopped our biodiesel activity, being the workers fired and the plants shutted down.*
>
> *Since this we wanted to find a solution that could work for you and we sent a proposal a few weeks ago to try to meet our deal. What we know since then about this situation…is that Vitol were studying internally the proposal, so we are waiting for*

> *your feedback about this (or any different) proposal you could consider, taking into account our actual financial situation….*
>
> *As per the conversations we have had during this month, we will do our best in trying to meet our deal, we Vitol and Beta will have to find a solution worthy for Vitol and achievable for Beta….*
>
> *In the case that finally you decide to use your rights, we have nothing to do more than understand your position although is not the situation we prefer. We think that we still could meet our contract although we havw (sic) realized that not by ourselves…"*

26. On 7th July 2016 Mr Wilson emailed Mr Camara:

> *"Thank you for making the time for our meeting yesterday.*
>
> *Notwithstanding our continued interest in your tolling proposal, you will understand that these discussions must be without prejudice to our rights in relation to the Contracts (as defined in our email of 27 June 2016 which is attached to this email).*
>
> *The delivery window for the Contracts has now passed and in breach of your obligations you have failed to deliver the 4500 MT specified under the Contracts.*
>
> *Accordingly, for good order, we have no choice but to exercise our right to terminate the Contracts and we hereby put you on notice that we reserve all of our rights, including but not limited to our right to claim damages against you."*

A summary of the parties' respective positions

27. Vitol relies on the Contracts as containing the contractual arrangements between the parties. Beta has always admitted the Contracts formed part of the parties' agreement but not always that any provision in them superseded or varied the main terms contained in Amendment#3. This area of dispute has now fallen away, since no material difference arises out of it and Beta has conceded the point.

28. Vitol contends that by its emails dated 1st, 15th and 17th June 2016 Beta was in repudiatory and/or renunciatory breach of its contractual obligations in that it made it clear that it was unable or unwilling to perform them. Vitol accepted that breach by not nominating vessels to perform the Contracts. Alternatively, it accepted such breach by its email of 7th July 2016 (which also followed Beta's failure to respond positively to Vitol's email of 27th June 2016).

29. Vitol's primary claim is that, had Beta performed its contractual obligations, the biofuels would have been sold on for delivery in Rotterdam in July 2016. The average UCOME market price in July 2016 was US$994.52/mt. Because of Vitol's

hedge of the Contracts, Vitol would also have bought back the gasoil futures at the same time. The average gasoil futures price in July 2016 was US$405.71/mt. The differential between the July UCOME market price and the July gasoil future price was therefore US$588.81/mt.

30. Thus, Vitol would have made a made a profit of US175.22/mt. Taking into account freight and storage of approximately US$30.50/mt, Vitol's total profit would have been US$144.72/mt. Vitol claims a total loss of US$651,240 (being US$144.72 x 4,500 mt).

31. Alternatively, Vitol claims losses equivalent to the difference between the price in the Contracts of €793.50/mt and the market price at the time when the biofuels should have been delivered, namely €864/mt, that is to say a difference of €70.5/mt. The price of €864/mt was achieved by Vitol on 29th June 2016 on the purchase of a similar cargo of UCOME biofuel on fob Bilbao terms. At a loss of €70.5/mt, the resulting overall loss is €317,250.

32. Beta contends that its obligation to deliver the biofuel was conditional upon nomination by Vitol of the time(s) for loading and the performing vessel(s).

33. Beta admits that the emails of 1st, 15th and 17th June 2016 amounted to an anticipatory breach of the contractual arrangements by renunciation. However, Vitol did not have the necessary subjective understanding at the time when an anticipatory breach was accepted as terminating the contractual arrangements. Its failure to nominate vessels by 24:00 hours on 27th June 2016 did not constitute the acceptance of an anticipatory breach as terminating the Contracts. Amongst other things, it was insufficiently unequivocal. It was also the result of oversight and/or misunderstanding.

