**Appeal Ref: CA-2024-001951**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE BUSINESS AND PROPERTY**
**COURTS OF ENGLAND AND WALES (LONDON) CIRCUIT COMMERCIAL COURT (KBD)**
**(His Honour Judge Pearce sitting as a Judge of the High Court)**

**BETWEEN:**

**KSY JUICE BLENDS UK LIMITED**

**Claimant/Appellant**

**-and-**

**CITRUSUCO GMBH**

**Defendant/Respondent**

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# APPELLANT'S SKELETON ARGUMENT

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*References to the Judgment are in the following format Judgment/para.*

## A. INTRODUCTION

1. This case concerns a contract between the parties dated 18 May 2018, with reference No: KSYCITROSUCO18.05.2018.44/2018, being a three-year contract for the Appellant to sell and the Respondent to buy Orange Juice Pulp Wash ("**wesos**" or "**Greek wesos**" to reflect the production location) over the years 2019, 2020 and 2021 (the "**2018 Contract**") [Core/190-194]. Trial took place over four days in March 2024. Judgment was handed down on 9 August 2024 (the "**Judgment**") [Core/79-140].

2. The dispute is whether (a) the 2018 Contract provided for the sale of 3600MT of wesos with 1200MT to be delivered each year or (b) whether it provided for the sale of 1200MT of wesos with 400MT to be delivered each year plus an unenforceable "agreement to agree" to purchase a further 800 MT per year if the parties could agree a price by December the previous year.

3. The Learned Judge held that the 2018 Contract was an unenforceable agreement to agree beyond 400 MT of wesos per year and/or that there was no agreed price beyond 400 MT per

year: See Judgment/145(a)&(b) [Core/120]. The Appellant contends that he was wrong to do so. In particular:

a. **Ground 1**: The Learned Judge erred in that he failed to find:

i. That on a true construction of the 2018 Contract or by way of an implied term (implied by section 8(2) of the Sale of Goods Act 1979 or otherwise) the parties agreed that a reasonable, or a market, price was to be paid in relation to the 800 MT per year; or

ii. That on a true construction of the 2018 Contract or by way of an implied term, the parties agreed to exercise reasonable endeavours to agree the number of free trucks (and therefore the price) and/or the price in relation to the 800 MT per year.

b. **Ground 2**: In doing so the Learned Judge erred in (*inter alia*) finding that such terms would be too uncertain to be enforceable and/or inconsistent with the 2018 Contract, in particular the phrase "open price to be fixed" at Clause 5 [Core/191].

4. In summary, the Judge's conclusion is inconsistent with (1) authority (including Court of Appeal authority in *Mamidoil v Okta* [2001] 2 Lloyd's Rep 76), (2) the express provisions of the 2018 Contract and its commercial purpose, the Judge's own findings - (a) that the 2018 Contract evinced an intention to deal with the full quantity of 3600 MT of wesos (1200 MT per year) rather than providing for the sale of 400 MT per year with an "optional" or "target" amount of a further 800 MT per year, and (b) about the purpose and meaning of the "free trucks" mechanism in the context of the 2018 Contract - and (3) the Judge's findings and/or the evidence and/or the uncontested evidence and/or common ground relating to the market and/or reasonable price of wesos and/or how the price of wesos is ascertained.

5. The Judge should have found that on a true construction of the 2018 Contract or by way of an implied term, the parties had agreed (1) that a reasonable price, (2) or market price, was to be paid in relation to the 800 MT per year, alternatively (3) to exercise reasonable endeavours to agree the number of free trucks and/or price in relation to the 800 MT per year. The Judge should then have gone on to make findings as to what the reasonable or market price (as

appropriate) was at the relevant times, or (as appropriate) what price the aforesaid reasonable endeavours would have resulted in at the relevant times.

6. The Learned Judge granted permission to appeal on Grounds 1 and 2 above. This Skeleton Argument is structured as follows.

B. THE 2018 CONTRACT
C. THE DISPUTE IN SUMMARY
D. THE LAW
E. THE JUDGMENT
F. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE
G. RESPONSE TO SPECIFIC POINTS MADE IN THE JUDGMENT
H. CONCLUSION

## B. THE 2018 CONTRACT

7. The key provisions of the Contract are as follows:

| | |
|---|---|
| *"3. Price* | *Invoicing price is 1.600euro/mt for 60 brix*<br>*Price adjustable according to brix value +- 5 brix*<br>*Free trucks will be offered from the seller according to the agreed volume & price of each year.*<br>*Calculation basis for the 1.200mt fixed is 1.350 euro/mt which corresponds to the 400mt/year 2019-2020-2021* |
| *4. Place of delivery* | [detailed provisions are included] |
| *5. Delivery period:* | *1.200MT per each year*<br>*Deliveries to start January to December with the following split:*<br>*400mt fixed at 1.350euro/mt – invoicing price is 1600euro/mt*<br>*Difference of price in free trucks*<br>*800mt at open price to be fixed latest by December of the previous year*<br>*Difference of price in free trucks" (emphasis added).* |
| *6. Quality:* | *As per approved sample KSY 3599B & KSY 3599C and as per previous deliveries*<br><br>*Brix (refr) min 50*<br>*Ratio 12-22*<br>*Acidity 2, 3-5,0*<br>*Pulp max 5* |

*10. Quantity 3600mt"*

## C. THE DISPUTE IN SUMMARY

8. The 2018 Contract is a contract for the sale and purchase of wesos. Wesos can be produced in the orange juice production process by subjecting orange pulp (the residue left when producing orange juice) to a water extraction process (Judgment/5) [Core/81]. Contracts for wesos are normally concluded before production to allow for planning (Judgment/51) [Core/93]. Orange juice (and therefore wesos) is produced seasonally. In Greece peak production is December to March each year (Judgment/7) [Core/82]. Wesos has a limited shelf life of 12 months (Judgment/7) [Core/82].

