

Case No: 2008 FOLIO 748

Neutral Citation Number: [2010] EWHC 141 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2010

Before:

THE HON MR JUSTICE BLAIR

Between:

GLENCORE ENERGY UK LIMITED

Claimant

- and -

TRANSWORLD OIL LIMITED

Defendant

Mr Richard Southern QC and Mr Alexander MacDonald
(instructed by Clyde & Co) for the Claimant

Mr Andrew W. Baker QC (instructed by Jones Day) for the Defendant

Hearing dates: 14th, 15th, 16th, 17th December 2009, 12th, 13th January 2010

Judgment

Mr Justice Blair:

1. This is a claim by Glencore Energy UK Ltd (“Glencore”) against Transworld Oil Ltd (“Transworld”) arising out of a contract on f.o.b. terms for the sale of a cargo of Nigerian oil known as Ukpokiti, in respect of which Glencore was buyer, and Transworld was seller. The background to the dispute is that on the morning of 30 March 2008 whilst the tanker was waiting to berth, the crew of a tug that was to assist in that operation was subject to a kidnapping. Although in the event the kidnap was resolved quite quickly, and Transworld says that the tanker could have lifted the cargo, by then it had sailed away. Thereafter the parties sought to put in place alternative arrangements, but these ended in failure. The issues that arise for decision in the action in broad terms are whether the contract came to an end or was affirmed, and if so, whether the claim was nevertheless time barred under the NNPC (Nigerian National Petroleum Corporation) terms, and if not, what is the measure of damages for breach.

The facts

2. Glencore Energy UK Limited is part of the Glencore group of companies carrying on oil trading operations out of London. Transworld Oil Limited is also part of a substantial group of companies. It is based in Bermuda, and at the present time, does not trade any oil other than Ukpokiti, the evidence being that such sales are relatively infrequent. In addition to the considerable volume of documentation generated over the course of the parties’ dealings, I heard from six witnesses of fact, the first three being from Glencore’s West African desk. At the time of the contract, Mr Rick Dumbleton dealt with operations, and Mr Anthony Stimler and Mr Martin Wakefield were traders. Mr Wakefield had been on the West African desk since 1995. On the Transworld side, I also heard from three factual witnesses, the first of whom was Mr Allan Bechter, who is based in the company’s Bermuda office, which is a small one, with only eight people working in it. He concluded the deal with Glencore, and his name appears on various emails. In fact however, his role within Transworld is concerned with IT. The evidence was that the President of Transworld, Mr John Deuss, used him to conduct the transaction in question, since he did not think it appropriate for someone as senior as the President to do so. Prior to the transaction with Glencore, Mr Bechter had only been involved with two other sales of crude oil, both Ukpokiti. Mr Deuss did not give evidence himself, Transworld’s second witness being Mr John Shea, an employee of a subsidiary of Transworld, who was at the time seconded to a Nigerian company called Tetra Petroleum Oilfield Services (Nigeria) Ltd (“Tetra”) which provided technical services to the oilfield. Its third witness was Mr Emmanuel Nnonah, Tetra’s Operations Manager at the time, who like Mr Shea, was based in Nigeria. A witness statement by Mr John Lovell whose company operated the Ukpokiti Terminal was also before the Court.
3. The facts as I find them to be are as follows. Ukpokiti crude is a good quality, low sulphur crude oil extracted from the offshore field bearing the same name. It is located in the eastern offshore oil province of Nigeria, and at the material time, the oil was produced only in small quantities. The Ukpokiti Oil Terminal consists of a floating production storage and off loading facility (FPSO), being a converted tanker named the “Trinity Spirit”. The sea water depth around the area is approximately 85 feet. The evidence is that only about one cargo per quarter is shipped. In practice, the relatively small size of the cargos means that it needs to be shipped as part of a cargo

loaded at some other West African terminal. Loading at the terminal is a tricky operation. As explained to me by Mr Shea, a tanker would ordinarily require the assistance of two vessels to berth, including a large tug. This is because the operation is carried out bow to bow, and whatever the sea conditions, the tanker has to be lined up and kept in position.

The making of the contract

4. The contract between the parties came about as follows. On 22 February 2008, Glencore entered into a contract with BP for the sale of 650,000 barrels (plus/minus 5%) of Espoir crude oil, scheduled to load during the period 30 March to 4 April 2008. Espoir crude is loaded in the Ivory Coast, which is to the west of Ukpokiti. The evidence of Mr Wakefield is that he discussed with BP whether it would be interested in a top-up cargo of Ukpokiti crude which was being offered at the time by Transworld. Once confirmation was received by the Ukpokiti Terminal that the “Narmada Spirit”, the tanker chartered by BP for the Espoir lifting, would be acceptable to be received at the Ukpokiti terminal, the contracts necessary to conclude the deal were entered into. There were three such contracts.
5. The first in time was the contract between the parties to the present claim. Mr Bechter said that the deal was concluded in a conversation between him and Mr Wakefield when he was at Mr Deuss’s house. Mr Deuss dialled the number, and passed Mr Bechter the phone. The contract was dated 6 March 2008, and was for the sale by Transworld to Glencore of “285,000 bbl \pm 5% of Ukpokiti blend crude oil”. Clause 5 provided for a delivery period at the end of March as follows: “TO BE LIFTED IN ONE CARGO LOT AND MUST BE FIRST LOAD PORT, FOB UKPOKITI MARINE TERMINAL, THE FPSO “TRINITY SPIRIT”, NIGERIA ... DURING 25-29 MARCH 2008”. The evidence is that a provision that the Ukpokiti Terminal has to be the first load port is incorporated in such contracts reflecting the limitations of the terminal. It is however possible by arrangement to load a part-laden tanker at the terminal provided (according to Mr Wakefield) that there are not more than 400,000 barrels on board. Such an instance involved Glencore in early 2007 when a Suezmax was loaded from Ukpokiti as a second cargo. As will be seen, after the first failed loading in the present case, the parties did contemplate such a loading.
6. As regards precise time for delivery during the 25-29 March 2008 period, clause 5 continued: “BUYER TO NARROW TO A 3-DAY LAYCAN LATEST COB LONDON TIME 7 MARCH 2008, PER BUYERS NOMINATED VESSEL MT NARMADA SPIRIT (ALREADY ACCEPTED BY THE TERMINAL) OR SUBSTITUTE, SUBJECT TO ACCEPTANCE BY THE TERMINAL ...”.
7. The price was provided for in clause 6 to be determined by the “AVERAGE OF FIVE (5) CONSECUTIVE QUOTATIONS AS PUBLISHED IN PLATTS CRUDE OIL MARKETWIRE FOR THE MEAN OF DATED BRENT” within a period around the narrowed laycan. The exact five day quotation period was in Glencore’s option as buyer. It was to be declared on or before the working day prior to the first of the chosen days. In this regard, the contract provided that, “BUYER TO DECLARE AT ITS OPTION ITS PREFERRED FIVE (5) DAY QUOTATION PERIOD WITHIN THIS WINDOW LATEST ONE (1) WORKING DAY PRIOR TO THE FIRST (1ST) DAY OF THE ADVISED PRICING PERIOD”. The parties refer to this as the “pricing declaration”, and it forms an important part of this case. As is usual in this

business, that element of the price was then increased by a premium, in this instance US\$2.05 per barrel above the dated Brent price. Brent (as the expert evidence explains) is the “marker” crude for such transactions. Nothing turns on the construction of the contractual provisions, the effect of which is not in dispute.

8. By a contract dated 7 March 2008, Glencore sold the same quantity of Ukpokiti blend crude oil to BP. In this contract however, there was a difference in that the price was determined by the average of five consecutive quotations as published in Platts Crude Oil Marketwire for the mean of dated Brent for the five days *after the bill of lading date* (in other words not at the option of the buyer). In the case of this contract, the premium was US\$3.00 per barrel, the differential being Glencore’s profit on the deal.
9. By a contract dated 20 March 2008, Transworld bought the oil which it was selling to Glencore from two Nigerian companies with an equity interest in the oilfield, Atlas Petroleum International Ltd and Summit Oil and Gas Worldwide Ltd. The contract is on back to back terms with Transworld’s sale to Glencore, save perhaps for the premium, which Transworld has redacted from the document.
10. The sequence of the respective contracts (Transworld’s supply contract coming well after its sale to Glencore) has been cited in support of the suggestion that Transworld was indeed an equity participant in the oilfield, but there is no supporting evidence as regards such an equity interest, and Transworld has unequivocally stated that it is wrong. Mr Bechter told me that he was not aware of any such interest, though he accepted that Tetra was part of Mr Deuss’s business interest. On the other hand, Mr Bechter was not in a position to know the full facts, and there does seem to me to be at least some substance in Glencore’s submission that arrangements between Transworld, Tetra and Atlas and Summit were not entirely arms’ length, but it does not make any difference to the matters I have to decide.

The declaration by Glencore as to the pricing period

11. So far as the delivery obligation is concerned, on 7 March 2008 in accordance with the requirements of clause 5, Glencore narrowed the laycan under its contract with Transworld to 26 to 28 March 2008. That is to say, laytime for delivery was not to commence prior to 26 March and Transworld was entitled to cancel the contract if Glencore’s vessel did not arrive on or before 28 March (*The Luxmar* [2007] 2 Lloyd’s Rep. 542). Laytime of 36 hours + 6 hours NoR (Notice of Readiness) was allowed by the contract, after which demurrage was payable at the rate provided for by the charterparty under which the vessel was performing. Glencore also narrowed the laycan under its Espoir contract with BP to 30 March to 1 April 2008, following agreement with BP. Thus if all had gone according to plan, the vessel would have loaded first at Ukpokiti, and then proceeded to Espoir for the balance of the cargo.
12. On 24 March, Mr Dumbleton of Glencore was advised by BP that the expected time of arrival of the vessel at the Ukpotiki Terminal would be 28 March. On 26 March, BP advised that its intention was to load no more than 271,000 barrels under its contract with Glencore (a smaller shipment would be loaded at the same time under a contract with Vitol S.A.). This was replicated as regards Glencore’s contract with Transworld, 271,000 barrels being effectively the contractual minimum (285,000 barrels less 5%).