34. Further or alternatively, the commission of an anticipatory breach by renunciation was irrelevant, since it was not accepted as terminating the Contracts before 24:00 hours on 27th June 2016. The Contracts continued to subsist thereafter, but Beta was discharged of its obligation to deliver the biofuel.

35. As for the claim to hedging losses, Beta contends that Vitol's case is *"incoherent"*. In any event, any losses by reference to loss of hedging profit are too remote to be recoverable. By the end of the hearing Beta placed no reliance on the liability exclusion clauses in the Contracts.

36. As for the comparator used by Vitol to establish market value, Beta submits that it is inappropriate, since the biofuel the subject of the comparator contract had higher sustainability properties (at 92.75% Greenhouse Gas ("GHG") compared to the 83% Greenhouse Gas properties of the biofuel to be delivered by Beta.

The witnesses

37. The following witnesses gave evidence:

    a) Mr Wilson for Vitol: gave evidence in statements dated 20th December 2016 and 24th April 2017. He is a biofuels broker employed by Vitol Broking Limited ("Vitol Broking"), part of the Vitol group of companies. Vitol Broking negotiates trading contracts on behalf of Vitol with Vitol's

counterparties and is responsible for negotiating the Contracts. He states that he made the decision not to fix or nominate a vessel to load the biofuel because Beta had made it completely clear that it would not and could not deliver the biofuel in June and there would therefore be no cargo to load. He also addresses the alleged foreseeability of Vitol's hedging activities and calculation of losses. He asserts that he has no doubt that Beta knew at the time that Vitol would hedge against the risk of a fall in the market price of UCOME. He addresses the suitability of the comparator prices used for Vitol's alternative market value claim;

b) Dr Ian Holdaway ("Dr Holdaway"), an expert witness for Vitol: is a petroleum chemist. He lectures to major oil and trading companies on various aspects of petroleum trading, hedging and pricing, refining and supply. He opines on the reasonableness of Vitol's trade differentials, on the reasonableness of the market price used by Vitol as at 29th June 2016, and on the difference in cargo quality in the biofuel and the cargo in the replacement contract agreed on 29th June 2016;

c) Mr Camara for Beta: is Beta's quality director. He deals with his (non)awareness of any hedging practices by Vitol. He refers to Vitol's email of 27th June 2016 and says no notice of termination was received until 7th July 2016. He states that he did not understand Vitol's failure to nominate to amount to an implicit termination of the Contracts. He points to previous occasions when Vitol nominated a vessel whilst alternative proposals were being discussed and it was a possibility (though not, as here, a certainty) that relevant cargo would not be available.

Were the Contracts terminated by Vitol's non-nomination by midnight on 27th June 2016 or by its notice of 7th July 2016?

38. As for whether or not the Contracts were terminated by Vitol's acceptance of Beta's renunciatory breach by 24:00 hours on 27th June 2016, it is common ground that Vitol needed to accept Beta's renunciatory breach of the Contracts. The issue is whether the Contracts were terminated by reason of Vitol's failure to nominate by midnight on 27th June 2016, as Vitol contends they were. If they were, then it is common ground that Vitol's claim succeeds on liability. Beta however contends that Vitol did not accept the breach by its non-nomination. It submits that Vitol was *"simply oblivious of the nomination deadline".* In any event the failure to nominate may have been consistent with an acceptance of renunciatory breach but it was not unequivocal in all the circumstances.

39. The issue has required a detailed analysis of the parties' exchanges in June 2016. The postfacto involvement of lawyers has led to the parties each now taking positions which are inconsistent to those adopted by their clients at the time. Thus, by way of example:

a) Vitol's email of 7th July 2016 is premised on the Contracts still being in existence at that time;

b) Beta's email of 29th June 2016 does not proceed on the basis that it has no obligation to deliver because of Vitol's failure to nominate.