9. The 2018 Contract was negotiated by Mr Kaden for the Appellant and Mr Lansbergen for the Respondent (Judgment/2&28) [Core/81 & Core/88]. Mr Lansbergen left the Respondent in the summer of 2018 (Judgment/65) [Core/99]. The people who took over from him considered the 2018 Contract to be a bad one (Judgment/33) [Core/89]. Further, the Respondent lost a contract it had with Döhler which the wesos from the Appellant had been intended for (Judgment/33&36) [Core/89]. As a result the Respondent did not want to purchase wesos from the Appellant.

10. It is common ground that the Appellant was obliged to sell and the Respondent was obliged to buy 400 MT per year delivered over 3 years (2019, 2020, 2021) at 1350 EURO/MT to be invoiced at 1,600 EURO/MT for 60 brix[1] with "free trucks" (i.e. free wesos) to be provided to bring the effective price down to 1350 EURO/MT. The dispute is whether the 2018 Contract contains an unenforceable "agreement to agree" insofar as the 800 MT per year was concerned.

11. Though the argument was put in a number of different ways, at the heart of the Appellant's case on the relevant issue is the contention that the contract is a sale of 3600 MT wesos at 1350 EURO per MT insofar as 400 MT per year is concerned and at a reasonable (or market) price "fixed" in December the year before deliveries are due to take place insofar as the 800 MT per year is concerned.[2]

[1] Brix is a measure of the amount of dissolved solids in a liquid via its specific gravity, and is used especially to measure dissolved sugar. "Price per brix unit" is commonly used in the orange juice business. See Judgment/8 [Core/82].

[2] There was also an argument relying on the invoice price as a "fall-back" but that is not pursued on appeal.

12. The Appellant contends that this is the case either on a true construction of the 2018 Contract (essentially "fix" when read in the context of the 2018 Contract as a whole), or by way of an implied term that a reasonable (or market) price be paid (implied by s 8(2) SOGA or otherwise) (POC/11-15) [Core/150-153]. These implied terms are related because as stated in Benjamin's Sale of Goods (12th ed) (in the context of s 8(2) SOGA[3]) at [2-047] "*what is a reasonable price is a question of fact dependent on the circumstances of each particular case*" but "*the reasonable price of goods for the purpose of this subsection is usually ascertained by reference to the current market price at the time and place of delivery*" though that is not necessarily "*the sole or conclusive*" test.[4] The Appellant's further alternative case - that there was an implied term to exercise reasonable endeavours to agree the number of free trucks (and therefore the price) -essentially comes to the same conclusion albeit via a different implied term.

13. As stated, the Respondent argued that the 2018 Contract is an agreement to agree insofar as the 800 MT per year was concerned.

14. The Respondent's pleaded case was that the 800MT per year was an "optional quantity" an "optional additional quantity" or "optional volumes" (AD&CC/7(2), 9, 10, [Core/162] 13, [Core/163] 14, [Core/165] 15, [Core/166] 16, [Core/167] 19, [Core 168] 22 [Core/169] & 38 [Core/174]) in relation to which there was no "crystallised" obligation to purchase unless and until the price was agreed (AD&CC/11, [Core/163] 14(6) [Core/166] & 19(2) [Core/168]) such that agreement on price was "a condition precedent of any obligation to purchase the additional" 800 MT per year (D&CC/10 [Core/184]).[5] This argument was (rightly) rejected by the Judge (as explained further below). Simply put, the wording of the 2018 Contract does not support a conclusion that the 800 MT per year was optional as the Learned Judge (rightly) accepted (Judgment/80-82 [Core/102-103], concluding "*I am satisfied that I should treat the contract as evincing an intention to deal in the full quantity*").

[3] The same is true whatever the source of the implied term. S. 8(2) SOGA simply reflects the most likely implied term in the context of a sale of goods when no express price is identified but the parties intend (objectively assessed) the contract to have legal effect.
[4] The Appellant says the same is true when a reasonable price for the sale of goods is implied outside of s 8(2) SOGA.
[5] This is also why the Respondent relied on a pre-contractual email referring to the 1200MT per year being a "target"; the Learned Judge rightly rejected this argument: See Judgment/63 [Core/98], Judgment/68-69 [Core/99] Judgment/80-82 [Core/102-103].

15. In its skeleton argument for trial the Respondent further argued that a term requiring it to pay a reasonable or market price would in any event be too uncertain in circumstances where there are no adequate objective criteria for determining the same (Judgment/120-126) [Core/114-115]. This was not part of the Respondent's pleaded case (and is inconsistent with some of the expert issues that were agreed between the parties).[6] It is (essentially) this argument that was (wrongly) accepted by the Judge as explained further below.

16. As to what that reasonable (or market) price is, the Appellant pleaded figures in its Particulars of Claim ("POC") (POC/32,33& 34 [Core/156-157]). Further figures were put forward in an Appendix to the Appellant's skeleton argument for trial to reflect disclosure provided and the expert evidence / agreement reached between the experts (there were expert issues relevant to price as explained below). The Respondent did the same (without prejudice to its primary position that the 2018 Contract was an unenforceable agreement to agree insofar as the 800 MT per year was concerned). Further submissions on price were made in oral closing submissions [Supp/185-234] (there were no written closing submissions).

17. The expert issues (which were agreed between the parties and approved by the Court)[7] included the following:

    a. What was the market price for orange pulp wash (1) at or around the time the parties entered into the May 2018 Contract, (2) in December 2018, (3) in 2019, (4) in 2020 and (5) in 2021 and how was that market value calculated/ what is it based on?

    b. Is there a correlation between the price of orange juice concentrate and orange pulp wash, and if so, what is the correlation?

    c. How is a reasonable price/ market price for orange pulp wash calculated?

[6] The only reference to certainty is at paragraph 15(3) of the AD&CC [Core/167] which was a response to the Appellant's alternative case that the parties were under an obligation to exercise reasonable endeavours to agree a price. In any event, even in that context, the alleged uncertainty is said to arise out of the fact that the price is to be agreed rather than being an allegation that a provision for a reasonable or market price is inherently too uncertain to be enforceable.