13. So far as the price is concerned, and importantly so far as this claim is concerned, on 26 March 2008 Glencore declared 27 March to 2 April 2008 as the pricing period under clause 6 of the contract. This was effected by an email sent by Mr Dumbleton to Mr Nnonah, Mr Shea and Mr Bechter (copied to Mr Wakefield) stating: “In accordance with our contractual terms, please note we hereby declare **“27 March – 02 April 2008”**, (both dates included, ie. 5 quotations) as our pricing period for the above mentioned lifting”. It is not in dispute that the average price of dated Brent over this period as ascertained by the contractual pricing formula was US\$101.433 per barrel, so that including the premium, the price per barrel was thereby ascertained at US\$103.483. The total price of the prospective shipment of 271,000 barrels on this basis is agreed to be US\$28,043,893.

Hedging by Glencore

14. Hedging is an extremely important part of the trading that Mr Wakefield does, since so far as presently relevant his evidence (which I accept) is that Glencore does not take speculative positions. His evidence in this respect is supported by the expert evidence (including that of Transworld’s expert). His explanation was as follows. Where, as was the case here, Glencore’s purchase and sale are not priced to the same formula, it will hedge its market exposure, starting on the first day of the pricing period. So in the present case, it sold 271 lots of Brent May futures at an average price of \$102.23 between 27 March and 2 April, consisting of 54 lots on each of the first four pricing days, and 55 lots on the fifth day. The reason for selling May rather than April futures is that, in the middle of each month the following month’s futures expire. April futures expire in mid March and would not have been available to hedge the 27 March to 2 April pricing period. In order to match the physical and futures position, it had therefore to sell May futures, which would expire in mid April, which is what it did. Had the cargo loaded at the end of March as intended, these futures would have been closed out by the purchase of May futures in batches of 20% of the total number of futures lots to be acquired over the 5 day pricing period in the BP contract, with the result that Glencore’s physical and future position would both have been closed out well before the expiry of the May futures in mid-April. An exposure to hedging losses arises where as a result of non-delivery there is no physical cargo against which to offset the futures position, but an alteration of the pricing period for the physical cargo after hedging contracts have been entered into can have the same effect.

The attempted loading

15. On 28 March 2008, the Narmada Spirit arrived at the Terminal, and tendered Notice of Readiness at 11:42 am. Free pratique was granted at 16:48 pm, and NoR was accepted by the Terminal at 06:00 am on 29 March 2008. I should say that the parties are agreed that none of the events over these few days is decisive to the outcome of the action, and no claim arose between them for what turned out to be a failed shipment. They form the background to the events that do give rise to a claim however, and Transworld in particular has made various points in this regard, so I should set out my findings briefly. The vessel did not berth on arrival nor the next day due, Glencore submits, to the lack of available operational tugs. This is what Mr Dumbleton of Glencore was told on the morning of 29 March, and it is consistent with the contemporaneous evidence, which shows that there were engine problems with the tug Jade Star, which had been chartered by the operators of the Trinity Spirit as the

main holding vessel. It does not appear that the Jade Star was fully operational, to quote Mr Shea, until the morning of 30 March 2008, and he accepted in cross examination that if the tug had not broken down and had arrived on the morning of 29 March, the Narmada Spirit would have berthed before the kidnapping happened.

16. The evidence shows that the tug Gunter meanwhile, which was a smaller service boat, arrived at the Terminal at 14.30 pm on 28 March (the same day as the Narmada Spirit). There it waited, presumably for the readiness of the Jade Star, and the arrival of a tug called the Aldoma, which was chartered on 29 March to replace the Jade Star. However events intervened, because at approximately 09:25 on the morning of 30 March 2008, five of the Gunter's six crew members were kidnapped. At the time, the tug was connected to Terminal's export hose.
17. With one qualification, I accept the evidence of Mr Emmanuel Nnonah that there is a difference between a kidnapping initiated by the host community (i.e. the indigenous inhabitants of the Niger Delta) and an incident in which unknown militants are involved. The qualification is that (in my judgment) the distinction will not necessarily be evident to visiting vessels caught up in such an incident. Mr Nnonah received information on the evening of 30 March that the kidnappers were in fact from a local community, with which contact had by then been made. Nevertheless, even on that basis, this must have been an alarming event for those in the vicinity of the Terminal, which was of course some miles offshore. In his oral evidence, Mr Nnonah described the tug being approached by boats from both sides. He could not say whether the kidnap took place at gunpoint: "sometimes these guys overpower you by just sheer numbers. Sometimes they come with knives". Anxious for information, Mr Dumpleton called him about 5pm on 30 March 2008. The terms of the conversation between them are disputed, but it seems likely that the position at that time was unclear. There was at least one other conversation between them that evening. According to Mr Dumpleton who made a note (which he claims was contemporaneous) he was told that Tetra could not give a definite time by which matters would be sorted out, and that Glencore should "take necessary steps". Mr Nnonah denies this. He says, "I suggested that the Narmada Spirit should remain in the vicinity of the Trinity Spirit until 10am on 31 March to ascertain whether loading would commence". As Transworld has submitted, it is unnecessary to decide as to the precise nature of the conversations between Mr Dumpleton and Mr Nnonah on 30 March. These, it is clear, were just some of a number of exchanges that took place between various of the parties involved in a difficult situation as they tried to decide on the appropriate course of action. These included requests for armed naval personnel.
18. According to Mr Shea, at about 5pm on 30 March, the Captain of the Narmada Spirit informed the Trinity Spirit that it was heading for deep water. At that point, he says that the tug Aldoma, which had arrived at around midday, also left for deepwater. The Jade Star apparently remained tethered to the export hose overnight, unable to disconnect itself without leaving the hose drifting and in danger of being damaged by becoming entangled with the Trinity Spirit's anchor chains.
19. At 20:58 on 30 March 2008, BP emailed the Master of the Narmada Spirit stating, "As per telecon due to the situation at Ukpokiti please proceed to Espoir to load the second parcel of this voyage". Transworld has submitted that the true reason for the vessel's departure was to avoid "tank tops" at Espoir. It is correct that the email

exchanges over the previous few days show concern on Glencore's part that because of storage limitations at Espoir the timing was tight if the vessel was to load at Ukpokiti and get to Espoir in good time. In cross-examination, Mr Dumbleton seemed to accept that the vessel had to arrive at Espoir by 2 April, and Ukpokiti is approximately 38 hours sailing time from Espoir. Transworld's case based on the evidence of Mr Shea and Mr Nnonah is that the Narmada Spirit could and would have berthed and commenced loading on 31 March or 1 April had it not sailed away. Although the crew of the Gunter were not released until sometime about 1 April, the Jade Star and Aldoma were by then both on hand. It appears that naval support was also available on 31 March. In those circumstances, Transworld's case in this respect may well be correct. Further, Transworld was not contacted in relation to the decision that the vessel should sail. But equally, I am satisfied from the evidence, and particularly the contemporaneous emails (including one from Mr Shea himself sent on 3 April which gives the kidnapping as the cause of the aborted lifting), that concern about tank tops at Espoir was not the only or even the primary reason for the departure of the Narmada Spirit. On the day of the kidnapping, in other words 30 March, the prospects for loading the following day or the day after must have seemed as best uncertain, and as worst dangerous, and it is not surprising in those circumstances that the Narmada Spirit sailed away.

Events following the departure of the Narmada Spirit

20. The tugs were dismissed on 31 March when it became apparent that the vessel had sailed for Espoir. Later the same day however, BP and the tanker owners stated that they now considered Ukpokiti to be a safe port. This meant that the Narmada Spirit could in principle come back. But there was an issue as to the extent to which it would be safe to berth a partially loaded tanker at the terminal. Over the next day or so discussions took place between Glencore, BP and others in that regard. Late on 1 April 2008, Mr Dumbleton emailed Mr Nnonah (copying in Mr Bechter) to the effect that in the absence of confirmation that Ukpokiti would be available to load with 700,000 barrels of Espoir crude oil on board, Glencore had "been forced to only load up to 400,000 barrels of Espoir to ensure that the Ukpokiti Terminal can comfortably load the full designated volume of Ukpokiti within the displacement limits". The evidence shows that those responsible in Nigeria were making every effort to receive the Narmada Spirit back, but that lifting would as before depend on the availability of suitable tugs. On or about 1 or 2 April 2008, the vessel departed Espoir and headed back to Ukpokiti giving an ETA of 23:00 on 3 April 2008. On 2 April 2008, Mr Mike Fox, Deputy Legal Counsel of Transworld, sent an email to the effect that confirmation that the Ukpokiti Terminal would be able to load with 700,000 barrels of Espoir crude on board had been communicated to Glencore on 1 April directly by John Lovell of Alliance Marine Services (which operated the terminal). Mr Dumbleton of Glencore responded shortly afterwards by email to the effect that Mr Lovell's statement had depended on the availability of suitable assist vessels, and that without confirmation that this could be done, its customer (i.e. BP), could not base its planning on an expectation of what could be achieved. By then, only 400,000 barrels had been loaded at Espoir. Given the scope of the issues in this trial, it is not necessary to determine between these versions of events.
21. At that point in time, it must have looked to the parties as though the Ukpokiti cargo could be lifted after all. But on 3 April 2008, the day of the arrival of the Narmada Spirit back at the Ukpokiti Terminal, the owners of the Aldoma decided that despite

the various assurances of calm and naval security, they would not allow the Aldoma to proceed to Ukpokiti for security reasons. That news was then communicated to Transworld. Later on 3 April 2008, Mr Fox emailed Mr Dumbleton at Glencore stating that:

“Due to circumstances beyond the control of the terminal and cargo shippers it will not be possible to receive the vessel Narmada Spirit back at the terminal to offload the agreed/nominated parcel(s) of cargo within a reasonable time.