40. Acceptance of a repudiation or renunciation requires no particular form. What is required is that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end: see *Vitol SA v Norelf Ltd ("The Santa Clara")* [1996] AC 800 (per Lord Steyn at 810H-811B):

> *"…(1) Where a party has repudiated a contract the aggrieved party has an election to accept the repudiation or to affirm the contract….(2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end. (3) It is rightly conceded by counsel for the buyers that the aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention…."*

41. Thus, acceptance can take place by conduct alone and, moreover, by conduct in the innocent party not performing its obligations:

> *"…a failure to perform may sometimes signify to a repudiating party an election by the aggrieved party to treat the contract as an end."*

(per Lord Steyn at 811F in *The Santa Clara*). Whether or not an act or omission amounts to acceptance is always a fact-specific question: "One cannot generalise on the point. It all depends on the particular contractual relationship and the particular circumstances of the case" (see again Lord Steyn at 811E-F in *The Santa Clara*). A specific example given, which might be said to be relevant to the index facts, is where there is an overseas sale providing for shipment on a named ship in a given month. The seller is obliged to obtain an export licence. The buyer repudiates the contract before loading starts. To the knowledge of the buyer the seller does not apply for an export licence with the result that the transaction cannot proceed. In such circumstances it may well be that an ordinary businessman, circumstanced as the parties were, would conclude that the seller was treating the contract as at an end. On the facts in *The Santa Clara* Lord Steyn placed weight on the fact that the tender of a bill of lading was the pre-condition to payment of the price. It would be possible to infer from a failure to tender a bill of lading a clear communication to a trader that the seller was treating the contract as at an end.

42. Beta submits that in order for a renunciation of a contract to be actionable, the party who purports to have accepted the renunciation as terminating the contract must also demonstrate that it subjectively believed that the relevant words or conduct were evincing an intention not to perform and further that, at the time of the alleged acceptance, it actually accepted the same as terminating the contract: see *SK Shipping (S) Ptd Ltd v Petroexport Ltd ("The Pro Victor")* [2012] 2 Lloyd's Rep 158 at [90] to [97]. There Flaux J (as he then was) decided (albeit obiter) that a claimant who contends that the defendant has renounced the contract should have to show not only that the words

or conduct were objectively evincing an intention not to perform, but that the claimant subjectively believed that to be the case. At [96], Flaux J stated:

> *"It seems to me that there is an analogy to be drawn between renunciation and (non-fraudulent) misrepresentation. Just as a claimant must show both actual reliance on or inducement by a misrepresentation as well as that such reliance or inducement was objectively reasonable, so it seems to me a claimant who contends that the defendant has renounced the contract should have to show not only that the words or conduct were objectively evincing an intention not to perform but that the claimant subjectively believed that to be the case. The passages which Mr Phillips highlighted from Viscount Finlay and Lord Shaw in Forslind and Lord Hershell's speech in Carswell v Collard seem to me to support the analogy."*

43. Beta submits that the requirement recognised by Flaux J that the innocent party subjectively believed that the relevant words or conduct were evincing an intention not to perform involves the corollary that the claimant must actually have decided to accept the same as terminating the contract in acting as it did. This is not a situation involving a purely objective interpretation of the law of contract, such as arises on the interpretation of commercial contracts and the question of whether conduct is objectively renunciatory, so as to be capable of acceptance as terminating the contract. Rather the question is whether a party has accepted a renunciation by a particular act. Beta refers in this context to *Peyman v Lanjani and others* [1985] 1 Ch 457 as providing support for the notion that, when a party is faced with an election to be made, it has to make an actual choice (see 482B, 484C, 486B, 487G , 487H and 488D).

44. I turn first to consider whether Vitol's failure to nominate by midnight on 27th June 2016 was a sufficiently clear and unequivocal act on the part of Vitol as to amount to an acceptance of Beta's renunciatory breach.