[7] See order of Philip Marshall QC sitting as a Judge of the High Court dated 8 April 2022 at [10(3)] [Supp/236-237] as amended by an order of Henshaw J dated 8 June 2023 at [1] [Supp/240].

18. As explained below there was significant common ground between the experts on these matters. They agreed that there was a correlation between the wesos price and the price for FCOJ, were able to agree market prices at various times between 2018 and 2021 and agreed on the factors relevant to the determination of the price (Judgment/47,[Core/92] Judgment/50, [Core /93] Judgment/98, [Core/107] Judgment/124, Judgment/125 [Core/115] & Judgment/144 [Core/120]).

19. Though the Learned Judge decided that the 2018 Contract was an unenforceable agreement to agree in relation to the 800 MT per year he went on to say that, if that had not been the case, the Appellant would have been entitled to damages (save in relation to the 2021 deliveries) (see Judgment/140 [Core/119] Judgment/144 [Core/120] & Judgment/145(d) and (f) [Core/121]).

## D. THE LAW

20. The principles applicable to the interpretation of contracts are well settled and should be common ground. The aim is to ascertain the intention of the parties, objectively assessed in the light of (a) the natural and ordinary meaning of the words used, (b) any other relevant provisions of the contract, (c) the overall purpose of the clause and the contract, (d) the facts and circumstances known or assumed by the parties at the time that the contract was made, and (e) commercial common sense, but disregarding subjective evidence of any party's intentions. See here:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words…, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith…"* (see *Arnold v Britton* [2015] AC 1619 at [15] per Lord Neuberger of Abbotsbury PSC, with whom Lord Sumption and Lord Hughes JJSC agreed)
>
> "*… Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise … This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its*

> *commercial consequences are investigated: … To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each*." (see *Wood v Capita* [2017] AC 1173 at [11]-[12] per Lord Hodge)

21. Further, in relation to words with a special meaning:

> "*[a]lthough a contract must normally be construed in accord with the ordinary meaning of the expressions contained in it, by considering the circumstances and situation of the parties at the time, and the subject matter of the agreement, the court may be enabled to ascertain a special meaning placed upon the words… In the case where the parties have attached a special meaning to certain words or phrases in their contract, i.e. they used a "private dictionary", extrinsic evidence is admissible to show that the parties did attach a particular meaning to the words used, even if that evidence is derived from pre-contractual negotiations*"
> (Chitty on Contracts, 35th edition, at [16-068] and cases cited, including *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69)

22. As to implied terms, the general principles are as follows:[8]

a. Terms are implied to give effect to the intention of the parties to the contract (objectively assessed) considering the express terms of the contract, commercial common sense and the facts known to the parties at the time of entry into the contract;

b. The test is necessity not reasonableness, though not "absolute necessity" but rather whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term in order to "make the contract work";

c. The implied term must also be capable of clear expression;

d. It must not be contradicted by the express terms of the contract; and

e. An entire agreement clause does not generally affect or prevent the implication of terms as a matter of fact.

[8] See e.g. *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] A.C. 742 at [15]-[31] per Lord Neuberger and *J N Hipwell & Son v Mrs Clare Szurek* [2018] EWCA Civ 674 per Hildyard J (with whom Gross LJ agreed) at [27].

23. Turning then to price in particular, as stated in the Judgment/52 [Core/94], the starting point is the express terms of the contract. Section 8(1) of the Sale of Goods Act 1979 provides, *"[t]he price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties*."

24. If the contract is silent on the price, the buyer is obliged to pay a reasonable price (see section 8(2) of the 1979 Act). What is a reasonable price is a question of fact dependent on the circumstances of each case. See Benjamin's Sale of Goods, [2-047]:

> *"Section 8(2) of the Act states that where the price is not determined as mentioned in s.8(1) the buyer must pay a reasonable price, and what is a reasonable price is a question of fact dependent on the circumstances of each particular case. This was also the rule at common law, where it was ultimately settled that the principle applied to executory agreements as well as to executed sales.*
> *The reasonable price of goods for the purpose of this subsection is usually ascertained by reference to the current market price at the time and place of delivery… But the market price may not be the sole or conclusive test…"*

25. As stated in the Judgment, the more difficult situation arises when the contract leaves the price to be determined or agreed later. The question is then whether the contract is (or contains) an "agreement to agree" which us unenforceable (Judgment/53 [Core/94] and cases cited).

26. The fact that the contract states that price is to be "fixed", "agreed" or "determined" does not necessarily lead to that conclusion. As the Courts lean in favour of giving effect to the parties' bargains it may be possible to imply a term that a reasonable or fair price be paid. The applicable principles are set out in two key decisions, namely *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyd's Rep 765 (per Rix LJ) and *BJ Aviation Ltd v Pool Aviation Ltd* [2002] 2 P&CR 257 (per Chadwick LJ). The relevant paragraphs are quoted in full in the Judgment (Judgment/54 [Core/94] & Judgment/55 [Core/96]) and are set out below for ease of reference.

27. In *Mamidoil* Rix LJ stated as follows (emphasis added):

> *"69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:*
> *(i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:*

*(ii) Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".*
*(iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.*
***(iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out****.*
*(v) Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.*
***(vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest****.*
*(vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.*
***(viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable.***
***(ix) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in s. 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in s. 15(1) of the Supply of Goods and Services Act 1982).***
*(x) The presence of an arbitration clause may assist the Courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."*

28. In *BJ Aviation Ltd* Chadwick LJ set out five principles at [19]-[24] including the following, which is relevant to this case (emphasis added):

> *"23. Fourthly,* ***where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price;*** *or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979* . ***But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the***

***conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness****."*

29. Therefore, by way of example (each case must of course be determined on its own facts):

a. In *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1 the parties entered into a contract for the supply of petrol "*at a price to be agreed by the parties in writing and from time to time*" and the Court held that it was an implied term of the contract that the price to be paid for the petrol should be a reasonable price;

b. In *Beer v Bowden* [1981] 1 W.L.R. 522, where a lease was granted at a fixed rent for the first five years of a 14-year term and thereafter at a rent to be agreed, it was implied that in the absence of agreement the rent would be the fair market rent, excluding the value of tenant's improvements;

c. In *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 which also concerned a rent review clause (rent "as shall have been agreed between the lessor and the lessee") the Court of Appeal held that the correct implied term in that case was for a reasonable rather than market rent (see in particular pp. 519D, 521E);

d. In *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep. 205 PC at 210, col 1[9] a price was to be renegotiated after five years of 15-year supply contract the Privy Council held "*it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties*". The Court also relied on (a) provisions of the contract "*indicating that the agreement was not confined to the first five years… What other reason could there be for making such elaborate provisions, emphasizing its long-term nature*", (b) the parties' intention to reflect the effects of changes in the costs of producing and supplying coal set out in a recital to the agreement and also clause 9.1 to it (quoted at p. 207, col 2 of the judgment), and (c) the fact that there was an arbitration clause in the agreement in question.

[9] See in full section headed "The uncertainty question" at page 209, col 2 – 210, col 2

30. As stated by Lord Wilberforce in *Cudgen Ruttle (No. 2) Pty Ltd v Chalk* [1975] AC 520 at page 536 F-G

> *"[t]heir Lordships consider that, in modern times, the courts are readier to find an obligation which can be enforced, even though apparent certainty may be lacking as regards some term such as the price, provided that some means or standard by which that term can be fixed can be found.*"

31. In summary, "bare agreements to agree"[10] are not enforceable essentially because there are no objective criteria against which to judge what the parties would have agreed.[11] In a bare agreement to agree parties are e.g. under no obligation to act reasonably or fairly. Instead "*either is to remain free to agree or disagree about that matter as his own perceived interest dictates*" (the phrase used by Chadwick LJ in *BJ Aviation Ltd v Pool Aviation Ltd* at [23] (quoted above[12]). In such cases the contract contemplates (on a true construction) that there may be no agreement at all on the relevant matter. As stated by Cartwright, *The Formation and Variation of Contracts* (3d ed) at [3-16] and [3-17]:

> *"… the courts have rejected the notion of a legally enforceable duty to negotiate on the basis that it would be uncertain. The courts cannot themselves complete the contract for the parties because whether there would have been an agreement at all, and (if so) what terms would have been agreed, depends upon the parties themselves, and each party is free to negotiate in his own interests without being subject to an overriding obligation to negotiate fairly, or in good faith, or to seek to come to an agreement".*
>
> However, where "*the parties have agreed on a term which contains (expressly or impliedly) an objective standard for its determination, the courts will generally be able to give effect to that standard so as to complete the contract*…"[13]

32. The <u>uncertainty</u> in a bare agreement to agree comes from the fact that each party is free to agree or disagree as his own perceived interest dictates. If that is <u>not</u> the case on a true construction of the contract, it may well be (and frequently is[14]) appropriate to imply a term that a reasonable or market price be paid. The natural or ordinary inference, if the parties do intend for a contract for the sale of goods (or the relevant part of the contract) to have legal

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[10] As Lewison puts it in *The Interpretation of Contracts* (8th ed) heading before [8.111]
[11] See e.g. Cartwright at [3-16] & [3-17], Lewison at [8.127]-[8.130] and Chitty at [4-174] *"[t]he result of such a provision may be to make the agreement so uncertain that it cannot be enforced*"
[12] and in Lewison at [6.163] and [8.129]
[13] Cartwright, at [3-17]. See also the leading cases of *BJ Aviation* at [23] and *Mamidoil v Okta* at [69], both referred to and quoted below.
[14] See Lewison at [6.163] "*Where a concluded contract does not specify the price to be paid for the benefits conferred by the contract, the court will* ***often*** *imply a term that the price is to be a reasonable price"* (emphasis added) and goes on to consider *BJ Aviation.*

effect, is that the price is to be a reasonable price (unless the parties, objectively assessed, agreed some other measure, expressly or implicitly). That this is the natural or most likely inference (in the absence of an indication to the contrary) is inherent in SOGA s 8(2) and is reflected in the statements made in the *Mamidoil* and *BJ Aviation* quoted above.

33. Further, "reasonable" is a sufficiently certain objective standard certainly when it comes to identifying a price in the context of a sale of goods. That "reasonable price" is a sufficient certain objective standard:

    a. In inherent in SOGA s 8(2);[15]

    b. Was recognised by the Court of Appeal in *Mamidoil* per Rix LJ (on behalf of a unanimous Court of Appeal) *"[f]or these purposes, an express stipulation for a reasonable or fair measure or price* ***will be a sufficient criterion for the courts to act on****. But even in the absence of express language, the Courts are prepared to imply an obligation in terms of what is reasonable*" (emphasis added);

    c. Is apparent from the various cases in which the courts have recognised and given effect to implied terms to the effect that a reasonable or market price (or e.g. rent) be paid (examples are referred to above).

    d. Has been recognised by a number of authoritative commentators. See Cartwright in, *Formation and Variation of Contracts* (3rd edition):[16]

> "*…the courts regard themselves as equipped to undertake an assessment of what constitutes a reasonable price – what reasonable parties would have agreed in the circumstances…*" "*[t]he courts can determine what reasonable persons in the parties' position would have agreed...*"[17]

34. It is therefore clear that the Courts have no difficulty in enforcing an express or implied provision that a reasonable price is to be paid. What the "reasonable" price is in a particular case will depend on the facts of that case (Benjamin's Sale of Goods at [2-047]), but that does

[15] An analogous rule applies in the case of a contract to supply a service: Supply of Goods and Services Act 1982 s.15.
[16] at [3-17], footnote 86
[17] See also Lewison at [6.163], Benjamin's Sale of Goods at [2-046] & Chitty at [17-030] (which proceed on the basis that a provision for "reasonable" price is certain enough to be enforceable).

not mean that a term providing for a reasonable price to be paid is too uncertain (or imprecise) to be enforceable.

