Appeal Court Ref: CA-2024-001951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
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)
[2024] EWHC 2098 (Comm)

BETWEEN:

KSY JUICE BLENDS UK LIMITED

Claimant / Appellant

-and-

CITROSUCO GMBH

Defendant / Respondent

RESPONDENT'S REPLACEMENT APPEAL SKELETON ARGUMENT

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*References to the judgment of His Honour Judge Pearce ("the **Judge**") are in the form "**Judgment/paragraph number**" and references to the Appellant's Skeleton Argument are in the form "**ASkel/paragraph number**".*

A. Introduction

1. This is an appeal about an archetypal unenforceable agreement to agree a price.

2. By a contract dated 18 May 2018, KSY Juice Blends UK Limited ("**KSY**") agreed to sell, and Citrosuco GmbH ("**Citrosuco**") agreed to buy, orange pulp wash over a period of 3 years (2019, 2020 and 2021) ("the **Contract**"). As to price, the Contract provided:

[Core/11/191] *3. Price* *Invoicing price is 1.600euro/mt for 60 brix*
Price adjustable according to brix value +- 5 brix
Free trucks will be offered from the seller according to the ***agreed volume & price*** *of each year.*
Calculation basis for the 1.200mt fixed is 1.350 euro/mt
which corresponds to the 400mt/year 2019-2020-2021

[…]

[Core/11/191] *5. Delivery period: 1.200MT per each year*
Deliveries to start January to December with the following split:

400mt fixed at 1.350euro/mt – invoicing price is 1600euro/mt
Difference of price in free trucks

800mt ***at open price to be fixed*** *latest by December of the previous year*
Difference of price in free trucks" (**emphasis** added).

3. As the Judge held, the provision for 800mt *"at open price to be fixed latest by December of the previous year"* ("the **Open Price Provision**") was an unenforceable agreement to agree a price.

4. Consistently with that, in late 2018, KSY and Citrosuco had tried to agree the *"open price"* for the 800mt of pulp wash for 2019.[1] In the event, however, no agreement was reached *"latest by December"* 2018 or at all. Further, in December 2019, KSY had again tried to agree the *"open price"* for 2019 (albeit it was now too late to do so) and also to agree the *"open price"* for 2020.[2] Again, however, the parties did not reach any agreement *"latest by December"* 2019 or at all.

[1] See the email dated 5.11.18 at Judgment, Appendix 2, p. 49 **[Core/6/127]**
[2] See the emails dated 10.12.19 and 17.12.19 at Judgment, Appendix 2, pp. 52-53 **[Core/6/130-131]**

5. As KSY put it at that time (ie 17 December 2019), Citrosuco had to agree the *"open price"* in order for KSY *"to be able and proceed with the invoicing of the variable volumes"* (ie the 800mt).[3]

6. Later, however, KSY performed a *volte face*. Citrosuco had accepted delivery and paid for 400mt of pulp wash for 2019 in respect of which the price had been *"fixed"* by the Contract **[Core/6/81]** (Judgment/¶2). As to the *"open price"* volume, notwithstanding what it had said on 17 December 2019, a few days later KSY changed its tune. On 27 December 2019, Ms Mary Riga of KSY noted that the parties had not agreed on the *"open price"* for 2019 but now wrote:

> *"…therefore we will invoice as per present price level & once agreed we will adjust the difference."*[4]

7. Thereafter, KSY issued invoices in January 2020 and May 2020 in respect of the additional 800mt of pulp wash for 2019 (which it had not delivered to Citrosuco) at the *"Invoicing Price"* **[Core/6/117]** of €1,600/mt (Judgment/¶¶132, 134). In the event, Citrosuco did not pay these invoices.

8. As Ms Corinna Hogan said in response to KSY, the parties *"never agreed on a price"* so Citrosuco would *"not be paying"*.[5] By 25 September 2020, KSY had decided that this refusal to pay and Citrosuco's interpretation of the Open Price Provision as an unenforceable agreement to agree amounted to a repudiation of the Contract, which KSY purported to accept. In turn, Citrosuco **[Core/6/85]** accepted that purported termination as a renunciation of the Contract (Judgment, ¶19).