45. Albeit not without some hesitation, I have concluded that it was not. Self-evidently there was no express statement of termination. It is a question of conduct by omission. It was not an omission responsive to an immediately prior communication or act. The omission was set against a background of previous consensual variation to the parties' contractual arrangements in circumstances of an inability on the part of Beta to perform. It was also set in the context of ongoing negotiations between the parties (even though Vitol was making it clear to Beta that it was treating the question of any new arrangement, such as a tolling agreement, as something quite separate from the Contracts). But most fundamentally, it was set in the context of Vitol's email sent to Beta at 15:43 hours on 27th June 2016. I accept the evidence of Mr Wilson that this email (from Ms Vennekens) has the air of a formulaic standard document – perhaps "cut and paste" at least in parts from elsewhere. But the document has to be read at face value. Its contents are inconsistent with an intention on the part of Vitol to terminate the Contracts within the next few hours by non-nomination. On the contrary, it presses Beta's "*contractual obligation to deliver the full 4500 MT specified under the Contracts and failure to comply…will be in breach of contract entitling [Vitol] to terminate and/or claim damages……".* It makes no reference to the question of nomination by Vitol which is a matter ignored in the communication.

46. In these circumstances, Vitol's silent failure to nominate was not a sufficiently clear and unequivocal act such as to terminate the Contracts. This conclusion is linked to the question of whether or not Vitol's obligation to nominate was a condition precedent to Beta's obligation to deliver which, on the facts of this case and as set out below, I have concluded it was not.

47. Whilst of forensic note only, this conclusion is also consistent with Mr Wilson's letter of 7th July 2016 at which time he was clearly not under the impression that Vitol had already terminated the Contracts. By that letter he was expressly exercising Vitol's right to terminate. It also mirrors the case advanced for Vitol (for example in its evidence in support of its abandoned application for summary judgment) at all times until Beta raised its defence based on its contention that Vitol's obligation to nominate was a condition precedent to Vitol's obligation to deliver. Until then Vitol relied only on its termination on 7th July 2016.

48. It is therefore unnecessary for me to consider whether Beta's submissions as to the existence of a separate requirement of a subjective belief on the part of Vitol that it was indeed terminating the Contracts by its failure to nominate are well-founded. Beta recognises that its position represents an extension of the law, building on the obiter comments of Flaux J in *The Pro Victor* based on dicta described by Beta as providing only a "*slender basis"* for the reasoning. I have been taken to commentary in *Benjamin's Sale of Goods* (9th Ed) ("*Benjamin"*) at 12-021 (footnote 107) where it is said that the proposition of a requirement for subjective belief in this context "*seems doubtful, as adding an unnecessary requirement"* and also to an article by Qiao Liu entitled "*The Pitfall of Subjective Renunciation"* ([2010] LMCLQ 359) suggesting that the proposition "*must be firmly rejected".* But as already indicated, I do not need to take the matter further.

49. However, for the sake of completeness on the facts, I am quite satisfied that Mr Wilson (and Vitol) did not simply forget Vitol's obligation to nominate. Vitol was very much focussed on the Contracts at all material times. I accept Mr Wilson's evidence that there was a conscious decision on Vitol's part not to nominate directly as a result and because of Beta's repeated indications in early to mid-June 2016 that it could not deliver in accordance with its obligations under the Contracts. Mr Wilson described Vitol's internal systems which are designed to ensure that nominations occurred. Vitol nominates a huge number of vessels. Mr Wilson was "*certainly not in the business of forgetting*". Vitol's position, as indeed made clear to Beta, was that any solution through, for example, a tolling agreement, was a separate issue to the parties' rights and obligations under the Contracts. I therefore reject Beta's suggestion that Vitol's failure to nominate was the result of oversight as a matter of fact.