35. As to reasonable (or other) endeavours obligations, each case turns on its own facts, but the Court may give effect to such an obligation, especially so when there is an objective yardstick to measure the endeavours. In recent years the courts have becoming more willing to enforce obligations to negotiate where they arise within a binding agreement.

36. As to endeavours obligations to agree a price, by way of example, in *Petromec v Petroleo Brasiliero*, [2006] 1 Lloyd's Rep. 121 at [117] and [118] Longmore LJ was ready to contemplate (obiter) that an express "agreement to agree" provision drafted by lawyers should be given effect. He distinguished *Walford v Miles* on the grounds that that was a bare agreement to negotiate, and no contract at all had eventuated, whereas the provision in *Petromec* was an express provision drafted by lawyers within a completed and enforceable agreement and was more than a bare agreement to negotiate. He dismissed the problem that any loss through breach may be unquantifiable (since the outcome which should have happened if negotiations had succeeded cannot be known) on the basis that the court can assume that a reasonable price would have been negotiated and received evidence on the amount of a reasonable price.

37. It is also important to bear in mind that where the parties have entered into what they believe to be a binding agreement the court is very reluctant to hold that their agreement is void for uncertainty. As stated by Leggatt J (as he then was) in As*tor Management AG v Atalaya Mining Plc* [2017] Bus. L.R. 1634 at [64] *"[t]o hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, 'a counsel of despair'...*" (emphasis added).

## E. THE JUDGMENT

38. The Learned Judge rightly found:

    a. That the 2018 Contract evinced "*an intention to deal with the full quantity*" of 3600 MT of wesos (Judgment/82) [Core/103] rather than providing for the sale of 400 MT per year with an "optional" or "target" amount of a further 800 MT per year (Judgment/79-82 [Core/102-103] & Judgment/112 [Core/112] in particular 82

[Core/103]). Clause 10 states that the quantity is 3600 MT, provision for quality, delivery etc is made in relation to the full 3600 MT and "*there is nothing in the language of the contract to suggest that the volume of 3,600 MT was in some sense an optional or a maximum*" amount[18]. Therefore on a true construction of the 2018 Contract the 800MT was not "optional". The contract was intended to have legal effect insofar as the full 3600MT was concerned (i.e. including the controversial 800 MT per year).

b. That the concept of "free trucks" – used at clauses 3 and 5 of the 2018 Contract and which on the Judge's findings was "central to the price" (Judgment/116) [Core/113] – was understood by the men who negotiated the 2018 Contract as a mechanism "*... used to adjust the contracted price in response to market price fluctuations*" (Judgment/9, [Core/82] see also Judgment/10 [Core/83] which refers to "*market conditions*");

c. That this case falls within the territory of cases where the Court must strive to assist the parties to preserve rather than to destroy their bargain (Judgment/79[19] [Core/102]); and

d. That to imply some term would give the 2018 Contract business efficacy (Judgment/122 [Core/114]).

39. Despite this, the learned Judge held that the 2018 Contract contained an unenforceable agreement to agree beyond the 400 MT per year (see conclusion at Judgment/145(a)&(b) [Core/120]). The reasoning is set out in the Judgment/120-128 [Core/114-116]. The crux of the Judge's reasoning is that an implied term requiring a reasonable or market price to be paid is too uncertain to be enforced. That conclusion is wrong for the reasons set out below.

## F. APPLICATION TO THE LAW TO THE FACTS OF THIS CASE

40. The 2018 Contract is not and does not contain a bare agreement to agree or negotiate. This is not a case where, on a true construction of contract, the parties remained free to agree or disagree about the price of the 800 MT per year as their own perceived interests dictate (to use

[18] The Judgment says "maximum *price*" but it is clear from context that this is a typographical error.
[19] With the slight caveat at Judgment/86 [Core/104]

the phrase used by Chadwick LJ in *BJ Aviation Ltd v Pool Aviation Ltd* at [23]) or "*to pursue its own commercial ends*" (to use the Judge's phrase at Judgment/123 [Core/114]) Instead, the express provisions of the 2018 Contract and its commercial purpose and/or commercial common sense support a conclusion that the parties intended a reasonable (or market) price to be paid.

41. **Firstly**, the Judge has (rightly) accepted, the 2018 Contract evinced "*an intention to deal with the full quantity*" of 3600 MT of wesos (i.e. an amount that included the 800 MT per year) given, *inter alia*, clause 10 of the 2018 Contract: See e.g. Judgment/82 & 112 [Core/103 & 112].

42. This is therefore <u>not</u> a case where (objectively assessed) the parties contemplated (at the time the 2018 Contract was entered into) that the 800MT per year may not be sold because the parties may not be able to agree on a price in relation to those amounts. The Respondent was not for example free to decide (after the contract was entered into) that it no longer wished to have the 800 MT per year such that it would not take it for any price (as in fact happened in this case) or would only pay a derisory amount. A construction of the 2018 Contract that allows the buyer to do so is plainly contrary to "*an intention to deal with the full quantity*" of 3600 MT (i.e. including the controversial 800 MT per year). In fact, the Respondent recognised this in its pleaded case because the 800MT per year was described as an "optional quantity" or an "optional additional quantity".[20] But (as the Judge has rightly found) the wording of the 2018 Contract does not support a conclusion that the 800 MT per year was optional (Judgment/79-82) [Core/102-103].

43. **Secondly**, it is in any event clear that the 2018 Contract does not contemplate a further "full" commercial negotiation in relation to the 800 MT per year. The minimum quality criteria (clause 6 [Core/191]), delivery place (clause 4 [Core/191]) and delivery period (clause 5 [Core/191]) - 1200 MT per year between January and December each year) were all agreed for the full 3600MT. The contract does not contemplate further negotiation about those matters directly or indirectly through a price negotiation (e.g. it was not open to the purchaser to decide that it needed less in a given year because the yearly volumes have already been set).

