IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 173

Suit No 1312 of 2014

Between

Toptip Holding Pte Ltd

… *Plaintiff*

And

Mercuria Energy Trading Pte Ltd

… *Defendant*

JUDGMENT

[Admiralty and Shipping] — [Carriage of goods by sea] — [Voyage charterparties]

[Contract] — [Formation]

TABLE OF CONTENTS

Toptip Holding Pte Ltd
v
Mercuria Energy Trading Pte Ltd

[2016] SGHC 173

High Court — Suit No 1312 of 2014
Steven Chong J
17–19 May 2016; 11 July 2016

1 September 2016 Judgment reserved.

Steven Chong J:

Introduction

1 It is said that the charter market, governed by the supply and demand for ships and shipping space, is about as perfect a market as one can find. A charterer who wishes to hire a vessel to transport cargo across the high seas knows that it is operating in a market in which freight rates fluctuate. But the charterer also knows that it has to assess the best freight it can obtain against a multitude of factors including the nature of the cargo, the extent to which it wants the charterparty to be "cargo friendly" rather than "shipowner friendly", and the requirements of any underlying sale contract such as the date by which the cargo has to be loaded or delivered to the buyer. The last factor is particularly crucial as it places the charterer under the pressure of time. Even if the market is not in its favour, the charterer has to secure a charterparty with a suitable laycan (*ie*, the period of time from the earliest day to the latest day

upon which the vessel can arrive at the loading port) or risk being in breach of the underlying sale contract. The shipowner, similarly, has to balance the security of a contract concluded in advance against the prospect that the freight market may rise in its favour, leading to a less profitable charterparty than one which its vessel could have otherwise secured. These factors assume an even greater significance in a situation such as in the present case where both the charterer and the owner have to time their contractual commitments on a back-to-back basis. The charterer has to secure a vessel which is acceptable to the shipper while the owner, which is often merely a disponent owner operating in the spot freight market, has to time the fixture of the vessel with the physical head owner in order to fulfil its obligation to the charterer. If the back-to-back fit does not materialise, this would usually give rise to losses and inevitably, legal proceedings.

2 It is in this commercial context that the parties to this present dispute entered into negotiations in October 2014 for a voyage charter to transport a shipment of iron ore pellets from Brazil to China. The deal, however, fell through and the essential question for determination in this trial is who should now bear the consequences of the aborted charter. The plaintiff, the putative charterer, claims that the defendant, the disponent owner of the vessel, entered into a binding charterparty *via* email, and that it breached this agreement by subsequently resiling from the contract in order to enter into an allegedly more profitable charter with another party. The plaintiff thus claims from the defendant the losses it suffered as a result of having to secure a substitute charterparty at a higher rate. The defendant, by contrast, contends that there was never a binding contract concluded, and that the breakdown of the negotiations was a result of the plaintiff's own indolence. In any case, its position is that the charterparty was always subject to its review on account of

an express "subject" clause; so the risk of the negotiations breaking down was firmly on the plaintiff. Thus, the key issue in this case is the nature and effect of this clause – "OTHERWISE SUB REVIEW OF CHTRS PFMA CP WITH LOGICAL AMENDMENT" – in the context in which the parties conducted their negotiations. There is also a consequent question as to whether the right of review under the clause was unqualified or had to be exercised in good faith.

3 In determining the true effect of the "subject" clause, it is necessary to trace the circumstances which led to its introduction, how the parties objectively perceived its effect and the commercial consequences of the competing interpretations to the clause given by the parties. In undertaking this exercise, it is also useful to examine the judicial interpretations which have been given to similarly worded "subject" clauses with the caveat that differences in wording may lead to a different interpretation and consequently, a different outcome.

Facts

4 The plaintiff is a Singapore incorporated company trading in bulk commodities, including iron ore.[1] The defendant is the Singapore subsidiary of a global energy and commodity group engaged, *inter alia*, in the chartering of dry cargo such as iron.[2] It does not own any vessels itself, but secures vessels as disponent owner to be chartered onwards.

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1 Affidavit of evidence-in-chief of Liu Bin dated 3 December 2015 ("LB affidavit"), para 2.

2 First affidavit of evidence-in-chief of Sanjeev Gupta dated 20 November 2015 ("First SG affidavit"), para 4.

5 On 10 October 2014, the plaintiff entered into a f.o.b. sale contract for the purchase of approximately 170,000 metric tonnes of iron ore pellets ("the goods") from the seller, Samarco Mineraco S.A. ("Samarco"). The goods were to be shipped from the Ponta Ubu port in Brazil to ports in China, with a laycan of 21 to 30 November 2014.[3]

Email correspondence on 13 and 14 October 2014

6 To charter a vessel to transport the goods, the plaintiff sent an email enquiry to a ship chartering broker, Mr Shu Changhong ("Mr Shu") on 13 October 2014 ("the Toptip Enquiry").[4] The Toptip Enquiry enumerated the plaintiff's requirements for the charter including the expected laycan, the deadline for the nomination of a vessel, the ports of loading and discharge, the details of the cargo to be loaded, the governing law and the forum for dispute resolution, amongst other terms.[5] The clauses relating to the freight rate and demurrage were left to be filled in by the defendant. Also attached was part of the f.o.b. sale contract which stipulated the shipping and loading terms which needed to be incorporated into the charterparty ("the Samarco terms").[6] Crucially, the Toptip Enquiry concluded as follows: "OTHERWISE AS PER VALE CP AS ATTACHED WITH LOGICAL AMENDMENT". This proviso was a proposal by the plaintiff through Mr Shu for the charterparty to be based on the *pro forma* charterparty of Vale S.A. ("the Vale *pro forma* CP"), one of the world's largest producers of iron ore.[7]

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3 LB affidavit, para 5.

4 LB affidavit, para 6.

5 LB affidavit, pp 18–19.

6 LB affidavit, pp 20–22.

7 LB affidavit, para 8.

7 On the same day, Mr Shu forwarded the Toptip Enquiry to the defendant *via* email. This email opened with the line, "PLS KINDLY CHECK THE BELOW FIRM ENQIRY AND REPLY US BEFORE 1700HRS 14 OCTOBER 2014 SINGAPORE TIME". It then set out the requirements for the charterparty as per the Toptip Enquiry before concluding: "Invite owners best freight for fixing".[8]

8 The defendant, after reviewing Mr Shu's email, replied the next day, on 14 October 2014 ("the Mecuria Bid"). The Mecuria Bid substantially repeated the terms as set out in the Toptip Enquiry, with the freight rates and demurrage clauses filled in. The relevant text of the Mecuria Bid is as follows:[9]

> Mecuria would like to offer firm bss following terms.
>
> …
>
> -FREIGHT RATE: USD 18.40 PMT BSS BELUN(OR ZHOUSHAN) PLUS NANTONG
>
> …
>
> -DEMM 15,000 USD PD PR. DHD
>
> …
>
> **-OTHERWISE SUB REVIEW OF CHTRS PFMA CP WITH LOGICAL AMENDMENT**
>
> END
>
> [emphasis added in bold]

Apart from the inclusion of the freight rate and demurrage, the only difference between the terms of the Toptip Enquiry and the Mecuria Bid was the change of the final proviso from "OTHERWISE AS PER VALE CP AS ATTACHED WITH LOGICAL AMENDMENT" to "OTHERWISE SUB REVIEW OF

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8 LB affidavit, pp 23–24.