50. However, it is equally clear that the decision by Vitol not to nominate was not made immediately before or in the specific context of the particular deadline for termination. Rather it was made more generally (albeit in advance of the deadline). Indeed in his first witness statement Mr Wilson refers repeatedly and mistakenly to a deadline of midnight on 26th June 2016, an error which the parties adopted until mid-way through trial. Nor did Vitol fail to nominate with a direct view to termination of the Contracts, even if it was Beta's breach that led to the non-nomination. Mr Wilson fairly accepted that he was not "*seeking to communicate*" termination of the Contracts on 27th June 2016 by non-nomination.

51. There is nevertheless no question but that Vitol terminated the Contracts on 7th July 2016. For these reasons, I conclude that the Contracts were terminated for breach by Vitol's notice on 7th July 2016, but not earlier.

Did Vitol's failure to nominate by midnight on 26th June 2017 relieve Beta of its obligation to deliver the biofuel?

52. This conclusion makes it necessary to go on to consider Beta's case that it was discharged of its further obligations under the Contracts by reason of Vitol's failure to make the required nominations under the Contracts by 24:00 hours on 27th June 2016.

53. Beta's case in summary is as follows:

a) First, the contractual machinery required two steps to be taken by Vitol before a delivery could take place: (i) nomination of a time for delivery; and (ii) nomination of a performing vessel. The existence of a condition precedent is inherent in the language of the Contracts;

b) Secondly, those requirements were interdependent with Beta's obligation to effect delivery, which would only arise if they were fulfilled. Reliance is placed on *Armitage v Insole* (1850) 14 QB 728 (a decision of the Queen's Bench sitting as a divisional court). A coal broker brought a claim against a coal merchant for failure to comply with a term of their agreement whereby the coal broker was to obtain, as part of his remuneration, a portion of coal every year for his own use, "*to be put free on board ship*". Notwithstanding that the coal merchant failed to deliver the coals, the claim failed, since the broker had not made any sufficient nomination for the shipment. Wightman J stated (at 731): "*the defendants clearly cannot give the coals free on board, until they know the ship ...* ." Further, strong reliance is placed on *Sutherland v Allhusen* (1866) 14 LT 666 (a decision of the Court of Exchequer Chamber). Here a claim by a purchaser against a seller of bicarbonate of soda for non-delivery of the final instalment of goods under a term contract was dismissed. The reason why the seller could not provide the goods was because its "*stock was exhausted*" (see 666). The claim nevertheless failed, since no nomination of a ship had been given. Pollock CB stated (at 667), referring to the decision in *Armitage v Insole*:

> *"The only question here is, was it incumbent upon the defts. to tender the goods, or was it incumbent on the plt. to tender the ship or point out the place where they were to be delivered, and, if on board ship, to specify the ship by description and name? It has been decided, in a case where the expression "free on board" was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify the place where they are to be delivered, before he can complain that the goods are not on board the ship. I think the spirit of that decision clearly applies in omnibus to the present case, and that the plt. was bound, if he meant these goods to be delivered on ship board, to name the place where he desired them to be delivered, and that it was not necessary for the defts. to tender the goods,*

> *as a sort of condition precedent to their delivery or to the ship being named, or the place being designated by the plt."*

Whilst the judges expressed their regret at the decision, they were unanimous in their exposition of the law. Beta submits that I am bound by these (higher) authorities to find in Beta's favour that Vitol's obligation to nominate was effectively a condition precedent to any obligation on Beta to deliver;

c) Beta relies on the following to demonstrate the continuing applicability of the above principles to fob contracts:

i) Professors Lorenzon and Baatz, "*Sassoon on C.I.F. and F.O.B. Contracts*" (6th Ed) comment (at 11-002):

> *"It is the duty of an f.o.b. buyer to nominate the vessel in which the seller is to place the goods free on board. This obligation of the buyer is a condition precedent to the seller's duty ..."*

ii) The editors of *Benjamin* comment (at 20-046):

> *"If no shipping instructions are given, or if shipping instructions are not given within the time allowed by the contract, the seller is not liable in damages for non-delivery."*

d) where a renunciation is not accepted as terminating a contract, the rights and obligations thereunder will continue to subsist for the benefit of both parties – *Fercometal SARL v Mediterranean Shipping Co SA, The "Simona"* [1987] 2 Lloyd's Rep 236 (at 240). Vitol's obligation to make its nominations continued. Absent the nominations, Beta would be discharged of its obligation to deliver, as in fact it was.