[20] AD&CC/7(2), 9,10 [Core/162], 13 [Core/163], 14 [Core/165], 15 [Core/166], 16 [Core/167], 19 [Core/168], 22 [Core/169] & 38 [Core/174]

The contract *does* - by contrast - recognise that the price will need to be adjusted to reflect the brix value of the product delivered (see clause 3 and also clause 6 "brix (refr).." [Core/191]).

44. **Thirdly**, the Contract expressly states that the buyer is to give instructions for delivery 15 days prior to a delivery and the seller is only released from its obligation to make the goods available for delivery if the buyer fails to give those instructions (clause 10 [Core/192]). This provision relates to the full 3600 MT (including the controversial 800 MT per year) in circumstances where (a) pursuant to the express terms of the 2018 Contract (clause 5 [Core/191]) delivery can be at any time between January and December in a given year, (b) the Respondent was to choose when as the wesos had to be ready for delivery at short (15 days) notice, with notice to be given by the Respondent (clause 9 [Core/192]), and (c) where wesos is a seasonal product that needs to be produced (as stated in the Judgment/51 [Core/93] "*Such contracts* [i.e. contracts for the sale of wesos] *would normally be concluded before production to allow the producer to plan the necessary production and the purchaser to have its use of the product identified*"). The clause does not for example state that the Appellant seller is released from its obligation to make the goods available if a price is not fixed in December prior to the year in which deliveries are to be made as one would expect if agreement on price was a precondition to the sale.

45. **Fourthly**, the commercial purpose of the 2018 Contract also supports the Appellant's case. The commercial purpose in a long-term contract for the sale of goods of a provision that allows the price to be modified is clear. It allows the price to reflect movements in the market. This commercial purpose is inherent in a long-term contract such as this one where there is an intention to sell the full amount (see recognition of this in e.g. *Mamidoil*, *Queensland Electricity Board* and the rent review cases referred to above). This is especially the case when the price of the thing sold is linked to the price of a traded commodity with a fluctuating market price (in this case FCOJ).

46. **Fifthly**, in further support of this commercial purpose the learned Judge has (rightly) found that the concept of "free trucks" was understood by the parties who negotiated the 2018 Contract as a mechanism "*... used to adjust the contracted price in response to market price fluctuations. It involves providing free product on top of the contracted volume, thus aligning the price of the goods with the current market conditions*." (Judgment/9 & 10 [Core/82 & 83]). The free trucks mechanism is an express part of the 2018 Contract and as stated by the Judge "central to the price" (Judgment/116 [Core/113]).

47. **Sixthly,** as explained below, the market price for wesos can be calculated from publicly available sources. There is also a readily ascertainable reasonable price as evidenced by the fact that the experts agreed on the approach to determining the price of wesos.

48. All of the above matters are (a) inconsistent with a conclusion that the parties remained free to agree or disagree about the price of the 800 MT per year as their own perceived interests dictate, and (b) support the conclusion that the parties intended (objectively assessed) the price to reflect changes in market movements or conditions such that a reasonable (or market) price would be payable. A provision for a reasonable price would reflect movements in the market and possibly duty, packing and transportation costs as well as identifying the correct figure in a range of market prices (see below).

49. Further this is not a case where it could be said that (very unusually) a provision for a reasonable (or market) price is not certain enough to be enforceable. To the contrary there is a remarkable amount of agreement between the parties and their experts.

50. The parties' experts agreed that there was a correlation between the price for wesos and the price for FCOJ (a traded commodity with published market prices) with wesos being around 70% of the market price for FCOJ) (Judgment/50 [Core/93] Judgment/98 [Core/107] & Judgment/125 [Core/115];

51. The experts were able to agree on the market prices of wesos (60 Brix) at various times between 2018 and 2021(Judgment/47 [Core/92] "*the experts agreed a table of ranges*…"). Mr Apa (the Respondent's expert) agreed in cross examination [Supp/ 174-184] that the information which the experts based their assessment on would have been available to both parties at the relevant times (Judgment/50) [Core/93]. This was also inherent in the conclusion recorded in the joint memorandum [Supp/59-69] (emphasis added): *"Market price of FCOJ* ***can be calculated from publicly available sources.*** *Each expert has collated this information and found an average price for the market price of FCOJ. This price has then been reduced by 70% to find the price of average pulp wash. This price was then amended to reflect the quality of 60 Brix, as opposed to 66 Brix."*

52. The prices were expressed as limited ranges. However Mr Apa (the Respondent's expert) confirmed in cross examination that the agreed price ranges merely reflected the fact that the

underlying data was for sales at different incoterms, with FCA Europe (the middle of the range) being similar in terms of the division of costs between the buyer and the seller as Ex Works Venlo which is provided for in the 2018 Contract.[21] Therefore the middle of the range set out in the table at Judgment/47 [Core/92] for December 2018 and December 2019 (the Judge did not permit the claim for deliveries in 2021: Judgment/144 [Core/120]) is the correct price for present purposes. At the very least the lowest number in the range is reasonable. [22]

53. The experts were also agreed that *"[d]uty, packing cost into drums and transportation costs to customer needs to be calculated on top*" i.e. on top of the identified and agreed market prices.[23] These were factors that the experts considered relevant to the determination of the "contract price" (to quote the Respondent's expert)[24] (Judgment/124 [Core/115]). The Appellant did not claim to be entitled to these "on top" of the market price but – if the Court decided this was appropriate to add in light of the evidence – there was uncontested evidence from the Respondent's expert (Mr Apa) as to those costs (and the applicable exchange rate). [25]

54. Yet further, in their Joint Memorandum [Supp/65] the experts responded to the question "*How is a reasonable price/market price for orange pulp wash calculated?*" by referring back to their conclusions on expert issues 2 and 3, namely "*What was the market price for orange pulp wash …?*" and "*Is there a correlation between the price of orange juice concentrate and orange pulp wash, and if so, what is the correlation?*"

55. Indeed, this is not even a case where the parties tried to but failed to identify a price. Instead (as explained above and in the Judgment/33&36) [Core/89] this is a case where the Respondent decided it did not want the 800mt a year after all at any price.