9 LB affidavit, pp 28–29.

CHTRS PFMA CP WITH LOGICAL AMENDMENT" ("the Subject Review clause"). As noted earlier, the nature and effect of the Subject Review clause lies at the heart of this dispute. Another fact which the defendant highlights is that it did not attach the Samarco terms to the email containing the Mecuria Bid.

9 Mr Shu immediately forwarded the Mecuria Bid to the plaintiff which "confirm[ed] to accept [the] bid".[10] Mr Shu then sent a closing email to the defendant: "We confirm the acceptance of your offer. Thanks for your business!"[11] The defendant's head of dry chartering, Mr Sanjeev Gupta ("Mr Gupta"), was copied to this closing email dated 14 October 2014 from Mr Shu to the defendant.

Subsequent correspondence between the parties

Provision of Australian cargo charterparty by the defendant on 16 October 2016

10 Following the above correspondence on 13 and 14 October 2014, Mr Shu sent a follow up email on 16 October 2014 to the defendant's point of contact, Mr Sanghwa Lee ("Mr Lee"), requesting for "the working CP in word format".[12] Mr Lee immediately replied that the defendant did not have such a working charterparty, and was instead "waiting for chtrs PFMA CP for [the defendant's] review".[13]

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10 LB affidavit, pp 30–32.

11 LB affidavit, p 33.

12 Affidavit of evidence-in-chief of Shu Changhong dated 3 December 2015 ("SCH affidavit"), p 31.

13 SCH affidavit, p 32.

11 Subsequently, Mr Gupta, who was copied in the above exchange, sent an email to both Mr Shu and Mr Lee asking two questions: (a) whether Mr Lee had a copy of a previous charterparty, for the carriage of similar cargo from Australia to China, which the plaintiff and the defendant had concluded several months earlier in July 2014 ("the Australian Cargo CP"); and (b) whether that could be used as a base.[14] Mr Lee then sent the Australian Cargo CP to Mr Shu *via* email on the same day, 16 October 2014.

12 The parties dispute the circumstances preceding this email correspondence on 16 October 2014, and the reason why the Australian Cargo CP was sent by the defendant to Mr Shu. This factual dispute will be examined in detail below (see [41] below). In brief, the plaintiff asserts that Mr Gupta had consented, over the phone, to the use of the Australian Cargo CP as the charterer's *pro forma* charterparty ("the charterer's *pro forma* CP"). Therefore, the defendant had lifted or waived the Subject Review clause by providing Mr Shu with the Australian Cargo CP on 16 October 2014. The defendant, on the other hand, disputes this account of the facts, and contends that the document had been provided to Mr Shu on his request and as a mere favour because he did not have any charterparty template in Microsoft Word format to work on.

Draft charterparty prepared by broker: 24 and 27 October 2014

13 After receiving the Australian Cargo CP, amendments were made to the document by Mr Shu based on the main terms contained in the Mecuria Bid. This draft charterparty was dated 14 October 2014 and sent by one of Mr Shu's employees to both the plaintiff and the defendant for their comments

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[14] SCH affidavit, p 33.

via separate email messages on 24 October 2014.[15] A few days thereafter, on the afternoon of 27 October 2014, Mr Shu sent a further email to the defendant[16] stating that the dispute resolution clause in the draft charterparty had to be amended due to a mistaken reference to the London Maritime Arbitrators Association rather than the Singapore Chamber of Maritime Arbitration.[17]

Nomination and purported rejection of vessel: 21 to 29 October 2014

14 While the draft charterparty was being prepared, the parties continued to correspond through Mr Shu.

(a) On 21 October 2014, the plaintiff sent an email to Mr Shu containing certain instructions from the Brazilian health authorities for the captain and crew of the vessel to be nominated. These instructions were forwarded to the defendant.[18]

(b) On 23 October 2014, the defendant nominated *The Pan Gold* for the "Ponta Ubu/China shipment",[19] and asked for the cancelling date to be pushed back from 30 November 2014 to 1 December 2014 as it was "targeting back end of laycan".[20] The defendant also provided the documents requested by the plaintiff for the nomination of the vessel.[21]

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15 SCH affidavit, pp 62 and 86.

16 SCH affidavit, p 111.

17 SCH affidavit, para 22.

18 SCH affidavit, pp 113–116.

19 SCH affidavit, p 121.

20 SCH affidavit, p 145.

21 LB affidavit, p 71; SCH affidavit, p 128.

(c) On 24 October 2014, the shippers, Samarco, objected to *The Pan Gold* due to concerns regarding the financial health of the vessel's head owner as identified in a note by the ship vetting agency, Rightship.[22] But the various parties – the plaintiff, the defendant, Samarco and *The Pan Gold*'s head owner – continued to communicate with each other through Mr Shu in order to resolve this problem.

(d) On 25 October 2014, after Samarco maintained its opposition to *The Pan Gold*, the defendant asked Mr Shu for Samarco's contact details in order to discuss the issue directly with Samarco. The contact details were provided by Mr Shu to the defendant on the morning of 27 October 2014[23], *ie*, shortly before Mr Shu sent the defendant the further email on the amendment to be made to the draft charterparty (see [13] above).

(e) On the morning of 29 October 2014, the plaintiff forwarded a message from Samarco to Mr Shu stating that, even though the defendant had not contacted Samarco directly, the latter had obtained a new and positive Rightship vetting analysis on *The Pan Gold*. It thus seemed that *The Pan Gold* was "OK", and Samarco stated that its shipping department would check with Rightship to ensure that the new analysis allowed it to accept the vessel.[24] Mr Shu immediately forwarded this "good news" to the defendant.[25]

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22 SCH affidavit, p 149.

23 SCH affidavit, pp 160–164.

24 SCH affidavit, p166.

25 SCH affidavit, p167.

Rejection of draft charterparty by the defendant on 29 October 2014

15 Later in the evening of the same day, the defendant sent an email to Mr Shu containing the following message for the plaintiff:[26]

> Owrs cannot accept chtrs cp after review, so subject failed on cp review. Owrs cannot accept chtrs cp for this trade.

16 According to the defendant, this was a valid rejection of the draft charterparty, which was subject to its review. The plaintiff's case, however, is that this message constituted a repudiatory breach by the defendant of the charterparty which had already been concluded on 14 October 2014. In line with this position, it sent a notice to the defendant on 5 November 2014 purporting to accept the repudiatory breach and thereby terminating the charterparty.[27]

Substitute charterparty secured by the plaintiff

17 In either case, the plaintiff had to secure a substitute charterparty in order to perform its obligation to Samarco under the underlying sale contract. Its pleaded case is that it did so on or about 8 November 2014 with RGL Shipping Pte Ltd ("RGL"), coincidentally also to charter *The Pan Gold*, but at the higher freight rate of US$25.25 per metric tonne for 168,109 metric tonnes of cargo in total. As noted above, the freight payable under the Mecuria Bid was US$18.40 per metric tonne of cargo. Therefore, the plaintiff claims the amount of US$1,151,546.65 being the difference in the two freight rates as the loss which it suffered as a result of the defendant's repudiatory breach of contract.

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[26] SCH affidavit, p 169.

[27] LB affidabit, p 136.

18 However, while there is no dispute that there was a substitute charterparty entered into between the plaintiff and RGL, the defendant raised some difficulties with the plaintiff's evidence as to its terms, as well as its claim that US$25.25 per metric tonne was the prevailing market rate when it entered into the substitute charterparty. These difficulties will also be examined below.

Issues

19 Both parties are *ad idem* that the following issues are before me for determination:

(a) Was a valid charterparty of a vessel concluded between the plaintiff and the defendant on 14 October 2014? This key issue turns on the nature of the Subject Review clause, as well as the effect of the parties' subsequent conduct.