54. I am unable to accept on the facts of this case that that there was no breach of contract by Beta in failing to deliver the biofuel because Vitol did not nominate under the Contracts.

55. First it is to be noted that the obligation to nominate is not an express condition precedent. Nor does Beta contend for the existence of an implied term. On the facts, as Vitol points out, the suggestion of an implied term based on obviousness or business efficacy would be hopeless, given Beta's openly declared inability to perform in advance of the deadline for nomination.

56. Thus Beta strives to rely on the structure of the contractual machinery in the Contracts by reference in particular to *Sutherland v Allhusen* (supra). However, that authority (and the others relied upon by Beta) are clearly and materially distinguishable on the facts. By way of example, in *Armitage v Insole* there was no fixed lifting period; the duty to deliver only arose on nomination. More centrally, there is no suggestion that in any of those cases the defaulting party had indicated its inability to perform in advance of the deadline for nomination. The seller's stock in *Sutherland v Allhusen* may have been exhausted, but it is not suggested that the seller had informed the buyer of that repeatedly, or at all, prior to the time for nomination and/or made it clear to the buyer that that position was permanent. There is in my judgment no basis for a

strict application of the rationale in *Sutherland v Allhusen* regardless of the parties' knowledge and understanding of the seller's ability to perform.

57. It is relevant to examine the purpose of the condition precedent contended for by Beta. It is to enable performance by the seller under the Contracts. When the parties know that such contractual performance is impossible, as was the case here, the obligation to nominate is simply stripped of its purpose and otiose. Without an assumed ability to perform, there is no rationale for the existence of a condition precedent. On the facts of this case, where to both parties' knowledge, the Contracts could not and would not be performed by Beta, the condition precedent contended for does not thus arise on a proper construction of the Contracts.

58. Vitol relies heavily on the authority of *Forrestt & Son Ltd v Aramayo* [1900] 83 LT 335 as cited in *Benjamin* (at 20-053) as support for the following contentions:

> *"But to succeed in a claim for damages the buyers would have to show one of two things.*
>
> *The first possible basis for such a claim would have been proof by the buyers that they were ready and willing to nominate a ship able to load in accordance with the contract….*
>
> *The second possibility would have been for the buyers to show that the sellers had indicated that they could not deliver….. within the contract period.*
>
> *Later authority supports the view that, if such an indication could have been treated by the buyer as an anticipatory breach and had been accepted by them as such, then they would have been entitled to damages at once without having to show that they would have been able to nominate a ship to load within the shipment period…."*

59. Vitol submits that a) it was ready and willing to nominate and b) Beta had indicated that it could not deliver within the contract period. On either basis, it is entitled to damages.

60. I accept Beta's submission that the comments in *Benjamin* must be read carefully in the context of the facts in *Forrestt.* (The key point in *Forrestt* was the requirement of readiness and willingness on the part of the innocent party before it could claim damages against its counterparty for non-performance. It was held on the facts that the defendant buyer who nominated late could not make deductions by way of liquidated damages in respect of delay in the period pre-nomination.) The decision was on the facts, rather than addressing the question of the proper construction of contracts such as the ones under consideration here. But nevertheless, the authority and related commentary in *Benjamin* is no way inconsistent with my conclusion as a matter of principle. There is also force in Vitol's submission that there would be no point in making what would have been, to both parties' knowledge at the time, what *Benjamin* describes as "*a perfectly useless nomination*" (see 20-054) which would at least have risked the incurring of more than minimal wasted expenditure.