This development is regretted and has arisen despite every effort under most difficult circumstances on the part of the terminal operators and ourselves to receive the vessel.

We are left with no possible alternative other than to advise all involved parties to take whatever steps they deem appropriate in the circumstances”.

Transworld’s case is that if the contract had not already expired unperformed, it was terminated by this email. As it is put in Transworld’s closing submissions, so far as Transworld was concerned, the commercial adventure was at an end. I prefer Glencore’s interpretation, which is that although the vessel was cancelled, the contract was not. This is consistent with what happened next, which was as follows.

22. Mr Dumbleton did not reply to the email until the following day—he had been assessing in the meantime the losses that would ensue if the Ukpokiti deal was cancelled. On the hedging, it seems that this amounted at that time to over US\$400,000. On 4 April, he asked to be kept “fully updated as to when the terminal are likely to be in a position to handle our customer’s vessel”. He passed on the information that Glencore had been told that the vessel would remain in the vicinity of the Ukpokiti Terminal until noon on 7 April, and if not “handled by the terminal before this time she will sail back to Espoir terminal in the Ivory Coast to load balance cargo and will NOT return to Ukpokiti Terminal”.
23. With the vessel waiting at the terminal, Mr Shea agreed in cross-examination that he was concerned about the accrual of demurrage. On 4 April, he sent an email to Mr Fox asking what it would take to cancel the tanker. Events then moved on, because Mr Dumbleton spoke to Mr Lovell who confirmed that the terminal could not receive the vessel because of the lack of tug availability. Mr Wakefield (of Glencore) then called Mr Bechter (of Transworld) and told him that the vessel was leaving. It was put to Mr Bechter in cross-examination that he did not understand the conversation to be conveying that the contract of sale was cancelled, and he said that he did not think of it in terms of the contract. That is supported by his email of 4 April sent to inform Mr Shea and Mr Fox of what had happened, which speaks of the vessel (rather than the contract) being cancelled.

The conversation between Mr Wakefield and Mr Bechter of 8 April 2008

24. For the next few days, Transworld considered other options. By 7 April, the Narmada Spirit had returned to Espoir and completed her loading there, and according to Mr Wakefield, BP had informed Glencore that she would not return to Ukpokiti. At this point in time, although Mr Fox by his email of 3 April had “advise[d] all involved parties to take whatever steps they deem appropriate in the circumstances”, and the

Narmada Spirit was out of the running, the status of the shipment at this stage was still unresolved, and it must have been plain to both sides that a resolution had to be reached. On Tuesday, 8 April 2008, a telephone conversation took place between Mr Wakefield (of Glencore) in London and Mr Bechter (of Transworld) in Bermuda which is crucial for the outcome of this action.

25. Mr Wakefield says that with a view to clarifying the way forward with Transworld, he spoke on the phone to Mr Bechter on 8 April 2008 about the abortive loading and whether there were any prospects of loading the contractual cargo in the near future. He made the call in the evening of 8 April from his home. His priority, he says, was to ensure that he was not left with a mismatch between the period he had hedged and the period over which the cargo would be priced for the sale to Glencore's ultimate customer. He says that during this phone conversation, he confirmed to Mr Bechter that everything would stay the same and would continue on all the same terms (save as to loading dates) and in particular the pricing period declared on 26 March. He says that Mr Bechter said something like "yes, okay" but made no further comment. This did not really surprise Mr Wakefield, he says, as he was aware that the market was relatively flat at that stage. He made a note of the telephone conversations in his notebook as follows:

"Spoke to allan of Tetra; need to send email summarising we keep deal afloat i.e re pricing/period".

The reference to "Allan" is a reference to Mr Bechter (he did not in his own mind draw a distinction between Transworld and Tetra), and the reference to an email was a note to himself, he says, and not something he had discussed with Mr Bechter.

26. Mr Bechter on the other hand says that towards the beginning of the week (the week beginning 7 April), he was asked by Mr Deuss to find out whether Glencore was still interested in purchasing the cargo that had not been lifted in March on the same terms and conditions. Before he was able to make contact with Glencore, at about lunchtime (Bermuda time) on 8 April when he was in Transworld's offices, he received the call from Mr Wakefield. He says that after reference to the kidnapping of the crew of the Gunter, they moved on to discuss the current situation, with one or other querying "where do we go from here" or words to that effect. He says that he asked Mr Wakefield (as he had been instructed by Mr Deuss) whether Glencore was still interested in purchasing the cargo, and Mr Wakefield confirmed that it was. They then discussed that the prospective purchase should take place as soon as possible on the same terms as the contract. To Mr Bechter, this meant that the words of the contract would apply, with only a few necessary modifications, such as to the delivery/laycan date. He says that he has no recollection of anything further being discussed, including that Glencore specifically wanted the price declaration to apply to a future transaction. He says that given his level of authority and his instructions from Mr Deuss, if Glencore had not expressed interest in purchasing a future cargo on the same terms as the contract, and had instead suggested a different arrangement, he would have told Mr Wakefield that he had to get back to Mr Deuss. He would then have raised the issue with Mr Deuss. In fact, when he spoke with Mr Deuss on 9 April, he says that he merely relayed that Glencore was interested in a future lifting on the terms of the contract.

27. Both witnesses were extensively cross-examined on their recollection of the conversation. Mr Wakefield accepted most of what Mr Bechter said in his witness statement as to the conversation between them. He said however that he wanted to make sure that everything was very clear. He said that it was something of a “one way conversation”, in that Mr Bechter was having to be brought up to speed, because (as was the case) Mr Bechter had been away on holiday at the end of March when the aborted delivery happened. Mr Wakefield said that the conversation was very much him making it “very clear” that Glencore planned to lift the cargo in the near future, and that the pricing that it had declared would stand firm. He said he moved “very quickly” onto that. He had a “very clear” idea of what he wanted to gain from the phone call, and wanted to make sure that it was clearly understood on both sides. Mr Bechter did not say much. He said “yes okay”. Very much of the push, he said, for the call was from his side. He said that he was aware that Mr Bechter would go back to talk to Mr Deuss, which was why he followed up the conversation with an email the next day. He was asked why he simply did not refer to a price that would remain fixed at US\$103.48. He said that he was using the usual language of traders, and that they only tend to talk about the price in figures at the invoicing stage. It was put to him that his evidence was tantamount to saying that he thought he had from Mr Bechter an open ended commitment to sell at \$103.48 whatever the market did in the interim, and however long it took to sort out a shipment, if indeed dates could eventually be agreed. He denied that (on his version of events) this was an unusual deal, because he was optimistic at that point in time that the lift would be rescheduled.
28. In cross-examination Mr Bechter said that Mr Deuss had not explained any of the background to him. He simply asked him to contact Glencore and find out if they were still interested in the barrels, and if they would use the same terms and conditions. It was clear to him that he was talking about the barrels that had not been lifted in March. He maintained that he had no recollection of Mr Wakefield mentioning a price, or of the price declaration coming up in the conversation. He said that he knew that Glencore had declared a price, but that the price declaration of 26 March was not in his mind on 8 April. He denied that it would not have meant very much to him if Mr Wakefield had told him that the pricing declaration that Glencore had made on 26 March would remain—that would, he said, amount to changing the contract. He did not take a note of the conversation, because it was very straightforward. He did not recall mentioning to Mr Wakefield that he was just the front man for Mr Deuss, and said that he was the person to talk to if anyone wanted to buy. He accepted that he tends to get quiet during a conversation, and might have said, “Yes, okay”. If Mr Wakefield had tried to say that the price would remain as in the March contract however, he would have said that he could not agree to that, and would have to get back to him. He said that it was a pretty short conversation, that he got an affirmative to both points he had been asked to raise, and that there was therefore no immediate urgency to get back to Mr Deuss.

The email of 9 April 2008 and events immediately following

29. After the conversation with Mr Bechter, Mr Wakefield spoke to Mr Dumpleton and relayed the details of the conversation, asking him to send a confirmatory email the following morning. The next morning, according to his fellow trader Mr Stimler, he told Mr Stimler that he had had a conversation with Mr Bechter and “everything stays the same, the pricing period, it’s all okay”. Mr Stimler added that Glencore needed to find a buyer as soon as possible, and that in the nature of West African cargos, they

would be looking at something possibly three weeks ahead. Realistically, because Ukpokiti constitutes a partial cargo, the earliest it would be possible to find somebody to load would be early May.

30. That morning (that is 9 April 2008) Mr Dumpleton (together with Mr Wakefield) drafted an email, and sent it to Mr Bechter, copying it to Mr Fox, Mr Deuss, Mr Shea, and Mr Nnonah. The email reads as follows.

“Subject: 26-28 March Ukpokiti Blend crude oil lifting

Hello Allan

Confirming telecon between Wakefield (Glencore) / Bechter (Transworld) regarding the prospects of loading our originally scheduled 26-28 March 2008 Ukpokiti Blend crude oil lifting. We would like to confirm our commitment to load the cargo at the soonest possible time for all parties concerned at the agreed contractual pricing and our declaration dated 27th March 2008 remains unchanged.

As previously requested, can you please supply us with a fully detailed “sequence of events” as background to your email dated 3rd April 2008 informing us that the terminal cannot perform the lift.