(b) Even if there was a charterparty concluded, was it void for uncertainty because (i) the terms were incomplete; and/or (ii) the words "WITH LOGICAL AMENDMENT" in the Subject Review clause were too vague?

(c) Was the defendant in repudiatory breach of contract in rejecting the draft charterparty on 29 October 2014? If so, what losses did the plaintiff suffer as a result of this breach?

Was a binding charterparty concluded on 14 October 2014?

20 The plaintiff's pleaded case is that there was a binding charterparty concluded on 14 October 2014 as per the terms of the Mecuria Bid. Curiously, the date when the contract was purportedly concluded was not initially pleaded in the plaintiff's statement of claim; it was only first identified in the

plaintiff's reply[28] after this omission was pointed out in the defence.[29] Nothing appears to turn on this. In any event, this is the only date pleaded by the plaintiff for the formation of the contract.

21 The plaintiff's arguments in support of the contract having been formed on 14 October 2014 are as follows.

(a) The opening language of the Mecuria Bid – stating that the bid was an offer from the defendants on a "firm bss [*ie*, basis]" – and the plaintiff's unequivocal acceptance of the bid are objective evidence that there was a firm agreement on the main or essential terms required for the formation of a charterparty on 14 October 2014. In relation to the Subject Review clause, the plaintiff submits that the clause merely indicated that the defendant, despite agreeing to be immediately bound by the main terms set out in the Mecuria Bid, had retained the right to withdraw from the charterparty after reviewing the charterer's *pro forma* CP with logical amendments. In other words, the defendant's review of the charterer's *pro forma* CP with logical amendments was not a condition precedent to the formation of a binding contract, but was instead a *condition subsequent*. The plaintiff further argues that the review was merely to be an objective or mechanical review for the purposes for verifying that the charterer's *pro forma* terms were consistent with the main terms in the Mecuria Bid.

(b) In any case, the defendant satisfied the condition under the Subject Review clause or waived its right of review by providing the plaintiff with the Australian Cargo CP on 16 October 2014.

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28 Reply (Amendment No 1) dated 27 April 2015 ("Reply"), paras 1(a) and 26.

29 Defence (Amendment No 2) dated 6 April 2015 ("Defence"), para 28.

(c) In addition, the nomination of *The Pan Gold* by the defendant on 23 October 2014 and its request for an extension of the laycan indicates that a charterparty had already been concluded by then and/or that the defendant had waived its right of review under the Subject Review clause.

22 The defendant's response is briefly as follows.

(a) The Subject Review clause precluded a binding contract from being concluded on 14 October 2014 as there was no agreement on the subsidiary terms as of that date. The defendant's case is the Subject Review clause was a "subject to contract type clause" which negated its intention to be legally bound unless and until full details were agreed. The defendant's review of the charterer's *pro forma* CP was thus a prerequisite to the formation of a binding contract.

(b) The defendant merely provided Mr Shu with the Australian Cargo CP to assist the plaintiff with the preparation of a draft charterparty for its review. This act did not absolve the plaintiff from its duty to provide the defendant with a charterer's *pro forma* CP with logical amendments, nor did it constitute a waiver of the defendant's right of review under the Subject Review clause.

(c) The defendant's nomination of *The Pan Gold* and request for an extension of the laycan did not unequivocally indicate that a charterparty had already been concluded by then and/or that it had waived its right of review. These actions were equally consistent with the parties moving towards the conclusion of a binding agreement as part of their negotiations.

23 I will now deal with these arguments in turn.

Nature and effect of Subject Review clause

24 It is well established that a contract may be formed even if certain terms of economic or other significance to the parties have not been finalised if an objective appraisal of their words and conduct leads to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement (*RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 ("*RTS Flexible Systems*") at [45] per Lord Clarke; see, also, *The "Rainbow Spring"* [2003] 3 SLR(R) 362 at [20]). As noted above, the defendant's case is that such a conclusion cannot be reached in this case because the Subject Review clause was a "subject" clause which precluded a contract from being formed until there was a full agreement on both the main and subsidiary terms. The plaintiff submits that the clause contained a condition subsequent instead. Hence the first issue to be resolved is the nature and effect of the Subject Review clause.

General principles on "subject" clauses

25 The leading local authorities on the impact of "subject to contract" clauses are *Norwest Holdings Pte Ltd (in liquidation) v Newport Mining Ltd and another appeal* [2011] 4 SLR 617 ("*Norwest*") and *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 ("*OCBC Capital (CA)*"). In *Norwest*, the following general principles were laid down (at [23] and [24]):

> 23 In the local context, it was held in the Singapore High Court decision of *Ground & Sharp Precision Engineering Pte Ltd v Midview Realty Pte Ltd* [2008] SGHC 160 that (at [18]):

> The meaning of 'subject to contract' is clear. This expression simply means that 'unless and until a formal written contract has been executed and exchanged by the parties there is no binding and enforceable contract between them. That is so even if the parties are in agreement as to all the terms.' (*Thomson Plaza (Pte) Ltd v Liquidators of Yaohan Department Store Singapore Pte Ltd* [2001] 3 SLR 437 at [27].)

In the Singapore High Court decision of *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR(R) 791 ("*United Artists*") (affirmed by the Court of Appeal in *Parkway Properties Pte Ltd v United Artists Singapore Theatres Pte Ltd* [2003] 2 SLR(R) 103 (where this particular point was not in issue)), it was similarly held (at [57]) that:

> It is well settled that the phrase 'subject to contract' makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed. The negotiations remain subject to and dependent upon the preparation of a formal contract. Either party may withdraw from the negotiations before a final agreement has been concluded.

24 *While the holding in United Artists quoted above seems to suggest that the phrase "subject to contract" is conclusive of the intention of the parties, in our judgment, the better view is that the question whether there is a binding contract between the parties should be determined by considering all the circumstances, not just the inclusion of the stock phrase "subject to contract" (on the basis that the substance of the situation must always prevail). These would include what was communicated between the parties by words or conduct.* In this regard, we are in agreement with the recent decision of the UK Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] 1 WLR 753 in which it was held that (at [56]):

> Whether in such a case [ie, concerning an agreement that is "subject to contract"] the parties agreed to enter into a binding contract, waiving reliance on the 'subject to [written] contract' term or understanding will again *depend upon all the circumstances of the case, although the cases show that the court will not lightly so hold.* [emphasis added]

[emphasis added]

26 On the issue of when parties might be found to have reached a binding contract notwithstanding the presence of a "subject to contract" clause, the following principles expounded by the High Court in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311 (at [25]–[44]) were approved by the Court of Appeal in *OCBC Capital (CA)*:

> (a) Whether an agreement is "subject to contract" is a matter of substance and not form. When it is not expressly stated to be "subject to contract", it is a question of construction whether the parties intended that the terms agreed upon should merely be put into form or to be subject to an agreement to the terms of which are not expressed in detail (at [28]).
>
> (b) The critical inquiry is to determine from the objective evidence whether the parties intended to be *immediately bound* to perform on the agreed terms or to defer legal relations until formal execution of the written contract (at [34]; also see *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 at [27]).