9. Subsequently, KSY claimed:

   (1) As its primary case, that the 800mt *"would be sold and invoiced at the Invoice Price with the parties able to agree…to an alternative price prior to the preceding December of each year"*; or

   (2) As a first alternative, that *"the Defendant* [ie Citrosuco] *was under an obligation to use reasonable endeavours to agree the number of free trucks"* (and hence the price) for the 800mt; or

   (3) As a second alternative, that *"if the parties were unable to agree a price for the Remaining 800MT per year the Defendant would pay a reasonable price, alternatively (if different) the market price"*; or

   (4) As a third alternative, that *"if no price was agreed for the Product the Defendant was liable to pay a reasonable price…pursuant to section 8(2) of the Sale of Goods Act 1979"*.[6]

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[3] See the email dated 17.12.19 at Judgment, Appendix 2, p. 53 **[Core/6/131]**
[4] See the email dated 27.12.19 at Judgment, Appendix 2, p. 54 **[Core/6/132]**
[5] See the email dated 13.1.20 at Judgment, Appendix 2, p. 55 **[Core/6/133]**
[6] See Particulars of Claim ("**POC**"), ¶¶11(e) **[Core/8/150]**, 13 **[Core/8/153]**, 14 **[Core/8/153]** and 15 **[Core/8/153]**

10. The Judge (rightly) rejected these myriad ways that KSY put its case. All save for KSY's primary case have been resurrected on this appeal. For the reasons set out below, the appeal should also be rejected. At the outset, however, and as a general observation, *"the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was"* means that the Open Price Provision – as the Judge held – *"is undoubtedly open to suspicion"*: cf. ***G Scammell and Nephew Ltd v HC&JG Ouston*** [1941] AC 251 at pp. 268.

B. The Grounds of Appeal

11. Against that introduction, KSY contends by its grounds of appeal that:

    (1) The Judge erred in that he failed to find:

        a. That on a true construction of the Contract or by way of an implied term (implied by section 8(2) of the Sale of Goods Act 1979 ("the **SOGA**") or otherwise) the parties agreed that a reasonable, or a market, price was to be paid in relation to the 800mt per year ("**Ground 1(a)**"); or

        b. That on a true construction of the 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 800mt per year ("**Ground 1(b)**").

    (2) In doing so, the Judge erred in (*inter alia*)[7] finding that such terms would be too uncertain to be enforceable and/or inconsistent with the Contract, in particular the phrase *"open price to be fixed"* at clause 5 of the Contract ("**Ground 2**").[8]

12. Accordingly, the grounds of appeal raise the following issues, which are addressed below:

    (1) As to Ground 1(a):

        a. As a matter of construction, did the parties agree that a reasonable, or a market, price was to be paid in relation to the 800mt per year?

        b. Alternatively, was it an implied term of the Contract that a reasonable, or a market, price was to be paid pursuant to (i) section 8(2) of the SOGA or (ii) otherwise?

[7] As these other reasons were not identified in Ground 2 as required by CPR PD52C, ¶5(1), KSY may not rely upon the same (whatever they are) at the hearing of the appeal: see CPR 52.21(5).
[8] Whilst the Grounds of Appeal filed with the Appellant's Notice include a 3rd numbered ground **[Core/1/15]**, KSY was refused permission to appeal on this ground **[Core/7/142]**

(2) Alternatively, as to Ground 1(b):

a. As a matter of construction, did the parties agree to exercise reasonable endeavours to agree the number of free trucks and/or the price in relation to the 800mt per year?

b. Alternatively, was it an implied term of the Contract that the parties would exercise reasonable endeavours to agree the number of free trucks and/or the price?

13. Further, Ground 2 does not raise any free-standing issue but rather arises only in the context of KSY's case on its implied terms. As such, it is not addressed separately below.

C. The law applicable to agreements to agree

14. As to the law, this appeal concerns (1) the application of well-known general principles of contract law in respect of agreements to agree; (2) the correct approach to the implication of terms as to price in a sale of goods contract; and (3) the enforceability of an obligation to use reasonable endeavours to agree. Each is addressed below.

(1) General principles in respect of agreements to agree

15. The starting point is that each case about an agreement to agree *"must be decided on its own facts and on the construction of its own agreement"*: see ***Mamidoil v Okta*** [2001] 2 Lloyd's Rep. 76 at [69].

16. As such:

(1) The first task is to construe the contract applying the ordinary principles of construction (eg as set out in ***Arnold v Britton*** [2015] AC 1619 at [15]).

(2) The contract must be construed *"before one can consider any question of implication"*: per Lord Neuberger in ***Marks & Spencer plc v BNP Paribas*** [2016] AC 742 at [28].

17. Where a term is construed as an agreement to agree, Rix LJ drew a distinction in ***Mamidoil*** (at [69]) between:

(1) A scenario where *"no contract exists"*, in which case *"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""* (ie propositions (ii) and (iii) from [69] as numbered at ASkel/¶[27); and **[Core/3/32]**

(2) A scenario where *"parties have acted in the belief that they had a binding contract"*, when *"the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out"*. In such a

case, *"even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence"* (ie propositions (iv) to (x) from [69] as numbered at ASkel/¶27).

[Core/3/32]

18. As to whether a case will fall within the second scenario:

    (1) An important factor will be whether *"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"*: see ***Mamidoil*** at [69].