We look forward to hearing from Transworld at your earliest convenience and keeping us updated as to when our Ukpokiti lifting can take place.”

31. In cross-examination, Mr Wakefield accepted that the words “our commitment” referred to Glencore’s commitment. Mr Bechter read it in the same way. Mr Bechter accepted in cross-examination that he looked at the email, and saw who it was copied to. He read the reference to the price declaration, and accepted that it referred to the declaration which had been sent to him (in fact sent on 26 March 2008). But, he said, he did not pay “sufficient attention” to that phrase, which caused him no concern. He said that he understood it to reflect the conversation of the previous day, and that it was only when it was reread on May 5-6, that he realised what was being referred to. He said that he had mentioned the email to Mr Deuss (who in any case was one of the recipients) focusing on the middle paragraph, and was told to get together with Mr Fox and start putting together the “sequence of events” there referred to. He accepted that Mr Deuss was a “hands-on guy with his business”. He been told by Mr Fox (who did not give evidence) that he just glanced at the email when it came in, knowing that he (Mr Bechter) was going to deal with it with Mr Deuss.
32. There was in fact no response from Transworld to the email. On the other hand, as Transworld points out, Glencore did not chase for confirmation, as it had for example in relation to the pricing declaration. Mr Wakefield told me that he would have expected Transworld to come back within a day had there been a problem. In any case, Glencore continued to maintain its hedges. If Mr Wakefield had understood the contract to be cancelled, he said, the futures positions would have had to be closed out, which they were not.
33. The evidence is that there were a number of conversations between Mr Wakefield and Mr Bechter over the next few days about fixing a new loading period, and possible alternative sales of the cargo now that BP was no longer in a position to lift. Among

the emails sent was one from Mr Bechter to Mr Wakefield on 14 April 2008. Mr Bechter explained that the email was largely drafted for him by Mr Deuss. The subject of the email is "T-085 - reschedule of March lift". Mr Bechter said that 85 was the total number of lifts done at the terminal, of which the (aborted) March lift was number 85. He accepted that this reflected his understanding of the position, namely that the parties were rescheduling the March lift. He did not agree however that the passage of the email which refers to a possible lift on May 1-2 and asks whether Glencore was planning to co-load on the same vessel, assumed that the deal was still afloat. Finally, in this sequence of events, on 17 April 2008 Mr Wakefield noted a phone call to the effect that, "Tetra [that is Transworld] say up to 450 Ukpokiti available – our volume will be fixed at 271 min/max". Mr Bechter explained that this was Mr Deuss's decision. It was the same volume that had been declared by Glencore on 28 March 2008, but Mr Bechter disagreed that it showed that Mr Deuss understood that he was carrying on with the March contract to sell Glencore the 271,000 barrels that had previously been declared.

The email of 22 April and following events

34. On 22 April 2008, Mr Bechter sent Mr Wakefield a further email. This time, the subject was "May lifting and resolution of dispute". Mr Bechter said that so far as presently relevant, it had again been drafted by Mr Deuss. It refers (and is plainly a response to) Mr Dumpleton's email of 3 April 2008 to the effect that Glencore intended to hold Transworld responsible for costs incurred in connection with the aborted March lifting, continuing:

"Without acknowledging any liability, Transworld proposes that we both agree to make a good faith effort to amicably resolve any disputes arising from the aborted loading. In the meantime, when we receive the NNPC [Nigerian National Petroleum Corporation] 'allowable' for May and confirmation of available support vessels (etc.), Transworld will prepare a new agreement to supply 271,000 barrels of crude oil during a date in May to be agreed upon".

35. Mr Wakefield said, and I accept, that it did not occur to him at the time that this meant that the existing contract would not in fact be kept afloat but would be replaced by some new agreement. He thought it concerned matters of an operational nature in terms of laycan, or the like. It appears to me to be significant that, as Glencore points out, there was no reference in it to Mr Dumpleton's email of 9 April which expressly stated that the price declaration remained unchanged. Mr Deuss has not given evidence at the trial, and it is not possible to reach a concluded view as to whether Transworld's understanding was different at this time.
36. Meanwhile, Mr Wakefield and Mr Stimler were looking for another buyer for the Ukpokiti crude. Mr Stimler told me that Ukpokiti is not an easy cargo to sell despite being a good quality crude oil because the production rate is very low, and in practice it has to be treated as a top-up cargo. On 1 May 2008, he began to discuss an opportunity to sell the Ukpokiti to Morgan Stanley, and this was provisionally booked to load during 20 to 30 June. The premium was \$3.50 to dated Brent, which Glencore considered to be a good price. On 1 May 2008, Mr Dumpleton emailed Mr Bechter following a telephone conversation to the effect that a sale of 285,000 barrels plus/minus 5% had been provisionally booked to load during 20-30 June (dates to be

narrowed) subject to clearances. He said, "We look forward to hearing from you as soon as possible regarding Transworld clearance".

37. The sale to Morgan Stanley had to be confirmed by 6 May 2008. Having discussed the position with Mr Deuss, Mr Bechter confirmed on the phone to Mr Dumpleton on 1 May that Transworld "was in principle willing to conduct the lift between 20-30 June, subject to confirmation as to receipt of the necessary allowables". He says that in the expectation that these would be received, Mr Fox prepared a draft sale contract. He sent an email to Mr Dumpleton on 5 May 2008 (which was a bank holiday in the UK) saying:

"We expect to receive all government clearances necessary for a late June lifting of 271,000 barrels. To that end, please find attached a draft contract together with a comparison document showing the differences between this draft and the agreement entered into in March.

Please let us know if you have any comments. If you have none, we will circulate an execution copy for signature".

38. There were a number of changes made to the contract of 6 March 2008. Mr Bechter was asked about a new clause 18 that had been added entitled "ENTIRE AGREEMENT", which among other things says that, "REFERENCE IS MADE TO THE AGREEMENT DATED MARCH 6, 2008, BETWEEN BUYER AND SELLER (THE "PRIOR AGREEMENT"). THE PARTIES HEREBY AGREE THAT BUYER'S OBLIGATION TO PURCHASE AND SELLER'S OBLIGATION TO SELL UNDER THE PRIOR AGREEMENT (AND ANY RELATED COMMUNICATIONS) ARE HEREBY EXTINGUISHED AND OF NO FURTHER FORCE OR EFFECT AND ARE REPLACED BY BUYER'S OBLIGATION TO PURCHASE AND SELLER'S OBLIGATION TO SELL AS SET FORTH IN THIS AGREEMENT". Despite the apparently clear wording, Mr Bechter did not agree that this clause was put into the draft in order to terminate the agreement of 6 March 2008.
39. Mr Dumpleton says that he could not open the attachment because he was at home, it being Bank Holiday Monday, but he spoke to Mr Bechter and queried why a new contract was required. Mr Bechter could not specifically remember Mr Dumpleton calling him on 5 May. Not having spoken to Mr Dumpleton, Mr Stimler nevertheless that day acted on the email, and confirmed the deal that Glencore had entered into with Morgan Stanley.
40. Mr Stimler says that the following morning, that is 6 May 2008, Mr Dumpleton called him over to his desk to look over the attachment to the email, which by then he had opened, and which contained a draft contract. This contained a price clause which required a new pricing declaration instead of the pricing period Glencore had already declared under the contract. Mr Dumpleton emailed Mr Bechter that morning making a number of comments on the draft. As regards the price, he said:

"We refer to my email to yourself dated 9th April 2008 which confirms a telecon between yourself and Martin Wakefield. This email clearly states our commitment to load our originally scheduled 26-28 March 2008 Ukpokiti as soon as possible at the agreed contractual pricing and our declaration dated 27th March 2008 remains unchanged".

He then provided an alternative form of words which included reference to the period 27 March to 2 April 2008. As regards the “entire agreement” clause, he said that Glencore was not entirely happy to see that this wording had been added, but would agree to it subject to Transworld “honouring your agreement referred to in my email dated 9th April 2008”, and mentioned that “we also currently have a hedge exposure due to the non-lift which in this market is costly”.

41. Mr Bechter said in evidence that when he saw Mr Dumbleton’s comments in his 6 May email about the price, he felt shocked. He went and looked up the email of 9 April 2008 and “realised that we had a big problem. We had been working on the premise that we were going to be selling at some point with prices, as they always had been, around a loading date”. He says that Mr Deuss was very surprised as well. Mr Bechter emailed back on 7 May stating that, “Transworld does not agree with the application of the previously nominated pricing window of March 27 thru to April 2 for the contemplated June lifting. That window would have applied to the late March lifting if that lifting had occurred, and that lifting could have taken place on March 31 had the vessel not unilaterally left the terminal area on March 30. Our draft contract calls for a pricing window referencing a period around the lifting date – which will be in June. There is no basis for selling June barrels at a March price, and therefore your proposition is not acceptable to us”.
42. On 7 May, there was a conversation between Mr Stimler and Mr Bechter, in which the former states, “Allan did not argue at all and just listened which tells me he is most certainly trying it on”. However Mr Bechter did not see it that way, considering that the parties were “totally on a different page on this price”. Arguing with Mr Stimler was not going to solve anything at this point, he said, and I accept that this was his view. Mr Bechter did not strike me as someone who would “try it on”. After some further exchanges between the parties, Transworld wrote formally on 21 May 2008 to the effect that “availability of June barrels no longer exists”. Mr Bechter explains that by then Transworld had concluded a sale to Vitol S.A. of a further 220,000 barrels for delivery in late May. On 22 May 2008, Glencore replied stating that it had no alternative other than buying back its hedges and cancelling its sale to Morgan Stanley. It made it clear that legal proceedings for breach of contract would ensue. In terms of the legal analysis, by this email it submits that it accepted Transworld’s repudiatory breach as putting an end to the contract, and if it otherwise proves its case, this is not in dispute. Although at one point Glencore was seeking an indemnity against claims by Morgan Stanley, it stated during the course of the trial that such a claim was no longer pursued.