27 While the above principles were developed in relation to agreements pending the formal execution of a written contract (*ie*, "subject to contract"), the relevant cases in the specific context of charterparties indicate that they are equally applicable to "subject" clauses stating that a binding contract will not be formed until there is full agreement on the details (*ie*, "subject to details") (see Julian Cooke *et al*, *Voyage Charters* (Informa Law, 3rd Ed, 2007) ("*Voyage Charters*") at para 1.17–1.19; *Star Steamship Society v Beogradska Plovidba (The "Junior K")* [1988] 2 Lloyd's Rep 583 ("*The Junior K*") at 586–596). The same is true for a "subject review" clause – a variant of a

"subject to details" clause which specifies that either or both parties' review of the final terms is a precondition to contract formation (see *Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd (The "Pacific Champ*") [2013] 2 Lloyd's Rep 320 ("*The Pacific Champ*") at [68]). In these cases, the words "subject to details" and similar expressions have generally been held to negative any intention to be legally bound unless and until full details are agreed. However, there have also been cases such as *The Pacific Champ* where the courts have held that a binding contract was concluded despite the presence of a "subject" clause (see [37] below for a discussion of the case).

28 Hence it is clear from the authorities that the use of phrases such as "subject to contract", "subject to details" and "subject to review" is never *per se* conclusive of the intention of the parties. Ultimately, the question in the present case is whether the Subject Review clause indicates that the parties intended to defer legal relations until full details were agreed or whether they nevertheless agreed to be *immediately bound* to perform on the main terms as set out in the Mecuria Bid. To answer this question, I have to consider the full factual matrix of the case, particularly the circumstances in which the clause was introduced and the objective evidence of the correspondence between the parties on 14 October 2014.

Analysis of Subject Review clause

29 There is arguably some evidence in favour of the plaintiff's submission that the defendant's intention to be bound by the main terms set out in the Mecuria Bid was unequivocal. First, the Mecuria Bid expressly stated that the offer was on a "frm bss". Second, the defendant did not respond to clarify that there was no contract formed when Mr Shu replied with his closing email stating: "We confirm the acceptance of your offer. Thanks for your business!"[30]

Third, Mr Gupta himself admitted on the stand that he had "no objection" to the main terms,[31] and that he "was going to stand behind the [freight] number provided [he] agree[d] with the terms and conditions which were put out [by the plaintiff]."[32]

30 Against this, there is the fact that there was no agreement on 14 October 2014 on the other terms of the charterparty apart from those stated in the Mecuria Bid. This was due to the express *rejection* by the defendant of the clause incorporating the Vale *pro forma* CP which was initially in the Toptip Enquiry (see [6] above). This clause read: "OTHERWISE AS PER VALE CP AS ATTACHED WITH LOGICAL AMENDMENT". By removing this clause, the defendant specifically rejected the plaintiff's offer to incorporate the Vale *pro forma* CP in total, subject only to logical amendments. In its place, the defendant introduced the Subject Review clause stating: "OTHERWISE SUB REVIEW OF CHTRS PFMA CP WITH LOGICAL AMENDMENT". There were three components to the clause: (a) a reference to the charterer's *pro forma* CP, distinct from the Vale *pro forma* CP; (b) the need for logical amendments to be made to that charterparty to produce a draft charterparty; and (c) the defendant's right to then review the draft charterparty. Hence, there was not even a counter-proposal by the defendant as to what the subsidiary terms of the charterparty ought to be. Instead, the defendant was asking for the *plaintiff* to provide a charterer's *pro forma* CP (with logical amendments) for it to review the subsidiary terms contained therein.

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30 LB affidavit, p 33.

31 Notes of Evidence ("NOE") for 19 May 2016, pp 62:20–21.

32 NOE for 19 May 2016, pp 64:21–23.

31 The plaintiff argues that these subsidiary terms – relating to matters such as *force majeure*, late payment and stevedore damage – were "not of such fundamental importance to the performance of the charter" and that their absence did not "render the entire agreement unworkable".[33] This may be so. But the question is not whether the main terms were sufficient for the operation for a working charterparty. It is whether the parties intended to defer legal relations until full details were agreed. As Steyn J (as he then was) noted in *The Junior K*, "in negotiations parties are free to stipulate that no binding contract shall come into existence, *despite agreement on all essentials*, until agreement is reached on yet unmentioned and unconsidered detailed provisions" [emphasis added] (at 585) (see, also, *Norwest* at [29]).

32 In this regard, it is clear that the subsidiary terms were an important part of the commercial bargain between the parties. Mr Gupta informed the court that the freight rate which the defendant offered was conditional on these other terms being to his satisfaction because he "did not want to do this business at [the rate of] [US$]18.4 [per metric tonne] with Vale terms and condition[s]".[34] His evidence, which was unrebutted by the plaintiff, was that the terms and conditions of the Vale *pro forma* CP were onerous, and would not have allowed him to offer the lower freight rate of US$18.40 per metric tonne of cargo (relative to the market rate of over US$20 at that time).[35] This also provides a sensible commercial explanation for why the Subject Review clause was deliberately introduced by the defendant in the Mecuria Bid in place of the clause incorporating the Vale *pro forma* CP. Crucially, this explanation indicates that the defendant's agreement to be bound by the main

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33 Plaintiff's Closing Submissions dated 22 June 2016, para 150.

34 NOE for 19 May 2016, pp 62:1–7.

35 NOE for 19 May 2016, pp 67:21–27.

terms in the Mecuria Bid was not unequivocal – the defendant was only willing to enter into a binding charterparty if the subsidiary terms contained in the charterer's *pro forma* CP were favourable and allowed it to perform the contract at the lower freight rate offered in the Mecuria Bid.

33 The plaintiff's construction of the Subject Review clause, on the other hand, is implausible. First, it argues that the word "otherwise" contemplates that a contract was concluded between the parties, and that the charterparty was *otherwise* subject to a condition subsequent. I disagree. The word "otherwise" was a clear reference to the fact that the terms to be incorporated from the charterer's *pro forma* CP (with logical amendments) were terms other than those contained in the Mecuria Bid itself. This is how the word "otherwise" was used in the clause incorporating the Vale *pro forma* CP into the Toptip Enquiry as well. Next, the plaintiff focusses on the word "review", which it submits only contemplates a single review. This point is strictly irrelevant in this case as there were no multiple reviews by the defendant to begin with. The plaintiff also submits that the "review" is confined to one item – the charterer's *pro forma* CP with logical amendments – and not a draft contract or draft charterparty. This is a distinction without a difference – the charterer's *pro forma* CP, after the logical amendments were made, would necessarily have been a draft charterparty for the defendant's review.

34 The plaintiff then relies on the lack of an express reference to a draft charterparty and the words "with logical amendments" to argue that the defendant's right of review was an "objective" right of review to "simply to confirm that the *pro forma* terms were consistent with (and did not contradict) the main terms agreed between the parties on 14 October 2014".[36] In other

[36] Plaintiff's Closing Submissions dated 22 June 2016 ("PCS"), para 67(ii).

words, it submits that as long as the amendments made were logical and compatible with the main terms in the Mecuria Bid, the defendant did not have a right to accept or reject the substantive terms of the charterer's *pro forma* CP. In short, the right to review was limited *only* to the "logical amendments". This submission, in my view, is contrary to both the plain language of the clause and commercial common sense.

35 It is true that the term "with logical amendment", stood alone, would not prevent a binding contract from being concluded. As noted in *Voyage Charters* at para 1.20:

> Their effect, unlike "subject to details", is not to permit either party to raise for negotiation any matters of detail which he wishes, and the only amendments permissible are those which follow logically and inevitably from the terms agreed, and thus can be determined objectively.

However, a plain reading of the language of the Subject Review clause makes clear that the right to review was *of* the charterer's *pro forma* CP after the logical amendments had been made (*ie*, a draft charterparty prepared by the plaintiff), rather than a review of the logical amendments *per se*. This interpretation also accords with commercial sense – it would be illogical for the defendant to agree to be bound by the charterer's *pro forma* CP, whatever its terms might be, but then specifically retain the right to review only the logical amendments made. This is particularly so as the logical amendments can be determined objectively, as the plaintiff itself asserts. It is difficult to see what commercial purpose, if any, such a narrow right to review would serve.