Quantum

61. Vitol claims for the loss of the profit that it says that it would have made if Beta had delivered the biofuel on 2 alternative bases.

62. I remind myself at the outset of s. 51 of the Sale of Goods Act 1979 which provides materially:

> *"51. Damages for non-delivery*
>
> *…*
>
> *(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.*
>
> *(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver…"*

The primary claim

63. Vitol's primary claim is not based on the ordinary market measure, but instead upon its alleged actual loss suffered through the use of hedging instruments.

64. Mr Wilson's evidence was in summary to this effect:

a) Vitol "hedges" by entering into related transactions so that it can trade whilst laying off its risk by selling a futures contract. It trades on the trade differentials worked out by comparing the price on Vitol's long position (the purchase price) and short position (the hedge in gasoil futures);

b) Vitol's projected profit is the difference between the trade differential in the opening month of the trade with the trade differential in the closing month of the trade;

c) Had the biofuel been delivered it would have been sold for delivery fob ARA (Amsterdam/Rotterdam/Antwerp range) in July 2016. At the same time it would have bought back the gasoil futures;

d) When Beta indicated its inability to deliver in March, Vitol's short position was rolled forward to June;

e) Taking the difference between the January and June trade differentials and allowing for saved freight and storage, Vitol's profit per mt would have been US$144.72/mt;

f) Thus, Vitol's lost profits were US$651,240.

65. Dr Holdaway supports Vitol's calculations as a matter of mathematics and supports the reasonableness of the market prices relied on.

66. The only evidence to support Vitol's selling of gas oil futures is a (redacted) transactions statement issued by Mizuho Securities USA Inc dated 20th November 2015. It records Vitol selling 4,500mt of ICE LS Gasoil futures at US$434.50/mt with a March 2016 maturation ("the ICE transaction").

67. Both parties explored both in the evidence and in submissions questions of foreseeability and remoteness in some detail. Beta submits that these hedging losses were not caused by any breach on its part; thus for example all of the postponements of delivery pre-June 2016 were consensual with no rights being reserved. The losses were not reasonably foreseeable and are too remote; they are not of the type or kind for which Beta can be treated as having assumed responsibility: see *Transfield Shipping Inc v Mercator Shipping Inc ("The Achilleas")* [2009] 1 AC 61 at [21] to [23]. Reference was made to *Addax v Arcadia Petroleum Ltd* [2000] 1 Lloyd's Rep 493; *Trafigura Beheer BV v Mediterranean Shipping Co SA ("The MSC Amsterdam")* [2007] 1 CLC 594; *Glencore Energy UK Ltd v Transworld Oil Ltd ("The Narmada Spirit")* [2010] 1 CLC 284; *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 384 (Comm) (unreported); *Transpetrol Maritime Services Ltd v SJB (Marine Energy) BV ("The Rowan")* [2011] 2 Lloyd's Rep 331.

68. However, there is a more fundamental problem with Vitol's primary claim, as exemplified by Beta's exposé. Vitol's claim can be broken down as follows:

a) The difference between the onward sale and purchase prices:

	US$ 994.52 pmt	(On-sale price of UCOME fob Rotterdam)
LESS	US$ 848.09 pmt	(Purchase price of UCOME fob Bilbao)
	US$ **146.43** pmt	(Money made on physical trade, before accounting for costs)

b) Accounting for transport and storage costs, Vitol's profits on the physical trade would be:

	US$ 146.43 pmt	(As above)
LESS	US$ 30.50 pmt	(transport and storage costs)
=	US$ **115.93** pmt	

c) As for the gasoil futures, the profit Vitol made was or ought to have been:

	US$ 434.50 pmt	(Price at which gasoil futures were sold)
LESS	US$ 405.71 pmt	(July gasoil price)
=	US$ **28.79** pmt	

d) Adding the profit on the physical trade to the profit claimed on the hedge:

	US$ 115.93 pmt
PLUS	US$ 28.79 pmt
=	US$ **144.72** pmt

e) Result:

144.72 x 4,5000 mt = US$ **651,240.**

69. Dr Holdaway agreed that this presentation was accurate: it matched Vitol's figures. It shows that the claim is for loss of profits a) on a (hypothetical) sub-sale and b) then on a hedge.