Liability: discussion and conclusions

43. The parties’ contentions as regards liability are in essence as follows. Glencore submits that whatever the status of the contract of sale following the abortive lifting, in the telephone conversation of 8 April 2008, the parties mutually affirmed the contract. Since, it submits, the pricing declaration (once made) became part of a contract, the affirmed contract included the price thereby ascertained. In any case, it is submitted, in the course of the phone conversation Transworld expressly agreed that the pricing declaration would stand. The email of 9 April, it is submitted, is confirmatory of the agreement reached the day before. Alternatively, it is submitted that the email itself gave rise to an agreement. The same legal outcomes, it is submitted, can be reached under the doctrine of waiver.

44. Transworld submits that loading not having taken place in accordance with the contract, the contract expired unperformed. That being so, it is submitted that Glencore's case as regards affirmation discloses no cause of action, because its claim cannot succeed unless it proves that a new contract was concluded for delivery at the price declared. Alternatively, it is submitted that Transworld terminated the contract for breach by Glencore by Mr Fox's email of 3 April 2008 to the effect that it would not be possible to receive the Narmada Spirit back at the terminal within a reasonable time, and all parties should take whatever steps they deemed appropriate in the circumstances. Further, it is submitted that there was no mention of the March pricing declaration in the conversation of 8 April 2008. Alternatively, if it was mentioned, it was not agreed to by Transworld. Even if it was agreed to, such agreement was not intended to be binding, nor could it be binding, as it would have been an agreement to agree as regards delivery time, and unenforceable. The email of 9 April was merely a proposal by Glencore to apply the March price to a rescheduled delivery, and had it been agreed, which it was not, it would have been equally unenforceable. For those reasons, it is submitted that Transworld is under no liability.
45. Understandably, the weight of the parties' respective submissions at the trial went to the facts rather than the law, and in particular as to the telephone conversation between Mr Wakefield and Mr Bechter on 8 April 2008. I have summarised the evidence in that respect above, and I must now set out my findings as to what happened. In approaching this task, I have kept in mind the words of Robert Goff L.J. in *Armagas v Mundogas* [1985] 1 Lloyd's Rep 1 at 57 that, "It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth". Bingham J made a similar observation in *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 605 when considering whether negotiations had resulted in a contract.
46. The starting point it seems to me, is that by the time Mr Bechter and Mr Wakefield spoke on 8 April 2008, both Glencore and Transworld had decided that it was in their commercial interests to keep (in Mr Wakefield's words) the deal afloat. This is reflected in the contemporary emails passing between Mr Deuss and Mr Shea on 3 April. Mr Deuss did not follow Mr Shea's recommendation to declare "force majeure" on the grounds of the kidnapping. He speaks of it remaining "of paramount importance that we find an early offload solution". At that point in time, he was envisaging shipping the oil to Transworld's refinery in Louisiana, but this appears to have been expensive. At some point, his thoughts must have turned back to Glencore, because sometime before the telephone conversation, Mr Bechter says that he was "asked by Mr Deuss to find out whether Glencore was still interested in purchasing the cargo that had not been lifted in March on the same terms and conditions". Glencore was also keen to make the lifting happen, and before Mr Bechter was able to make contact, he received the call from Mr Wakefield.
47. By that time, Glencore had assessed its hedging losses. In terms of the overall probabilities, from Mr Wakefield's perspective, it was essential that if the deal did remain afloat, it did so on the same terms as to price, otherwise Glencore would incur continuing exposure on its hedging contracts. If the contracts were unwound at current prices, these had been estimated internally at some \$400,000. But the losses might increase, and as events would prove, did increase very sharply. If Mr

Wakefield had understood the contract to be cancelled, he said, the futures positions would have had to be closed out, which they were not, and I accept his evidence in that regard. It follows that he had every reason to get the position as regards the price tied down, and as an experienced trader it is inherently plausible that (as he says) he went into the conversation with Mr Bechter knowing what he needed to get out of it, and that one thing he needed to get out of it was that the price declaration would stand. Transworld has argued that his evidence is unreliable in this respect since Glencore's hedges were left in place when the Narmada Spirit sailed from Ukpokiti on 30 March 2008. Thus, it is said, Mr Wakefield was speculating at this point in time. But, as I see it, the position was different. The vessel did in fact return to Ukpokiti on or about 3 April, and as I have described, was prepared to wait there for some days with a view to the loading taking place. By the time the conversation of 8 April took place, the vessel had departed, and was not coming back.

48. That brings me to my assessment of the witnesses themselves. Despite the parties' respective criticisms, in my judgment, both Mr Wakefield and Mr Bechter were honest witnesses, who did not seek to put an inaccurate version of their recollection before the Court. There was however one major difference between them. Mr Wakefield is an oil trader with long experience of West African cargoes. Mr Bechter on the other hand, though apparently representing Transworld in relation to the transaction, was employed in connection with the company's Information Technology. As I have said, the evidence was that the President of Transworld (Mr Deuss) used him to conduct the transaction in question, since he did not think it appropriate for someone as senior as the President to do so. Prior to the transaction with Glencore, Mr Bechter had only been involved with two other sales of crude oil, both Ukpokiti. The reality at all times was that Mr Bechter simply acted as the medium through which communications passed to and from Mr Deuss. He accepted in cross-examination that this was not something he made apparent to people he was dealing with. Specifically, he said that he did not make it clear to Mr Wakefield that (as was put to him) he was "just the front man for Mr Deuss".
49. A significant factual issue was the extent to which Mr Wakefield was nevertheless aware of his role. His evidence was somewhat confused in this respect. He accepted in cross-examination that he would have become aware as he was negotiating the transaction that the principal at Transworld was Mr Deuss, not Mr Bechter. He accepted that Mr Bechter was not a decision-making trader on behalf of Transworld as he was for Glencore, and that he would need to refer to Mr Deuss if matters were proposed for agreement. As regards the 8 April phone conversation, he said that he was aware that Mr Bechter would go back to talk to Mr Deuss, which is why he followed up with an email the next day. He also said however that he thought he was dealing with a trader who was the designated trader at Transworld, and though it had become clearer in these proceedings that decisions had to be taken by Mr Deuss, at the time Mr Bechter did not suggest that this was a problem. In re-examination, he said he only became aware of Mr Bechter's status when the dispute emerged later. Whilst Transworld fairly submits that caution is required as regards such evidence in re-examination, it appears to me that the right course is to view Mr Wakefield's evidence in the round. Transworld submits that it was perfectly apparent to Mr Wakefield that Mr Bechter was not a person in a position to give commitments binding Transworld. There is however no suggestion that he was aware at the time that Mr Bechter was the company's IT officer. He thought that he was the designated trader. Furthermore, it is not part of Transworld's case that he in fact lacked

authority to reach agreement on behalf of the company. Taking Mr Wakefield's evidence as a whole, I am satisfied that the full extent of Mr Bechter's limited role was not apparent to him at the time of the 8 April conversation. But in any case, Glencore did in fact copy Mr Deuss with the email sent the following day.

50. In terms of contemporary documents, Mr Bechter took no note of the conversation. Mr Wakefield on the other hand was methodical about note taking, as he had to be given his role as a trader. His entry, "*Spoke to [Mr Bechter]; need to send email summarising we keep deal afloat i.e re pricing/period*", provides contemporaneous evidence of what he actually understood to have been agreed. Both parties rely on the fact that unlike some other entries, this one is not highlighted. Transworld submits that this shows that no binding commitment was entered into. Glencore submits that it shows that Mr Wakefield did not regard the conversation in resulting in a new contract or amendment. For my part I do not find the absence of highlighting determinative either way. What matters more in my view are the terms of the entry. Transworld submits that it says no more than, "I have had a chat with Mr Bechter on the phone, and need to send an email". This does not appear to me to be a proper reading of the terms of the entry. It appears to me to support Mr Wakefield's evidence that he and Mr Bechter agreed to keep the deal afloat, and specifically to keep the pricing period the same.
51. The conversation was followed by the email of 9 April. The stated subject is "26-28 March Ukpokiti Blend crude oil lifting". It "confirms" the telecon between Mr Wakefield and Mr Bechter regarding the "prospects of loading our originally scheduled 26-28 March 2008 Ukpokiti Blend crude oil lifting". It says, "We would like to confirm our commitment to load the cargo at the soonest possible time for all parties concerned at the agreed contractual pricing and our declaration dated 27th March 2008 remains unchanged". Transworld submits that the email was merely a proposal by Glencore to apply the March price to a re-scheduled delivery. It did not purport, it was submitted, to record that any such proposal had been agreed by Mr Bechter already. However I prefer Glencore's submission in this respect, namely that the email is good contemporaneous evidence, uninfluenced by any exigencies of the litigation, of the substance of the conversation the evening before. It covers the relevant points, and made it clear that the price declaration "remains unchanged". The email was copied to Mr Fox, Mr Deuss, Mr Shea, and Mr Nnonah without eliciting any comment. Whilst it is understandable that Mr Bechter who lacked expertise in such matters should not (as he put it) have "paid sufficient attention" to the reference to the pricing declaration, I agree with Glencore that it is improbable that none of the other recipients noticed the reference to the price declaration or grasped what it meant. In that regard, despite Transworld's submissions to the contrary, I consider that I am entitled to take into account that there has been no evidence from either Mr Deuss or Mr Fox.
52. What happened following these exchanges is also, in my judgment, important in reaching a conclusion. I have referred above to Mr Bechter's email of 14 April headed "T-085 - reschedule of March lift". This certainly appears to reflect an understanding that the contract was still in place but that the lifting had to be rescheduled. During this period, Glencore was seeking a buyer for the shipment, reaching agreement in principle with Morgan Stanley on 1 May 2008. As explained above, this gave rise to the sending to Mr Dumpleton of Glencore on 5 May 2008 of a draft contract drafted by Mr Fox. A new clause 18 was added to the original terms

which among other things stated that, “Reference is made to the agreement dated March 6, 2008, between buyer and seller (the “prior agreement”). The parties hereby agree that buyer’s obligation to purchase and seller’s obligation to sell under the prior agreement (and any related communications) are hereby extinguished and of no further force or effect and are replaced by buyer’s obligation to purchase and seller’s obligation to sell as set forth in this agreement”. Mr Bechter did not agree that this suggested addition was put into the contract in order to terminate the agreement of 6 March 2008, but he was not responsible for the drafting, and that is the plain import of the wording. Whilst (as Transworld has submitted) the fact that a new draft contract was sent is consistent with its case that a new contract was needed, the terms of the draft are entirely inconsistent with its case that the existing contract had already terminated. In his response of 6 May, Mr Dumpleton said that Glencore could agree to “include this wording subject to Transworld honouring your agreement referred to in my email dated 9th April 2008 that the agreed contractual pricing and our declaration dated 27th March 2008 is now in this contract”.