36 The plaintiff also contends that the clause would have provided for a deadline for the completion of the review and included the word "approval" if the defendant wished to retain a "subjective" right to review the substance of the subsidiary terms. The first part of this argument is a *non-sequitur*. It is

unclear why the absence of a deadline necessarily indicates that the review was "objective" rather than "subjective". A stipulated deadline would have benefited the defendant in either case, and the fact that it was not provided for is neither here nor there. Next, the absence of the word "approval" is immaterial; the distinction between a "right of review" and a "right of approval" is purely a matter of semantics. In any case, the plaintiff's broker, Mr Shu, emailed the defendant on two separate occasions – 24 and 27 October 2014 (see [13] above) – seeking the defendant's "comments" on the draft charterparty. On their face, these emails suggest that he was seeking the defendant's substantive approval of the draft which he had prepared. So I am not persuaded that the defendant's right of review under the Subject Review clause was merely "objective".

37 Finally, the plaintiff relies on the English High Court's decision in *The Pacific Champ*. The case concerned a claim by the sub-charterer of the *Pacific Champ* against the bareboat charterer of the vessel. In assessing the claim, the court had to construe the effect of the following clause: "SUB REVIEW OWNERS HEAD CP BTB" ("cl 12"). The bareboat charterer argued that the clause was a condition precedent to the existence of a binding contract which allowed either party to withdraw from the fixture before the condition precedent was satisfied. Eder J accepted that terms such as "subject to details" generally precluded the existence of a binding contract (at [68]). But he found that cl 12 had to be read with cl 13 which immediately followed. Clause 13 read: "SUB CHTRS RECONFIRMATION COB NYT FEB 12, 2008". Taken together, it was found that the legal effect of these two clauses was that there was a concluded contract subject to a condition subsequent, *ie*, a reconfirmation by the charterers within the time specified in cl 13; and the owner was not entitled to back out of the contract until the time for

reconfirmation had expired (at [68]). The plaintiff argues that this reasoning should be applied to the present case, and that the defendant was bound by the terms of the Mecuria Bid from the moment there was an agreement on the main terms.

38 *The Pacific Champ*, however, can be distinguished. First, and most pertinently, there was no time specified in the Mecuria Bid for when the review had to be completed by unlike in *The Pacific Champ*. It is unrealistic that the defendant would have agreed to be bound by the main terms for an indeterminate amount of time during which it would not have been entitled to back out of the contract. More importantly, in *The Pacific Champ*, cl 13 made clear that all that was required was a *reconfirmation* of the terms which had already been incorporated into the charterparty by virtue of cl 12. Here, the Subject Review clause did not even identify a particular *pro forma* contract from which the subsidiary terms could be incorporated. This is a crucial difference. As noted earlier, the obligation was on the plaintiff to provide its *pro forma* charterparty with logical amendments for the defendant's review. Further, the evidence shows that the identification of these terms was not a perfunctory exercise. The defendant was only agreeable to provide the lower freight rate it had offered in the Mecuria Bid if the subsidiary terms were to its satisfaction (see [32] above). By then, the defendant had specifically rejected the Vale *pro forma* CP as proposed by the plaintiff. Therefore it is clear that not any *pro forma* charterparty would suffice. Thus, the analysis of Eder J in *The Pacific Champ* is not relevant to the Subject Review clause.

39 Accordingly, I find that the Subject Review clause, construed in its full factual context, does indicate that the defendant did not have the unequivocal intention to be immediately bound by the terms of the Mecuria Bid on 14 October 2014. It was not a condition subsequent as the plaintiff asserts.

Did the defendant lift or waive the Subject Review clause by providing the Australian Cargo CP?

40 The next issue is whether the defendant "lifted" (*ie*, fulfilled) the condition under the Subject Review clause or waived its right of review thereunder by providing the Australian Cargo CP to Mr Shu on 16 October 2016. The plaintiff employs both the language of "lifting" and the doctrine of waiver as alternatives[37] – the former is appropriate if the Subject Review clause contained a condition subsequent which needed to be fulfilled to prevent the contract from coming to an end, while the latter would apply if the clause was a condition precedent to the conclusion of a binding contract. However nothing of substance turns on which legal analysis is adopted. On both analyses, the plaintiff's case is that the defendant, by providing the Australian Cargo CP, had accepted that there was no longer any need for (a) the plaintiff to provide the defendant with the charter's *pro forma* CP with logical amendments; or (b) the defendant to then review this document. If so, then the parties would be bound by the terms of the Mecuria Bid regardless of whether the Subject Review clause was a condition subsequent or a condition precedent to the formation of a contract. At the same time, it is worth noting that if the plaintiff is unable to prove its case on this issue, then its claim would necessarily fail even if the Subject Review clause was a condition subsequent. This is because the plaintiff accepts that the defendant had the right to withdraw from the contract if the condition subsequent had not been fulfilled.

41 The plaintiff relies on two pieces of evidence in support of the submission that the Subject Review clause had been lifted or waived. First, as

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[37] Statement of Claim (Amendment No 1) dated 9 March 2015, paras 7 and 8.

noted above (at [12]), the plaintiff refers to a telephone conversation during which Mr Gupta had purportedly consented to the use of the Australian Cargo CP as the charterer's *pro forma* CP. According to Mr Shu and the plaintiff's witness Mr Liu Bin ("Mr Liu"), there was an earlier telephone discussion between the two of them on or about 15 October 2014 concerning the provision of a *pro forma* charterparty to the defendant, as per the Subject Review clause. Their evidence was that Mr Liu informed Mr Shu that the plaintiff did not have a *pro forma* document on hand, but suggested that a previous charterparty which the plaintiff and the defendant had concluded several months earlier (*ie*, the Australian Cargo CP) could be used as a base instead since the terms of that previous charterparty had been acceptable to both parties.[38] Mr Shu's testimony was that he then called Mr Gupta to discuss using the Australian Cargo CP as the charterer's *pro forma* CP, and that Mr Gupta agreed. Mr Shu asserted that Mr Gupta expressly assured him, "don't worry bro, we are fixed clean". Mr Gupta accepted that there was a conversation during which he and Mr Shu discussed the Australian Cargo CP. But he disputed agreeing to the use of the Australian Cargo CP as the charterer's *pro forma* CP or assuring Mr Shu that the parties were "fixed clean".[39] His evidence was that Mr Shu simply informed him that the plaintiff did not have a template Microsoft Word document, with suitable headings, for preparing the draft charterparty; he thus agreed to give Mr Shu the Australian Cargo CP in word format as a favour, expecting the plaintiff to prepare a draft charterparty specific to the proposed fixture for the defendant's review.[40]

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38 LB affidavit, para 19; SCH affidavit, para 14.

39 NOE for 19 May 2016, pp 86:13–89:25.

40 NOE for 19 May 2016, pp 88:15–89:4.

42 Second, the plaintiff submits that the email correspondence between Mr Shu and the defendant's representatives Mr Lee and Mr Gupta on 16 October 2014 (see [10] above) which took place *after* Mr Shu's conversation with Mr Gupta referred to at [41] above,[41] is evidence that the defendant had agreed to use the Australian Cargo CP as a base and therefore lifted or waived the Subject Review clause. In particular, the plaintiff relies on the email sent by Mr Gupta to both Mr Shu and Mr Lee which stated as follows:

> Do we have their Australian cargo CP? Can we use that as base?