    (2) Conversely, where there has been no part performance of the agreement in question, a case will be far less likely to fall within the second scenario. Thus, as Lord Denning M.R. said in ***F&G Sykes (Wessex) Ltd v Fine Fare Ltd*** [1967] 1 Lloyd's Rep. 53 at pp. 57-58:

> *"In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed."*

19. If (and only if) a case falls within the second scenario – ie where the Court is satisfied that the parties intended that their bargain should be enforceable – then the Court 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"*: see ***BJ Aviation Ltd v Pool Aviation Ltd*** [2002] P&CR 25 at [23]. As to that:

    (1) In the case of an agreement to agree, in the event that the parties fail to reach agreement, 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 "market" price, or a "reasonable" price"*: see ***BJ Aviation*** at [23].

    (2) However:

        a. Any term to be implied must identify some *"objective criteria"* to allow the Court to determine the matter left to be agreed in the event that the parties themselves fail to agree: see ***Mamidoil*** at [73](vi).

        b. The implication of a term can only be done consistently with established principles for implication: see ***Teekay Tankers v STX Offshore*** [2017] 1 Lloyd's Rep. 387 at [202].

        c. Accordingly, for example, a Court *"cannot imply a term which is inconsistent with what the parties have actually agreed"*: see ***BJ Aviation*** at [23]. Thus, as Chadwick LJ put it:

> *"…if, on the true construction of the words they* [ie the parties] *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".*

(3) Further, *"no doubt an important factor"* that will permit a Court to imply a term is whether a contract contains *"some machinery or formula (e.g. an arbitration clause) which, if liberally construed, was wide enough to provide a method alternative to agreement by which the uncertainty could be resolved"*: see ***Benjamin's Sale of Goods***, 12th Ed. at **2-017**; and see ***Mamidoil*** at [69].

20. As such, whilst a Court may strive to preserve a bargain, it does not follow that the Court *"will always be prepared to imply an obligation in terms of what is reasonable"*: see ***Teekay*** at [205].

21. Further, even in a case where the Court is satisfied that the parties intended their bargain to be enforceable, the extent to which the Court should strive to give effect to that intention will always depend on the circumstances (eg as to the extent of any part performance: see ***F&G Sykes*** at pp. 57-58). Where – as in this case[9] – a finding that a contract contained an agreement to agree would only undermine a discrete part but not all of the bargain the parties believed they had reached, the Court does not have to strive to the same extent as might otherwise be required where the fate of an entire bargain is at stake; *a fortiori* if there has been no part performance of that part of the bargain which is to be held unenforceable.

(2) The correct approach to the implication of terms as to price in a sale of goods contract

i. The position where the price is left to be agreed

22. In a contract for the sale of goods, *"undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract"*: per Viscount Dunedin in ***May & Butcher Ltd v The King*** [1934] 2 KB 17 at p. 21. This is because – whatever the parties may have intended – such an agreement would be too uncertain to be enforceable.

23. Further, expressions such as *"shall reasonably be agreed"* or similar (eg *"to be fixed"*) are *"the very paradigm of an agreement to agree"*: see ***Morris v Swanton*** [2018] EWCA Civ 2763 at [27]. Thus:

[9] Judgment/¶86 **[Core/6/104]**

(1) As ***Formation and Variation of Contracts***, Cartwright, 4th Ed. notes (at **3-16**), *"An agreement for the sale of goods at a price which "shall be agreed upon from time to time" is…uncertain and does not create a contract".*

(2) As ***Chitty on Contracts***, 35th Ed. notes (at **4-174**), *"the* ***most natural inference*** *to be drawn from the fact that the parties left such an important matter as the price to be settled by further agreement was that they did* ***not intend to be bound*** *until they had agreed on price"* (**emphasis** added).

(3) As ***Benjamin's Sale of Goods*** notes (at **2-046**), *"If the price is left to be agreed upon subsequently between the parties, there will* ***ordinarily be no binding contract****, on the grounds of uncertainty, unless and until they later reach agreement on a price"* (**emphasis** added).

ii. A "reasonable price" under section 8 of the SOGA

24. Where, however, no price has been agreed in a contract for the sale of goods, *"a special rule"* set out in section 8 of the SOGA may allow the seller to claim a *"reasonable price"*: see ***Benjamin's Sale of Goods*** at **2-046**. Section 8 of the SOGA provides:

> *"(1) The 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.*
>
> *(2) Where the price is not determined as mentioned in sub-section (1) above the buyer must pay a reasonable price."*

25. As to that, section 8(2) of the SOGA applies only where there is *"silence"* about the price in a contract for the sale of goods; it does not apply where *"there is a provision that the two parties are to agree"* because in such a case *"there is no silence"*: see ***May & Butcher v The King*** at p. 21.[10]

26. Further:

(1) Section 8 of the Sale of Goods Act 1893, which is replicated in section 8 of the SOGA, reproduced, and *"was known to have reproduced, the old law upon the matter"*: see ***May & Butcher v The King*** at p. 20 (see also ***Benjamin's Sale of Goods*** at **2-047**). In other words, that statue *"codified"* the common law rules applicable to sale of goods contracts: see ***Barton v Morris & Antr*** [2023] AC 684 at [132] and [214].