53. Mr Bechter said that he only “realised that we had a big problem” when he looked up the email of 9 April 2008 after receiving this email of 6 May. That may be true in his case, but it appears to me that the terms of the draft contract suggest that others in Transworld may have realised by then that Transworld had potential exposure on the basis of what was set out in the email of 9 April, and wanted Glencore to sign up to an explicit statement that the existing contract was “extinguished” and replaced by the new draft. But it is not necessary to resolve this point in reaching a decision. My overall findings are however necessarily reached in the absence of evidence from Transworld’s decision maker, Mr Deuss.
54. In the light of all the above, I express my factual conclusions as to the 8 April 2008 telephone conversation. I have taken into account the points advanced by Mr Andrew W. Baker QC in his powerful closing submissions for Transworld. As he submitted, in cross-examination Mr Wakefield did not dispute most of Mr Bechter’s account. Nevertheless, on the balance of probabilities, I accept Mr Wakefield’s evidence that the price declaration was mentioned by him in the conversation, albeit as he puts it, in the context of a one way conversation. Having observed Mr Bechter give evidence, I also accept that “Yes, okay” was the kind of response that might be expected from him, and that this was how he did respond, thereby conveying agreement to Mr Wakefield. I make it clear that I accept that Mr Bechter has, as he has maintained, no recollection of the pricing issue being raised. However, in my judgment, this is probably because he had no appreciation of the significance of the pricing declaration, and there was no reason for such a reference to make an impression on him. So far as he was concerned, Glencore agreed to the contract continuing on the same terms and conditions, which corresponded to his instructions from Mr Deuss. I am satisfied that, viewed objectively, Mr Bechter agreed in the conversation of 8 April 2008 to the deal remaining afloat with the March pricing.

Conclusions on the law

55. Those being my findings of fact, I set out my conclusions on the law. Transworld submits, and I would accept, that under an f.o.b. contract, the seller is neither entitled nor obliged to deliver, equally the buyer is neither entitled to call for, nor obliged to accept, delivery, otherwise than at the time specified in the contract. That being so, once the Narmada Spirit sailed from Ukpokiti on 30 March 2008 without having

loaded, the contract would, in Mr Baker's words, "expire unperformed". However that does not necessarily follow, and would not follow if, as Glencore submits, the parties decided to keep it alive. The parties are to be regarded, to quote Bingham J in *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 611, "as masters of their contractual fate. It is their intentions which matter and to which the Court must strive to give effect". The parties are perfectly at liberty, if they so agree, to keep their contract afloat. The question whether they have agreed to do so must be determined in the usual way: "The Court's task is to review what the parties said and did and from that material to infer whether the parties' objective intentions as expressed to each other were to enter into a mutually binding contract. The Court is not of course concerned with what the parties may subjectively have intended" (*Pagnan* at p.610). That passage was concerned with the making of a contract, but the same principle applies to the mutual affirmation of an existing one. I reject therefore Transworld's case that Glencore's claim discloses no cause of action, because it has not pleaded that a new contract was concluded.

56. The question therefore is whether the parties did mutually affirm the contract, and if so, on what terms. For the reasons set out in detail above, I am satisfied that they did so in the conversation of 8 April 2008. I am satisfied, again for the reasons set out above, that whatever his subjective intentions may have been, viewed objectively Mr Bechter agreed in the conversation of 8 April 2008 to the deal remaining afloat including the pricing period declared in March. He agreed to maintain the existing contract, not a future transaction on the same terms. Transworld has submitted that it understood that a new contract was being proposed, on the same terms and conditions as the contract, but with a new laycan and other necessary amendments. If Mr Fox's drafting in the draft contract sent on 5 May 2008 went further, it is submitted, that only reinforces the conclusion that Transworld understood the parties to be finalising the negotiation of a contract, there being none extant. The issue must be determined objectively, and I doubt that Transworld's understanding is admissible in this regard. However since the matter is raised, I should state that in the absence of evidence from either Mr Deuss or Mr Fox, I am not prepared to find that this was in fact Transworld's understanding.
57. Transworld may be right to submit that an agreement which provides for future delivery at what would on this basis be a fixed price would be an unusual one (though Mr Wakefield denied in cross examination that it was an unusual one in this instance). At the same time, from Glencore's perspective, unless the price remained the same, it was imperative that its hedging contracts were unwound. The position as to price was unambiguously spelled out in the email of 9 April, and the parties thereafter behaved as though the contract continued to subsist, which in my judgment it did on the March pricing declaration. I think that Glencore's alternative submission that the contract was varied to allow for later shipment is also right, though I would decide the issue on the basis of mutual affirmation.
58. Nor do I accept Transworld's submission that even if, viewed objectively, the parties affirmed the contract on the basis of the March pricing declaration, this could not be binding, as it would have been an agreement to agree as regards delivery time. I accept the submission of Mr Richard Southern QC for Glencore founded on Benjamin's Sale of Goods, 7th edn, para 20-029 that, "If no shipment period is specified by the contract, the period may be fixed by the terms of the buyer's shipping instructions, provided that those instructions allow the seller a reasonable time for

shipping the goods”. That distinguishes the present case from *Willis Management (Isle of Man) Ltd v Cable and Wireless Plc* [2006] 2 Lloyd’s Rep 597 relied upon by Transworld. In that case, it was the fact that the parties had not agreed the basis upon which the outstanding matter could be agreed or determined that led to the conclusion that the agreement was incomplete in an essential respect. As Lloyd LJ put it in *Pagnan* in the Court of Appeal at p.619, “...there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later”. As a matter of fact in the present case, the parties did agree new shipment dates for the end of June. It was at that point in time that they fell out over the question of the price. But by then, viewed objectively, the parties had in my view affirmed the March contract on the basis of the March pricing declaration. It is not in dispute that upon that premise, Transworld was in repudiatory breach in refusing to make the shipment. That breach was accepted by Glencore on 22 May 2008 as putting an end to the contract, and it follows that in my judgment, Glencore is entitled to succeed on the liability issue.

Art 33 of the Nigerian National Petroleum Corporation General Terms and Conditions

59. The contract of 6 March 2008 provided at clause 16 as follows [D3/58]:

OTHER TERMS AND CONDITIONS

EXCEPT AS SPECIFICALLY DETAILED ABOVE, NIGERIAN NATIONAL PETROLEUM CORPORATION’S GENERAL TERMS AND CONDITIONS OF SALE OF NIGERIAN CRUDE OIL – PART 11 OF THE CONTRACTS (LATEST EDITION) SHALL COVER THIS SALE.

60. Transworld relies on Article 33 of the Nigerian National Petroleum Corporation’s General Terms and Conditions to submit that Glencore’s claim was shut out on 5 June 2008, in other words 14 days after Glencore’s termination of the contract on 22 May 2008. Article 33 (Cessation of Seller’s Liability) provides as follows:

“Any existing claims, costs, expenses, fees or demands arising in connection with this Contract which have not been notified to SELLER with supporting documents shall not be accepted by SELLER and SELLER hereby expressly disclaims any liability for such claims, costs, expenses, fees or demands unless notice in writing with supporting documents has been delivered to SELLER in respect of such claims, costs, expenses, fees or demands prior to or within fourteen (14) days of the expiration of the Contract period or the early termination of this Contract. Upon failure of the BUYER to deliver such notice within the period stated herein, BUYER shall be deemed to have waived its rights to such claims, costs, expenses, fees or demands.”

61. The factual position as regards the promulgation of the NNPC Terms is not entirely clear, but I find as follows. The Terms are published annually. The 2007 Terms did not contain Article 33, which was introduced in the 2008 Terms. The only information before the Court from NNPC is that passed on by Mr Nnonah to the effect (as he fairly made clear in his oral evidence) that the Terms run from the beginning of the year to the end of the year, apart from in 2008 when they started on 1 March 2008 to the end of the year. He did not know when or how the 2008 Terms were published. So far as evidence of availability to the parties in this case is

concerned, Glencore's representative in Nigeria sent the 2008 Terms to Glencore in London on 26 March 2008. Mr Nnonah first saw a copy on 5 May 2008. Neither party (I find) was aware of the new edition at the time they entered into the contract on 6 March 2008.