Mr Gupta's explanation was that this email, again, was for the purpose of sourcing the word format document to be given to Mr Shu as a favour. He pointed out that he was asking his colleague Mr Lee if the Australian Cargo CP could be used as a base, thereby expressing his concern as to its suitability. So, according to him, the email does not indicate that he had already agreed to the use of the Australian Cargo CP as the charterer's *pro forma* CP prior to Mr Shu's email to the defendant.

43 After considering the plaintiff's evidence, I am not satisfied that the defendant, by providing the Australian Cargo CP to Mr Shu, had either released the plaintiff from its obligation to prepare a draft charterparty, or waived the defendant's right to review this draft. Regardless of whether the Subject Review clause was a condition subsequent or a "subject" clause, it could only be lifted or waived by clear and unequivocal words or conduct (see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India*

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[41] NOE for 17 May 2016, pp 92:22–24.

(The "Kanchenjunga") [1990] 1 Lloyd's Rep 391 at 398). The burden is on the plaintiff to prove this.

44 In the present case, there is simply insufficient evidence for me to find that the Subject Review clause had either been lifted or waived. First, no weight can be given to Mr Shu's testimony of the telephone discussion between him and Mr Gupta, which was unsupported by any objective evidence. He stated on the stand that he has a text message between him and Mr Gupta that mentioned the Australian Cargo CP;[42] but no such message was adduced by the plaintiff. There is no conceivable reason for Mr Shu not to have produced this text message if he had in fact sent out the alleged message to Mr Gupta. Mr Shu also accepted that it was he who contacted Mr Gupta to ask for a copy of the Australian Cargo CP.[43] Given this fact, his assertion that Mr Gupta voluntarily informed him that the parties were "fixed clean" was odd, particularly as he confirmed that he did not ask Mr Gupta for such an assurance.[44] Overall, my assessment is that Mr Shu embellished his evidence of the discussion between him and Mr Gupta. Even if Mr Gupta was willing to consider using the Australian Cargo CP as a base and communicated this over the telephone, it is implausible that he would have made a firm commitment to using it as the charterer's *pro forma* CP *prior* to the email exchange on 16 October 2014, let alone waived the defendant's right of review. The email exchange on 16 October 2014 confirms this analysis. The defendant's initial response through Mr Lee to Mr Shu's email request for the charterparty in word format was that the defendant was still waiting for the charterer's *pro forma* CP for its review. Mr Gupta's subsequent email to Mr Lee and Mr Shu

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42 NOE for 18 May 2016, p 2:14.

43 NOE for 17 May 2015, pp 91:2–4.

44 NOE for 17 May 2015, pp 100:8–26.

is equivocal. It contains a question to Mr Lee about the suitability of the Australian Cargo CP rather than an unqualified direction that this charterparty should be used as a base without any further review. So the email in fact contradicts Mr Shu's evidence that Mr Gupta had already committed to using the Australian Cargo CP as a base *prior* to the email correspondence between the parties on 16 October 2014. If Mr Gupta had already orally *agreed* with Mr Shu to use the Australian Cargo CP *prior* to the email of 16 October 2014, it would be inexplicable for him to then pose the question to Mr Shu whether the Australian Cargo CP *could* be used as a base. It is far from unequivocal evidence that the Subject Review clause was lifted or waived by the defendant acceding to Mr Shu's request for a copy of the Australian Cargo CP. In my view, the objective evidence before me suggests otherwise.

Relevance of defendant's nomination of vessel and request for extension of the laycan

45 The plaintiff seeks to rely on the defendant's subsequent conduct in relation to the nomination of *The Pan Gold* and its request for an extension of the cancelling date on 23 October 2014 either as evidence that the parties intended to be *immediately bound* by the terms of the Mecuria Bid (*ie*, there was a contract formed on 14 October 2014) or that the defendant had subsequently waived its right of review under the Subject Review clause. In either case, there must be a *clear inference* that the defendant had the intention to be bound by the terms of the Mecuria Bid or had waived the Subject Review clause (see *RTS Flexible Systems* at [85]–[86]) and that burden rests with the plaintiff.

46 The defendant's request for an extension of the cancelling date was consequential on its nomination of *The Pan Gold* and hence these two acts should be construed together. While these two acts, taken together, could

arguably be construed as conduct consistent with the parties performing a charterparty which had already been concluded by that date, they are equally consistent with the parties taking steps *in anticipation* of a contract to be concluded. In examining the legal effect of such subsequent conduct, it is necessary to bear in mind that in the context of the present case, there is a Subject Review clause which even by the plaintiff's case has legal content. As explained above, irrespective whether the clause is to be construed as a condition precedent or condition subsequent, in either event, it is my finding that the condition had not been satisfied. The question therefore is whether the alleged subsequent conduct would materially alter this finding.

47 As I noted in my introduction, the charter market is dynamic. The defendant did not own any vessels itself and needed time to secure a suitable vessel to perform the charterparty. Yet as of 23 October 2014 when the defendant nominated *The Pan Gold*, the plaintiff had not provided the defendant with a draft charterparty. In other words, the nomination of the vessel was clearly made *in advance* of the draft charterparty which was still being prepared by the plaintiff for the defendant's review. However, the defendant could not ignore the fact that the laycan which the parties were working towards was fast approaching. In this context, Mr Gupta's explanation that he nominated *The Pan Gold* to "jog up their discussion"[45] is certainly plausible. The nomination of *The Pan Gold* is, by itself, an ambivalent act. The extension request does not affect this analysis because it was consequential on the nomination; the defendant would have required the plaintiff's consent regardless of whether the contract had already been concluded since the cancelling date was a central term of the charterparty which both parties needed to agree on. So the defendant's subsequent conduct

[45] NOE for 19 May 2016, pp 74:11–28.

in relation to the nomination of *The Pan Gold* on 23 October 2014 and the extension request do not lead to any clear inference that the parties were performing a contract which had already been concluded prior to that date.

48 It is not without significance that at the time of the nomination, the defendant had not chartered *in The Pan Gold* and hence was not in a position to charter *out* the vessel to the plaintiff.[46] This supports the defendant's submission that the nomination was made *in anticipation* of a concluded charterparty. In Mr Gupta's words, the nomination of *The Pan Gold* "wasn't an obligation". Instead it was "a business which [he] was trying to make with [the plaintiff]".[47] Further, Mr Gupta gave unchallenged evidence that when *The Pan Gold* was rejected by the plaintiff on 24 October 2014, the defendant decided to drop the back-to-back charterparty with the head owner as it was also on a "subject" basis then.[48] This conduct is equally significant. If a charterparty had been concluded between the plaintiff and the defendant on 14 October 2014, it would not have made sense for the defendant to "drop" the back-to-back charterparty with the head owners on 24 October 2014 given the fast approaching laycan. This decision, in my view, was entirely consistent with the defendant having proceeded all along on the basis that no charterparty was concluded with the plaintiff on 14 October 2014.

49 Accordingly, I find that the defendant's subsequent conduct does not impact on my finding that there was no charterparty concluded between the plaintiff and the defendant on 14 October 2014. Nor was there a subsequent waiver of the Subject Review clause. The parties were in negotiations

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46 NOE for 19 May 2016, pp 114:27–31.

47 NOE for 19 May 2016, pp 75:16–20.

48 NOE for 19 May 2016, pp 98:20–24; 113:26–31.

throughout, and there is no basis for the plaintiff's claim premised on a breach of contract.

Was the charterparty void for uncertainty?