56. However, it would not have been hard to identify what the price was if the Respondent had been minded to do so. This is clearly illustrated by the expert evidence and an email dated 6.11.2018 that was internal to the Respondent, in which Ms Hogan (of the Respondent) carried

[21] Transcript [Day 3/p.11/line 23]-[Day 3/p.12/line 7] [Supp/177] and [Day 3/p. 14/lines 6 to 20] [Supp/178].
[22] An alternative would be to adopt the price at the midway point in the relevant delivery period as the Respondent's contended in their Appendix 1 at trial.
[23] See Joint Memorandum [Supp/63] and also Judgment/49 [Core/93].
[24] Apa Supplemental Report at [18] [Supp/73-74]
[25] Apa Supplemental Report at [17] [18] & [20] [Supp/73-74]

out a calculation for the 800MT which came out at 1,180 EURO/MT at 60 Brix in circumstances where the parties' experts' agreed market price range for wesos at 60 Brix for December 2018 was EURO 1,180-1,365 (Judgment/38 [Core/90], Judgment/39 [Core/90] & Judgment/124 [Core/115]).[26] This is no coincidence.

57. In summary, this is clearly not a case where "*the court is driven to the conclusion"*[27] that the 2018 Contract is an unenforceable agreement to agree, and the Judge was wrong to find that it was. Equally, the Court is plainly able to determine what a reasonable price was – i.e "*what reasonable parties would have agreed in the circumstances*"[28] – once it is accepted that in this case (for the reasons set out above) the parties were not allowed to freely pursue their own commercial ends in negotiating the price.

## G. RESPONSE TO SPECIFIC POINTS MADE IN THE JUDGMENT

58. The specific points made in the Judgment (insofar as relevant to this appeal) are addressed briefly below.

59. In relation to the applicable legal principles, the authorities relied on by the Respondent at Trial and referred to in the Judgment do not support a conclusion that a reasonable (or market) price (generally or in this case) is too uncertain to be enforceable.

60. **Firstly**, *Gillatt v Sky Television Ltd* [2000] All ER (Comm) at 470B (referred to in the Judgment/90 [Core/105] – which concerned a share sale).

    a. In *Gillatt* it was argued that the value of the shares could be ascertained by reference to the "open market value" which enabled the court to fix a price. The court held that it could not do so because the agreement to refer the valuation to "an independent chartered accountant" was an essential term of the contract, and that meant the court was not entitled to substitute its own opinion for that of the accountant. See headnote and also pp 470a-d, and 472j-473c.

[26] Apa Supplemental Report at [20] [Supp/74]
[27] Using the language of Chadwick LJ in *BJ Aviation*.
[28] As the point is put by Cartwright at [3-017].

b. The Judgment refers to *Gillatt* for the proposition that "open market value" is or may be "a matter of judgment" (Judgment/90) [Core/105]. However the point made by the Court at p. 470 is not that, but rather that *"[t]he fact is that in this case the parties expressly recognised that such a valuation is pre-eminently a matter of judgment for the independent accountant entrusted with the task by the parties*" (emphasis added). It was the parties' choice to entrust the valuation to an accountant that prevented the Court from assessing the value of the shares.[29]

c. In any event, in *Gillatt* (as also set out at page 470b-c) "*there is more than one possible approach to such a valuation of shares in a private company: an earnings basis, an assets basis, a discounted cash flow basis, or a combination of these approaches*". No such difficulty arises in this case. As stated above, the parties' experts were agreed on the approach to ascertaining the price of wesos.

d. *Gillatt* therefore supports the Appellant's interpretation. There is no reference to valuation by a third party or similar in the 2018 Contract and so there is no question of the Court substituting its own decision as to what a "reasonable or market price" is for that of an identified third party whose opinion the parties have agreed to abide by.

e. Further, even if there is no sufficiently certain or identifiable *market* price, that does not mean that an implied term providing for a *reasonable price* is too uncertain to be enforceable. For example, in *Gillatt* itself, Pill LJ expressly recognised the possibility of the parties agreeing to a "fair value" at p.472j (and sees no issue with such a provision). An as stated above, it is clear from (*inter alia*) s.8(2) SOGA and *Mamidoil* that a provision (either express or implied) for payment of a reasonable price (or fair price or similar) is certain enough to be enforceable.

61. **Secondly**, as to the Court of Appeal's decision in *Morris v Swanton Care and Community Ltd* [2018] EWCA Civ 2763 (quoted in the Judgment/91 [Core/105] – which concerned a contract for consultancy services):

a. In *Morris* the relevant provision provided that "*Mr Morris shall have the option for a period of 4 years from Completion and following such period such further period as*

[29] See the Court's reasoning in *Gillat* and also e.g. commentary in Lewison at [6.166].

*shall reasonably be agreed between Mr Morris and the Buyer*…" (quoted in the judgment at [5(viii)]).

b. The Judgment relies on *Morris* for the passage at [28] of the Judgment (Judgment/91&109 [Core/105&110]) where Gloster J stated that the difficulty with the term is that:

> *"…it presupposes that there is such a thing as a reasonable period which everyone could equally recognise as being reasonable, rather than the different commercial interests and different perspectives involved in any extension of the Earn-Out Consideration. Moreover, the court would have to identify some objective benchmark for determining the reasonable period without reaching an alternative subjective view or descending into the commercial fray; but that is not possible."*

c. However before getting to the passage quoted above at [28], Gloster J had already held (at [27]) that when the phrase "*as shall reasonably be agreed between Mr Morris and the Buyer"* was construed in the context of the whole agreement in that case, it was "*plain*" that "*for there to be any further period, there first has to be a further agreement between the parties*". In other words, the contract contemplated that there may not be a further period.

d. By contrast in this case, as the Learned Judge has (rightly) found, the 2018 Contract evinced "*an intention to deal with the full quantity*" of 3600 MT of wesos (Judgment/82) [Core/103] rather than providing for the sale of 400 MT per year with an "optional" or "target" amount of a further 800 MT per year. For that (and the other reasons at Part F above) this was not a case where the parties contemplated (objectively assessed) that there may not be a sale of the full 3600 MT.

e. In addition, *Morris* concerns an extension of time during which consultancy services would be provided. Even if "reasonableness" is not a sufficient certain yardstick in that context it <u>is</u> a sufficient yardstick in the sale of goods when it comes to price. This is clear from (1) the existence of s 8(2) of SOGA, (2) the fact that the Court of Appeal said so in *Mamidoil* and (3) the various other authorities referred to above.