70. As for the sub-sale, there is no evidence of such a subsale at that price. Moreover, the factors that might justify an award of loss of profit on a sub-sale (such as existed in *Bence Graphics Ltd v Fasson Ltd* [1998] QB 87 (see in particular 100B- G)) are not obvious on the facts here. There certainly was not the same close and protracted relationship from which it could be inferred that Beta had "*detailed knowledge"* of Vitol's business. And in any event, I accept, as both Dr Holdaway and Mr Camara confirmed, that fob Rotterdam prices are higher than fob Bilbao prices. Fob Rotterdam prices are for goods destined for Germany, where greater GHG savings are required, and the goods are more expensive. Mr Camara estimated the difference at €20 to €25/mt. This is supported by a 2016 daily commentary from Argus.

71. As for the hedge, there is a fundamental problem, as Dr Holdaway fairly recognised. The claim seeks to compare the price at which gasoil futures were sold under the ICE transaction with the average price for gasoil in July 2016. However, the ICE transaction matured in March 2016. Put in this way, as Dr Holdaway expressly accepted, Vitol's claim is (at least in part) "*impossible*"; it compares *"apples"* with "*pears"*. The ICE transaction was not in existence as at July 2016. It was closed out and followed by 2 (unparticularised) roll-overs which may have made gains or losses. Vitol argues that it had to roll over because of Beta's delays (which of course were the subject of agreed extensions) in order to maintain the same trade differential. But the fact remains that Vitol's claim is not based on the necessary "like for like" basis.

72. I therefore reject Vitol's primary claim as not representing a fair or proper basis of compensation.

Alternative claim

73. It is common ground that, if liability is established, Vitol is entitled to damages on a market value basis. The only area of dispute here is whether Vitol's comparator figure of €864/mt is a fair one. This is the price paid by Vitol on 29th June 2016 when it purchased a similar cargo of 4,000mt of UCOME biofuel fob Bilbao. Mr Camara's evidence was that that this cargo had a specification of 92.75% GHG savings (as opposed to the 83% GHG savings of the biofuel); as a result it does not offer a valid comparison. The comparator figure should be €15 to €20/mt lower.

74. I prefer the evidence of Mr Wilson and Dr Holdaway to the effect that the comparator market price of €864/mt is a fair one. Mr Camara's evidence was driven by prices other than fob Bilbao prices, specifically by fob ARA prices. (In Rotterdam the main destination for biofuels is Germany and that is where the savings levels make a material price difference.) Mr Camara could not point to any data showing a price differential by reference to GHG savings fob Bilbao. Mr Wilson's evidence on this

issue was not challenged. Dr Holdaway was firm in his evidence that it was right to use fob Bilbao prices (where there would be no reduction in price to reflect lower GHG savings levels) and estimated the market value accordingly. He did refer in his report (at paragraph 38) to reported fob ARA prices but, as Vitol pointed out, there is no reported index for fob Bilbao. And the figure of €864/mt is in any event less than the fob ARA value identified of €936.7/mt.

75. Vitol is therefore entitled to damages in the sum of 4,500 x (864-793.5) = €317,250. Assuming an exchange rate of US$1.109/€1, the sum in US$ is US$351,830.25.

Conclusion

76. For these reasons I find in favour of Vitol on liability and award the sum of US$351,830.25 by way of damages, based on Vitol's alternative case on quantum. I invite the parties to agree all supplementary matters so far as possible, including questions of interest and costs. In so far as relevant, the parties' attention is drawn to paras. 2.57-2.59 of Practice Direction 51N.