50 As a result of my finding that there was no concluded charterparty, there is strictly no need for me to consider the defendant's alternative submission that the charterparty, even if it was concluded, was void for uncertainty. Nevertheless, I shall make three brief observations on this issue.

51 First, the defendant did not plead the defence of uncertainty. Despite its arguments to the contrary, I am of the view that this should have been done. Although the burden is on the plaintiff to prove that there was a valid charterparty, the defence of uncertainty raises issues of fact which do not arise from the plaintiff's statement of claim: O 18 r 8(1)(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In particular, it raises the question of what terms are essential to the existence of a workable charterparty. This is invariably a factual issue, the answer to which will vary from case to case depending on the particular voyage, the nature of goods to be transported and so on. As the plaintiff argues, this may well have necessitated it calling expert evidence to prove what constitutes a workable charterparty.[49]

52 Second, the parties dispute the impact of the defendant's failure to attach the Samarco terms to the Mecuria Bid (see [8] above). Mr Gupta accepted that he had received and seen the Samarco terms on 14 October 2014. His evidence was that he then deliberately did not attach the document containing these terms to the Mecuria Bid email because he did not agree to the Samarco terms. This omission, according to the defendants, is relevant as

[49] PCS, para 119.

it means that the key conditions in the Samarco terms relating to, *inter alia*, the nomination of the vessel, the notices of arrival and readiness, loading and laytime calculation, and demurrage and dispatch were not incorporated into the Mecuria Bid. This, in turn, rendered any charterparty concluded on 14 October 2014 incomplete.

53 This analysis is problematic as it fails to take into account one important fact. While Mr Gupta did not attach the Samarco terms to the Mecuria Bid, he left the clause incorporating these terms unchanged. This clause in the Mecuria Bid stated: "OWNRS SHALL COMPLY ALL SHIPPING/LOADING TERMS AS ATTACHED". The clear language of this clause, together with Mr Gupta's concession that he had notice of the Samarco terms, *prima facie* indicates that the defendant was willing to be bound by the Samarco terms when it made the Mecuria Bid. Indeed, Mr Gupta's own evidence, under cross-examination, was not that he was specifically averse to the Samarco terms, but rather that "it's the charterer's responsibility to pick up the clauses from the FOB contract and put that in the charterparty".[50] This was in line with Mr Gupta's overall evidence that he needed to review the charterer's *pro forma* CP after the relevant terms had been incorporated therein. Hence my view is that no real significance can be attached to the fact that the Samarco terms were not attached to the Mecuria bid. If necessary, I would have found that these terms had been incorporated into the Mecuria Bid.

54 Finally, the defendant argues that the use of the phrase "with logical amendments" gives rise to substantial uncertainty as reasonable parties can disagree on whether an amendment is logical. This submission is contrary to

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[50] NOE for 19 May 2016, pp 59:26–31.

the authorities which indicate that the phrase "with logical amendments", *on its own*, would not preclude a contract from being formed and that such amendments can be determined objectively (see [35] above). Thus I would have rejected this argument as well.

Breach of charterparty and damages

55 The final broad issue in dispute is whether the defendant's rejection of the draft charterparty on 29 October 2014 was a repudiatory breach of contract and, if so, what damages the plaintiff is entitled to. Because of my finding that there was never a contract concluded between the parties, this is also a dead issue. But as the parties have made substantial submissions on this point, I will deal with their arguments briefly.

Breach and ambit of defendant's right of review

56 On the issue of breach, the plaintiff argues that, even if the defendant had not waived its right of review under the Subject Review clause, this right had to be exercised reasonably and in good faith. Therefore, it claims that the defendant was in repudiatory breach by rejecting the draft charterparty on 29 October 2014 without giving any reasons or basis for the rejection. There are several difficulties with this argument.

57 First, the plaintiff relies on certain *obiter dicta* by Leggatt J in *Samos Shipping Enterprises Ltd v Eckhardt and Co KG (The "Nissos Samos")* [1985] 1 Lloyd's Rep 378 ("*The Nissos Samos*") where he appears to suggest that, where there is a "subject to details" clause, the parties are only entitled to resile from the contract "if in good faith either party is not satisfied with any of the details as discussed between them" (at 385). This dicta, however, was made in the context of pre-contractual negotiations where there is no binding

contract. But our own courts have held that there generally must be a clear and express agreement for such a duty to negotiate in good faith to be imposed (*HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [37]). In the present case, there is no clause obliging the parties to negotiate in good faith, and it is difficult to see on what basis such a duty can be imposed on the defendant. It is also worth noting that Leggatt J's observations in *The Nissos Samos* were examined in detail by the English High Court in *The Junior K*. In that case, Steyn J construed the dicta from *The Nissos Samos* in their context and came to the conclusion that Leggatt J was simply recording and stating a broking view. He noted that Leggatt J's observation was "reminiscent of the civilian doctrine of culpa in contrahendo" which "does not form part of [English] law". Steyn J thus rejected the argument that a "subject to details" clause encompasses a legally enforceable obligation to negotiate in good faith (at 589).

58 In any event, the plaintiff's reliance on the dicta in *The Nissos Samos* was not in aid of the argument[51] that the defendant was under a pre-contractual duty to negotiate in good faith. Rather, its case is that there was an *implied term* that the defendant was obliged to identify the terms they found unacceptable and that the parties will co-operate in carrying out the review.[52] This submission, based on the rules governing when a term can be implied "in fact",[53] is a non-starter for two reasons. First, the implied term has not been pleaded. The issue of whether an implied term has to be pleaded was considered by the Court of Appeal in *Jet Holding Ltd and others v Cooper*

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51 PCS. para 30.

52 PCS, paras 228–268.

53 PCS, para 228.

Cameron (Singapore) Pte Ltd and another and other appeals [2006] 3 SLR(R) 769. In that case, Andrew Phang JA drew a distinction between terms implied "in law" and terms implied "in fact" (at [89]). He then reasoned that the former category of implied terms, due to its nature, does not need to be pleaded (at [93]). This analysis necessarily entails that terms implied "in fact", such as the term which the plaintiff asserts, have to be pleaded. Second, the submission presupposes that there was a concluded charterparty, and that the Subject Review clause was a condition subsequent. However, I have found otherwise (see [49] above). So there was no contract into which these terms could have been implied. In essence, the parties were still in negotiations when the defendant rejected the draft charterparty on 29 October 2014. The defendant therefore had the unqualified right to either reject or accept any draft charterparty proposed by the plaintiff on that date.

59 The plaintiff alleges that it would be unjust for the court to reach such a conclusion and that the defendant should not benefit from having cynically disavowed the Mecuria Bid in order to enter into a more profitable charter with another party. I am not persuaded that there is any such injustice in this case. The facts indicate that the delay in the conclusion of the charterparty was largely the plaintiff's own doing. The Subject Review clause made clear that the onus was on the plaintiff to prepare a draft charterparty, based on its own *pro forma* charterparty, for the defendant's review. Even if the plaintiff did not have its own *pro forma* charterparty for this purpose, its broker, Mr Shu received the Australian Cargo CP on 16 October 2014. But the plaintiff only provided the draft charterparty to the defendant on 24 October 2014, some ten days after the alleged conclusion of the charterparty. By then, the laycan was less than one month away. A second draft charterparty was then sent by Mr Shu to the plaintiff on 27 October 2014. Mr Gupta's evidence, which was

largely uncontested by the plaintiff, was that even this later draft was unworkable.[54] During this period, further complications arose because of the plaintiff's rejection of *The Pan Gold* at the behest of its shipper. The rejection was purportedly premised on issues with *The Pan Gold*'s Rightship vetting. However, the defendant did not expressly guarantee the Rightship approval of the vessel in the Mecuria Bid. Even if the plaintiff was entitled to rely on the Rightship vetting to reject the vessel, it is undeniable that the initial rejection on 24 October 2014 and its complete turnaround which led to the acceptance of *The Pan Gold* on 29 October 2014 contributed to a delay of six days during which the freight rates moved against the plaintiff. In any case, even if the defendant's motivation for rejecting the draft charterparty on 29 October 2014 was simply to profit from a rise in the freight market, this was not in itself wrongful. The Subject Review clause specifically provided that a binding contract would only be concluded after the defendant's review of the detailed terms of the charterparty and a final agreement between the parties thereafter. Such an agreement was never reached.