62. The fact that the parties were unaware of it does not mean that they were not bound by the new edition of the Terms. Glencore submits that the reference to the "latest edition" in clause 16 of the contract means the latest *available* edition, and that since the 2008 Terms were unavailable to the parties when they contracted, they are not incorporated. Transworld submits that clause 16 makes clear that the current edition applies, and that publication is neither here nor there. That however entails the consequence that a party would be bound by Terms which it had no means of ascertaining. I would accept Glencore's argument to the extent that the reference to "latest edition" in clause 16 should be construed as meaning the latest edition published at the time of contracting in a form that is available to the parties, whether or not they apprise themselves of the content. The onus of proof is on Transworld in this respect, and it has not in my view made good its case on incorporation.
63. Glencore had a number of other arguments on the construction of Art.33 with which I should deal in case I am wrong in relation to incorporation. It submitted that the reference in Art.33 to "existing claims" means claims existing before the expiration or early termination of the contract in question. On that basis, it is submitted, the clause would not apply to claims based upon a repudiatory breach of contract, since such a claim only arises upon acceptance of the breach, at which point the contract terminates. Until then, it is not an "existing" claim. Transworld submits that "existing" means extant when the time bar comes down, or if that is wrong, then on any view Glencore's claim existed at the moment of its termination of the contract, which must be good enough. I prefer Glencore's construction in this respect. Giving a natural meaning to the words used in Art. 33, I do not think that a claim based upon acceptance of a repudiatory breach as terminating a contract is an "existing claim", in the sense of being a claim existing on the "early termination" of the contract. On the contrary, it is brought into being by such termination.
64. Alternatively, Glencore submits that it complied with the requirements of Art.33 in that taken in addition with earlier letters, the letter of 22 May 2008 was a sufficient "notice in writing with supporting documents" delivered to the seller within 14 days of the early termination of the contract (which on this hypothesis was 22 May). Transworld submits that the letter of 22 May 2008 brought the claim into existence, whereas Art.33 has in mind a subsequent notification. That does not seem to me to be a substantial point in this context. Of more substance is the submission that the letter was not accompanied by "supporting documents"—it is nothing to the point, it is submitted, that some or all of the supporting documents that Glencore might have produced would have been known to Transworld already. I would resolve this point by reference to the judgment of Bingham J in *The "Oltenia"* [1982] 1 Lloyd's Rep 448 which concerned a similar clause. He says at p.453, "The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh. ... This object can only be achieved if the charterers were put in possession of the factual material which they required in order to satisfy themselves whether the claims were well-founded or not". He concluded in terms equally applicable in Art. 33, that the "..."

plain effect of the present clause, in particular because of its documentary requirement, is that the claim should be presented with at least reasonable precision as to details and amounts". This has to be applied in the light of the short 14 day time limit in Art. 33 (it was 90 days in *The "Olenia"*). Not all relevant information might be available within such a time limit. In the present case, I agree with Glencore that for the purposes of the time bar, no further supporting documentation was required beyond the various communications which Transworld had already been sent. It follows that in my view, the claim was not time barred.

Damages

65. In the light of my finding that Transworld was in breach of contract, I come to the question of damages. Glencore claims the difference between the contract price and the value of the oil on the date when it ought to have been delivered. I shall come to the calculations later, but for the present it is sufficient to say that on the basis of the March price declaration, it is agreed that the contract price is US\$28,043,893. Glencore contends that the value of the oil when it ought to have been delivered (including what it submits was the appropriate premium) was US\$39,156,519, which less the contract price, gives a damages calculation of US\$11,112,626.
66. Transworld's case on quantum was first, and primarily, that damages should be assessed at the date when a contract for delivery of Ukpokiti crude on 25 June 2008 would typically have been entered into, which on the evidence is between 15 and 40 days ahead of the f.o.b. delivery date. That gives a figure (including what it submits was the appropriate premium) for recoverable loss of US\$7,562,797. Second, and alternatively, it submits that when on 22 May 2008 or thereabouts Glencore closed out its hedges, it thereby acted to mitigate its loss, and recoverable damages must reflect its reduced hedging loss. On that basis, recoverable damages are US\$8,516,446. Third, and alternatively that, if its second argument is wrong, Glencore should nevertheless in mitigation of its loss have entered into futures contracts on 22 May 2008 in order to fix its base loss at its then value. According to the agreed calculations, the second and third arguments result in the same amount, which (on the basis of Transworld's case as to the appropriate premium) is US\$8,516,446.
67. In terms of the expert evidence, I heard from Mr Michael Church for Glencore, and Ms Meg Annesley for Transworld. Both are well known in the field and their evidence was of assistance. In the event however, the scope of the issues requiring their input was limited, and neither party has invited me to make extensive findings, even where their evidence differs. The experts were agreed that it was very unlikely that there would have been an Ukpokiti cargo available for Glencore to buy to replace the Transworld cargo. In terms of the correct legal approach, the parties agree (though their precise reasoning differs) that there was no available market for Ukpokiti crude within the compass of s. 51(3) Sale of Goods Act 1979. It is common ground that the measure of damages is to be assessed under s. 51(2), which provides that where a seller wrongfully refuses to deliver the goods to the buyer, 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". As regards the value of the goods for these purposes, I agree with Glencore that in a case of anticipatory repudiatory breach such as the present, the relevant date to take (subject to the rules on mitigation) is the due date for delivery, alternatively the date when the goods ought reasonably to have been delivered, not the date of the repudiation or the buyer's

acceptance of it: see *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] A.C. 91. That was a case on a provision equivalent to s. 51(3), but Glencore submits, and again I agree, that the same principle applies, but because there is not a ready market, the court has to look at the next best evidence. The parties differ however as to how these principles apply in the present case. Glencore submits in this respect that one can still use dated Brent quotations as at delivery time, because that is the price at which oil typically changes hands. Transworld submits (its primary case) that a late June dated Brent quotation is not a price at which a late June shipment could have been sold in late June. To achieve that price would, it is said, require the contract to be concluded between 15 to 45 days ahead of the intended shipment, and this accordingly is the correct time to compute market value.

The appropriate premium

68. It is convenient to begin with the appropriate premium, that is to say the premium which Ukpokiti crude would command to dated Brent. Here, there was a difference of approach between the experts which I must resolve. Mr Church used the premium commanded by other similar light, sweet Nigerian crudes as comparables. However since Ukpokiti is shipped in smaller quantities than these crudes necessitating a two port loading, it results in higher freight costs, requiring a downward adjustment in the premium. In the event, Glencore was content to take the bottom of Mr Church's range, resulting in a premium of US\$3.40 per barrel. His approach is consistent with the premium applicable to the sale by Glencore to BP in March 2008, and Glencore to Morgan Stanley in May 2008.
69. Ms Annesley on the other hand, used a weighted average calculation to arrive at the premium. Her original report took five transactions for these purposes, including two between Transworld and Vitol in May 2008. (As explained above, these were the sales which were substituted for the Glencore transaction.) However prior to service of her report, the Vitol data and consequently the final numbers were all redacted. On 1 December 2009, Transworld applied to Christopher Clarke J for permission to rely at trial on an unredacted copy of the report on terms that the redacted content was not communicated to Glencore. That application was refused. There followed a second report by Ms Annesley, in which she observes that for "reasons to which I am not privy, the pricing information contained within the two contracts between Transworld and Vitol S.A. ... will not be available at trial". The same calculation is then made with the two Vitol transactions omitted. On the basis of the remaining three transactions (Transworld/Glencore, Glencore/BP and Glencore/Morgan Stanley) Ms Annesley expressed the view that the appropriate premium was US\$2.85 per barrel, and this was Transworld's case at trial. The consequence, as was put to her in cross-examination, was that she had proposed two different figures as the appropriate premium, the first of which was not disclosed. It does not appear to me with respect that this is a credible approach. Both figures cannot be right. For that reason, and also because there are in my view too few transactions to make a weighted average calculation reliable, I prefer the evidence of Mr Church in this regard. I shall therefore adopt US\$3.40 as the applicable premium per barrel.

Glencore's case

70. As I have said, Glencore claims the difference between the contract price and the value of the oil on the date when it ought to have been delivered. The contract price

is agreed to be the average of dated Brent between 27 March 2008 to 2 April 2008 in accordance with the price declaration, which is US\$101.433 per barrel plus the agreed premium US\$2.05, which comes to US\$28,043,893 (US\$103.483 times the contractual quantity of 271,000 barrels). As for the value of the oil, Glencore says that it ought to have been delivered within the agreed loading range 25 to 27 June 2008, so that the bill of lading would probably have been issued on 26 June 2008. On that basis the value of the oil at that time would most probably have been the average of the 5 Platts quotations following the bill of lading, this (it submits) being a typical pricing clause in the trade (it was the formula used in the sale by Glencore to BP and the sale by Glencore to Morgan Stanley). There is no issue over the average dated Brent price for those dates, being US\$141.089 per barrel. On Glencore's case this gives a market value of US\$141.089 plus a premium of US\$3.40, which comes to US\$39,156,519 (US\$144.489 times the contractual quantity of 271,000 barrels). Less the contract price, that gives a damages calculation of US\$11,112,626, which is what Glencore claims.