62. As to the application of the law to the facts of this case:

63. **Judgment/123** [Core/114] provides that "*The contention for the price being reasonable supposes that the court can determine what is reasonable. However, what is reasonable inevitably depends upon the circumstances in which the parties find themselves. For example, a reasonable price for a quantity of wesos in Brazil may not be the same as the reasonable price in Greece. The very fact of the express term that price be agreed would allow either party to pursue its own commercial ends in negotiating the price, but those ends may be very different*". As to this:

    a. What the "reasonable" price is in a particular case will depend on the facts of that case (Benjamin's Sale of Goods at [2-047]), but that does not mean that a term providing for a reasonable price to be paid is too uncertain (or imprecise) to be enforceable. Such terms (whether express or implied) are certain enough to be enforceable. See the numerous authorities referred to at Part D above.

    b. The statement that "*[t]he very fact of the express term that price be agreed would allow either party to pursue its own commercial ends in negotiating the price*" is wrong and asserts what it seeks to prove. If a contract provides for a price to be agreed or fixed or similar that does not necessarily mean that each party is entitled to pursue its own commercial ends in negotiating the price. If that were the case there would be no need for the detailed guidance in (*inter alia*) *Mamidoil* and *BJ Aviation*. For the reasons set out at Part F above in this case the parties were not (on a true construction of the contract) free to pursue their own commercial ends in fixing the price for the 800 MT per year.

    c. Even if the statement "*a reasonable price for a quantity of wesos in Brazil may not be the same as the reasonable price in Greece*" is true that does not render the pleaded implied term too uncertain to be enforceable. The circumstances of this particular case were known to the parties at the time of contracting (and are now known to the Court) – the wesos in this case was produced in Greece and delivered in Europe and the parties' experts were able to agree market prices at various times between 2018 and 2021 and were in agreement as to the approach to determining the price for wesos.

64. At **Judgment/124** [Core/115] the Judge states that the difficulty with a market price provision is the difficulty in defining the market price. This is inconsistent with the fact that the parties' experts' agreed on a table setting out the ranges for the market price of wesos at 60 Brix at

various times: See Judgment/47 [Core/92] and the Joint Memorandum [Supp/63-64]. In any event:

a. The other "variables" referred to, namely packing costs, transportation costs, duty and exchange rate variations, are either factors that are to be taken into account in ascertaining the market price or (more likely) additional amounts that the parties may add to the market price (i.e. possibly relevant to what a reasonable price is).

b. In line with this the experts' Joint Memorandum acknowledges the agreement between the experts that *"[d]uty, packing cost into drums and transportation costs to customer needs to be calculated on top*" i.e. to be added of the agreed prices in the table reproduced at Judgment/47 [Core/92].[30]

c. The Appellant did not in fact claim these amounts on top of the market price in its POC or Appendix 1. However if the Court disagrees and considers these should be added (in order to reach a market or reasonable price, as appropriate) that can be done as there were uncontested figures in Mr Apa's Supplemental report at [18] [Supp/73-74].

65. **Judgment/125** [Core/115] states that 70% of the price of FCOJ is not a certain enough comparison because that would only identify a likely price. However as stated above the experts were able to agree market prices at various times between 2018 and 2021 and were in agreement as to the factors relevant to determining the price for wesos. As to the other factors referred to at Judgment/125 [Core/115]:

a. The reference to the "general state of supply and demand" is not understood when the experts agreed on a table setting out market prices for wesos;

b. The "remaining shelf life of the product", is not relevant in the context of a long term (3 year) contract for the sale of wesos (a seasonal product that needs to be produced before it is delivered, with high season in Greece starting in December) where the

[30] Mr Apa stated in his supplemental report at [18] [Supp/73] "*The prices set out in Apa1 paragraphs 48(a) and 48(b) have been agreed in the Joint Memorandum dated 23 January 2024. Dr Koutoupis has stated in the Joint Memorandum that these prices are exclusive of duties, freight, packaging, etc. I agree with Dr Koutoupis that these will need to be taken into account when making a comparison against the Contract price*."

contract provides for the price to be fixed in December the year before deliveries are to take place – the question is not therefore what e.g. a reasonable price would have been for a spot sale of wesos already produced; and

c. The "*the likelihood that parties will only contract if they have a history of working together*" is irrelevant in the context of the 2018 Contract as even on the Judge's own findings the parties *had* agreed to contract in relation to the 800MT/year (Judgment/82 [Core/103]). In any event, the parties had contracted twice previously in 2017 (Judgment/13 [Core/83]).

66. The reasoning at paragraph 126 of the Judgment [Core/115] is wrong for essentially the same reasons. Further, as set out at Part F above the 2018 Contract and the surrounding circumstances do indicate that the parties intended that a reasonable (or market) price be paid.

## H. Conclusion

67. The Appellant respectfully submits that the Learned Judge erred in finding that the 2018 Contract contained an unenforceable agreement to agree and that the implied terms alleged could not "fill the gap". The Judge should have found that on a true construction of the 2018 Contract or by way of an implied term, the parties had agreed (1) that a reasonable price, (2) or market price, was to be paid in relation to the 800 MT per year, alternatively (3) to exercise reasonable endeavours to agree the number of free trucks and/or price in relation to the 800 MT per year. The Judge should then have gone on to make findings as to what the reasonable or market price was at the relevant time(s), or what price the aforesaid reasonable endeavours would have resulted in at the relevant time(s) (as appropriate). The Court is asked to make those findings or to remit this issue and also the (related) determination of the quantum of damages to the trial Judge.

LIISA LAHTI

30 August 2024

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