60 Put simply, this was a case where the plaintiff bore the risk of the freight market rising before the full conclusion of the negotiations. Conversely, if the market had fallen before the contract was concluded, the plaintiff would have been entitled to secure a less expensive fixture, and thereby profited. This was the legal effect of the Subject Review clause. It cuts both ways. The fact that the freight prices did rise, leading the plaintiff to suffer losses, was an ordinary incident of the charter trade rather than a consequence of any legal wrong.

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[54] NOE for 19 May 2016, pp 120:19–22.

Damages

61 The defendant submits that the losses which the plaintiff suffered cannot be quantified even if there had been a breach of contract. I agree that the plaintiff's evidence is problematic on both: (a) the terms of the substitute charter which it entered into with RGL; and (b) the prevailing market rate when it entered into the substitute charter. However, if I had ruled in favour of the plaintiff on liability, it is unlikely that I would have found these evidential gaps on the quantum of damages to be insurmountable.

62 First, as noted above (at [17]), the plaintiff's pleaded case is that the substitute charter was entered into with RGL on or about 8 November 2014 at the higher freight rate of US$25.25 per metric tonne. It submits that the terms of this substitute charterparty were contained in a "recap" email dated 7 November 2014 ("the Recap Email") which was sent to both the plaintiff's representative, Mr Liu, and RGL.[55] But Mr Liu, under cross-examination, disavowed the Recap Email and insisted that there is another document dated 8 November 2014 which was not tendered as evidence.[56] Hence the defendant, although it accepts that there was a substitute charter, argues that the court should not accept the plaintiff's claim as to the freight rate and terms of this charterparty. I agree that Mr Liu's testimony is problematic. However, all the other evidence leads to the clear conclusion that the plaintiff has proved its case as to the terms and freight rate of the substitute charter.

(a) First, although Mr Liu disavowed the Recap Email, he did not disclaim his evidence that the substitute charter was entered into at the

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55 Affidavit of evidence-in-chief of Jin Yan dated 3 December 2015 ("JY affidavit"), para 3.

56 NOE for 17 May 2016, pp 74:8–11.

lowest available rate at that time, which was US$25.25 per metric tonne.[57]

(b) Second, the representative of RGL, Mr Jin Yan, corroborated the plaintiff's case that the freight rate agreed for the substitute charter was indeed US$25.25 per metric tonne as stated in the Recap Email.[58] Mr Jin Yan was personally involved in negotiating the substitute charter on behalf of RGL, and is a disinterested party to this dispute. His evidence on this particular point was not challenged by the defendant at trial either. So there is no reason for me to disbelieve him.

(c) Third, the plaintiff also produced documentary evidence of the invoices and payment documents relating to the substitute charter.[59] Mr Jin Yan confirmed that the invoices were issued by RGL, and that the plaintiff had made full payment.[60] These documents indicated that the freight rate agreed with RGL was in fact US$25.25 per metric tonne.

(d) Finally, Mr Jin Yan's evidence was that there is no other document containing the terms of the substitute charterparty other than the Recap Email.[61] This is another point on which he was not challenged under cross-examination. This supports the plaintiff's explanation that Mr Liu was simply confused by the date of the Recap Email being 7 instead of 8 November 2014, and that his disavowal of

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57 LB affidavit, para 45(e).

58 JY affidavit, para 3.

59 LB affidavit, LB-16.

60 JY affidavit, paras 6, 7, 11 and 12.

61 JY affidavit, para 3.

the Recap Email does not undermine his other evidence as to the terms of the substitute charterparty.

Hence, if I had to decide the point, I would have found that the substitute charterparty with RGL was entered into at the rate of US$25.25 per metric tonne as pleaded by the plaintiff.

63 Next, the plaintiff's expert evidence on the market freight rate at the time when the substitute charter was entered into is incomplete. Its expert, Ms Karina Albers ("Ms Albers"), gave evidence that, during the period from 5 until 8 November 2014, the prevailing market rate for a capsize bulk carrier similar to *The Pan Gold* was on average US$24.50. Thus, she opined that the freight rate of US$25.25 secured by the plaintiff for the substitute charter was reasonable, and not much of a premium in relation to the market levels since the plaintiff had to confirm a charter and nominate a vessel by 11 November 2014, ten days before the agreed laycan commenced.[62] Her evidence was largely premised on data from the Baltic Exchange on Baltic Capsize Index routes and the Baltic Exchange fixtures lists on comparable charterparties concluded between 5 and 10 November 2014.[63] This underlying data, however, was not annexed to her expert report, or tendered as evidence by the plaintiff. This clearly ought to have been done, although Ms Albers informed the court that the data was publically available and could be downloaded from the Baltic Exchange online database. The defendant therefore argues that no weight should be given to her evidence. I disagree. The plaintiff's failure to adduce the underlying data from the Baltic Exchange, while unsatisfactory, is not by

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62 Affidavit of evidence-in-chief of Karina Albers dated 1 December 2015, Exhibit KA-2 ("KA Report"), pp 7–8.

63 KA Report, pp 2 and 6.

itself fatal to its claim on the facts of this case. First, Ms Albers' evidence as to the prevailing market rates is only relevant to the issue of whether the substitute charter was secured at a reasonable rate. While the defendant alleges that the rate of US$25.25 per metric tonne was far in excess of the market rate, this submission is premised solely on one similar charterparty which was concluded on 10 November 2014 at the rate of US$23 per metric tonne.[64] It did not produce any evidence to otherwise contradict Ms Albers' expert evidence on the prevailing market rates, or to show that she misquoted the data from the Baltic Exchange. It is worth noting that, in her report, she did take into account the 10 November 2014 charter relied upon by the defendant as well. Thus, given Ms Albers' substantial expertise and qualifications in this area, I would not have rejected her evidence simply on the basis that the underlying data she relied on was not annexed. Her expert evidence was the best evidence before the court of the freight market rates during the relevant period. Next, even if I had been persuaded that the freight rate of US$25.25 per metric tonne was not reasonable, the plaintiff would still have been entitled to damages as Mr Gupta's own evidence was that the market rate at the relevant time was US$23 per metric tonne. This was still well above the rate of US$18.40 per metric tonne offered in the Mecuria Bid. In any case, I do not need to make any firm findings on this point given my rejection of the plaintiff's claim.

Conclusion

64 For the above reasons, I dismiss the plaintiff's claim with costs fixed at $175,000 plus reasonable disbursements to be taxed if not agreed.

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64 First SG affidavit, paras 33 and 34.

Steven Chong
Judge

Edgar Chin Ren Howe and Thio Soon Heng, Jonathan Mark (Incisive Law LLC) for the plaintiff;
Tay Twan Lip Philip and Yip Li Ming (Rajah & Tann Singapore LLP) for the defendant.