Transworld's primary case

71. Transworld's pleaded case is that the measure of damages is the difference between the value of a quantity of 271,000 barrels of Ukpokiti blend crude oil shipped f.o.b. the Ukpokiti terminal on or about 26 June, and the price (Defence paragraph 26). On this basis, the only difference between the parties is whether you measure the value of the oil on a single day, or on the five day basis argued for by Glencore. In case it should remain in dispute, it appears to me that the evidence supports the view that crude oil is not typically bought and sold on the basis of a single day's Platts dated Brent price, but is typically priced over an average of five day's quotations, in the case of West African crude most usually over the five business days following the date of the bill of lading. In so far as there is any difference between them, I prefer the view of Mr Church to that of Ms Annesley on this point.
72. In fact, at trial Transworld advanced a different case, which is that what Glencore lost on 22 May 2008 was a late June cargo at the March price, i.e. the right to take delivery of 271,000 barrels of Ukpokiti in late June for the declared March price. To estimate Glencore's loss directly and naturally arising in the ordinary course of events, therefore, requires the court to identify what a trader such as Glencore would do, in the ordinary course of its business, with a right to take delivery of 271,000 barrels of Ukpokiti in late June, for the March price. It is submitted that the evidence shows that what a trader such as Glencore would do is seek to conclude a contract to sell 15 to 45 days prior to the scheduled delivery, on a pricing formula to be negotiated with the buyer, but very likely pricing around the time of shipment, translated into a fixed price through the Brent swaps market. Ms Annesley's evidence is that such Brent swaps represent the current value of Platts dated Brent quotations in future periods. So on the basis of a 15 to 45 day lead time for delivery of Nigerian crudes, the dated Brent portion of an f.o.b. contract, it is submitted, can be assessed by reference to the swap prices prevailing 15 to 45 days ahead of the expected loading/pricing period. Therefore, the Platts dated Brent swap price data on a given date is inherently a measure, or means for measuring, the base value, i.e. the dated Brent element of the value, of Nigerian crude shipped (or to be shipped) 15 to 45 days later. Since the question in this case, it is submitted, is the value of a late June shipment of Ukpokiti crude, the inherent measure, or means of measuring, the base value is Platts dated Brent swaps price data in late May. Ms Annesley calculates that

this results in a base value for the cargo not delivered to Glencore of US\$ 128.54 per barrel—and that is Transworld’s primary case on quantum.

73. In summary therefore, Transworld’s case is that the market price of the oil in late June 2008 is to be assessed by reference to the dated Brent swaps price prevailing some weeks earlier, that being the time when a contract for delivery of a cargo of Ukpokiti crude in late June would typically have been made. To assess value by reference to the price of dated Brent at the time of delivery is impermissible, it is submitted, because a sale at that time would be treated as a distressed sale, and so not reflective of market value. The swaps price formula, it is submitted, properly reflects how a trader like Glencore would in fact have executed such a transaction.
74. In my judgment, there are a number of difficulties inherent in this approach. First, it appears to me to be wrong in principle to adopt for the purposes of damages a time equivalent to the time of the making of the contract, rather than its performance. Second, the formula for which Transworld argues is impossible to apply on a basis of any certainty. On the assumption, as the evidence shows, that contracts for the delivery of Nigerian crude are typically negotiated some 15 to 45 days prior to delivery, the question arises as to which of these days or which day to take in order to calculate market price. The solution adopted by Ms Annsley is to take an average of all the May dated Brent swaps prices, but there does not seem to be any particular merit in that as opposed to some other approach. Whatever range is adopted is essentially arbitrary. Finally, her evidence appeared to suggest that it is in principle impossible to value a cargo of oil in late June, and only possible to value a cargo to be loaded in late June. I prefer the evidence of Mr Church in this respect. Notwithstanding that the price of dated Brent is (as is common ground) by its nature a price for future delivery, it provides the Court with a ready means to measure the market price of the oil in question at the time of non-delivery. As Glencore puts it, correctly in my opinion, if on 26 June 2008 one wanted to buy a cargo of Brent, that is the price one would have to pay on that day, albeit with a future delivery date. The swaps prices prevailing weeks previously are essentially predictive, and do not (in my view) provide a basis for valuing the oil at the time of non-delivery. By then, the price may have gone up, or it may have gone down. I reject Transworld’s case in this regard. It follows that, subject to mitigation, I accept that Glencore’s claim is correctly calculated at US\$11,112,626.

Transworld’s first alternative case

75. Transworld’s first alternative case is in essence that Glencore’s recoverable loss has to reflect the price at which it closed out its hedging contracts. The facts in this respect are not in dispute. In the afternoon of 22 May 2008, that is to say the same day upon which Glencore accepted Transworld’s breach as putting an end to the contract, it purchased futures in 271 lots (matching the 271 lots originally sold in March) at an average price of US\$132.76 per barrel. Glencore thereby closed out the hedges it had put in place in March (as described earlier in this judgment). This resulted in a net loss to Glencore on its hedging activities in connection with the contract of US\$8,099,960. As it has transpired, that sum was not increased by liability incurred to Morgan Stanley, but Glencore lost in addition its turn on the deal, namely the difference in the premium on the buy and sell price. I need not go into the figures further, because the parties agree that on the basis of Transworld’s first alternative case, quantum is to be quantified at US\$8,665,496. Transworld’s case is straight

forward. Glencore, it is submitted, was bound to take proper steps to mitigate its loss. It did so by closing out the hedges, and thereby reduced its loss to US\$8,665,496. To permit Glencore to recover US\$11,112,626 by reference to the market price at the time of the delivery would be to give it a windfall of some US\$2.4m.

76. In support of its contentions, Transworld cites from the report of Mr Church (Glencore's expert) in this regard:

“... Glencore found themselves in the unenviable position of having sold 271,000 barrels of futures as a hedge against this cargo which now had been taken away from them. The futures position was no longer a hedge. It had become what is often called “an outright position”. They were short these barrels at a price considerably below the then current market price, with little prospect of it going back down. Sensibly, ... Glencore immediately reversed the position by buying back 271,000 barrels of July 2008 futures, but by doing so, established a loss of just over \$8 million.”

77. Having taken that action in mitigation, Transworld submits that Glencore must give credit for the losses it would have suffered on its hedges had they been closed out against the physical delivery of the cargo, which they would have been if the contract had been performed. Glencore on the other hand submits that this argument is based on the flawed premise that the closing of the hedges on 22 May 2008 was a step taken in mitigation of Glencore's loss. The only act in mitigation, it is said, which was open to Glencore was the purchase of a substitute physical cargo and it is common ground that this was not possible. The hedges it is submitted are independent transactions entered into by Glencore prior to Transworld's repudiatory breach in order to cover its exposure to the price risk created by the discrepancy between its sale and its purchase contracts. They are *res inter alios acta*. Transworld would not be entitled to the benefit of Glencore's hedges insofar as they lessened any loss arising out of Transworld's wrongdoing: if delayed delivery in a falling market meant a loss on the physical sale, Transworld would not be entitled to the benefit of Glencore's concomitant profit on its hedges. The hedges, like an insurance policy, should be ignored. A fortiori, it is submitted, Transworld cannot take the benefit of Glencore's hedges when it has merely reduced its exposure to a paper loss.
78. It appears to me that Glencore's submission has to be seen against the rest of the evidence in the case. Hedging has been presented as an essential part of its business, and the fact that the hedges were kept in place following the telephone conversation of 8 April 2008 has been relied upon as providing significant support to Glencore's case that the contract was mutually affirmed. The fact that the hedges were closed out on 22 May 2008 when it became clear that Transworld would not deliver is entirely consistent with that case. However it appears to me that its argument on mitigation is inconsistent. In that context, it is submitted that the Court has to ignore the hedging contracts. So far as the law is concerned, in the context of contracts for the sale of oil, it has been said that: “If a seller repudiates a contract before the time for performance arrives the buyer on existing authority is entitled to accept that anticipatory repudiation, treat the contract as at an end and claim damages. The basic measure of damages is such sum as will put the buyer in the same position as if the seller had duly performed the contract. The prima facie measure is, therefore, the difference between the contract price and the market price at the time of contractual performance. The seller is, however, only liable for such part of the buyer's loss as is

properly to be regarded as caused by the seller's breach. If the buyer fails to take reasonable steps to mitigate his loss consequent on the seller's breach, he is debarred from claiming any part of the damage which is due to his neglect to take such steps. The seller's breach is not causative of that additional loss and therefore not recoverable" (*Kaines (UK) Limited v Osterreichische Warrenhandelsgesellschaft m.b.H.* [1993] 2 Lloyds Rep 1 at 10, CA, per Bingham LJ). Applying that approach, it is, in my view, plain on the evidence in this case that, having accepted Transworld's breach as bringing the contract to an end, Glencore not only did but was required to mitigate its loss by closing out its hedges. To have allowed them to run on would have been to speculate in the movement of the price of oil, which Glencore has asserted is no part of its business for present purposes. By doing so, in the words of its own expert, it established its loss. I agree with Transworld that the position as regards the hedges is not *res inter alios acta*, nor is it equivalent to insurance. Hedging is on the evidence an integral part of the business by which Glencore entered into this contract for the purchase of oil, and since the closing out on early termination established a lower loss than would otherwise have been incurred, that has to be taken into account when determining recoverable loss. To put it another way, if the seller had duly performed the contract Glencore would have closed out its hedges at the then current prices, and there is no reason to put it in a better position in the case of non-performance.

Transworld's second alternative case

79. On the basis of the above finding, Transworld's second alternative case does not arise. This case proceeded on the premise that if the closing out of Glencore's hedges on 22 May 2008 has to be ignored, Glencore should have nevertheless have mitigated its loss by entering into appropriate hedging transactions in the paper market. Whilst that would have fixed Glencore's base loss at its then value, it would, as Glencore pointed out, have exposed it to additional further potential liabilities in circumstances in which Transworld was denying liability. It would also have exposed Glencore to the risk of Transworld's insolvency. On the facts of this case, I am satisfied that Glencore was not obliged to take such action to mitigate its loss. But, as I have held, the question does not arise because (in my view) the actual closing out of Glencore's hedges on 22 May 2008 has to be brought into account in determining its recoverable loss.

Conclusion

80. It follows that Glencore is entitled to judgment in the sum of US\$8,665,496. I am most grateful to both parties for their assistance.