[10] In ***May & Butcher v The King***, the House of Lords were concerned with section 8 of the Sale of Goods Act 1893, which was in materially identical form to section 8 of the SOGA: see p. 20.

(2) Whilst the requirement to pay a *"reasonable price"* imposed by section 8(2) is not expressed in the form of an implied term, nothing turns on this. *"There is no difference in substance between a rule which says that there is an implied term of the contract that the buyer must do X and a rule which says simply that the buyer must do X…The drafter could equally well have adopted the device of providing that such an obligation is an implied term of the contract of sale"*: see ***Barton v Morris*** at [132].

27. Accordingly, if section 8(2) of the SOGA does not apply because parties to a sale of goods contract have left the price to be agreed between them (ie *"to be fixed in a manner agreed by the contract"*), there is no room nevertheless to imply a term <u>in fact</u> at common law that, in the absence of agreement, the price was to be a "reasonable" one. To do so would be inconsistent with the express terms of the contract and at odds with the codification set out in the SOGA.

28. <u>First:</u>

(1) There is a distinction between terms implied in fact and terms implied in law (ie between those which operate as *"ad hoc gap fillers"* and those which operate as *"general default rules"*): see ***Barton v Morris*** at [49] and [134]. In particular:

a. The principal criteria for implying a term in fact is whether such a term is *"necessary to give business efficacy to the contract and/or so obvious that "it goes without saying""*: see ***Barton v Morris*** at [133]. Any such term will be *"an individualised term "which is implied into a particular contract, in light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made"*: see ***Barton v Morris*** at [135].

b. Terms implied by law, however, *"are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it"*: see ***Barton v Morris*** at [49] (citing ***Geys v Société Générale, London Branch*** [2013] 1 AC 523 at [55]).

(2) The basis of the implication of a term makes a difference to *"the burden of expression"*: see ***Barton v Morris*** at [136]. Thus:

a. As to a term implied in fact, it is the party contending for that term that has to show that the test for implication is satisfied. Where – for example – any such term would be inconsistent with the express terms of the contract, that party would fail.

b. As to a term implied in law, the opposite is true. *"A contract is presumed to include any term implied in law as a standard incident of a contract of that type, unless such a term is expressly excluded"*: see ***Barton v Morris*** at [135].

29. Second:

(1) In a contract for the sale of goods, if a term cannot be implied under section 8(2) of the SOGA that the price is to be a *"reasonable one"*, that will be because the price will have been *"determined as mentioned in sub-section (1)"*. In other words, under section 8 of the SOGA, the reason that a *"reasonable price"* cannot be implied unless the contract is silent as to price is because, otherwise, to do so would be inconsistent with the express terms of the contract.

(2) If a term providing for a *"reasonable price"* cannot be implied under section 8 of the SOGA on this basis, that must also be fatal for any attempt to imply such a term in fact at common law for the same reason (ie inconsistency). As Lord Warrington said in ***May & Butcher v The King*** (at p. 22) in respect of a term for the price to *"be agreed"*, which precluded the price being a *"reasonable"* one under the Sale of Goods Act 1893:

> *"It is said that this case is to be treated on the same footing as if there had been no finding of the price; as if the contract had been silent as to the price, and the law may then imply a reasonable price; but in the present case the facts preclude the application of any such principle. To do that would not be to imply something about which the parties have been silent; it would be to insert in the contract a stipulation contrary to that for which they have bargained to give them, not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document…"*

(3) In other words, in circumstances where the purpose of section 8 of the SOGA and other statutory provisions like it (eg section 15 of the Supply of Goods and Services Act 1982) was *"to codify what was the position at common law so that there is a close link between the statute and the common law"* (see ***Barton v Morris*** at [214]), it would be wrong if the implication of a term in fact at common law could outflank the SOGA, such that what amounted to inconsistency for the latter would somehow not qualify as inconsistency for the former.

30. On the other hand, a term for a reasonable price may be implied in law into a contract for the sale of goods even where no such price could arise under section 8 of the SOGA.[11] Where

[11] A contract to pay a reasonable price may also be implied from the conduct of the parties after the date of the contract: see ***Mamidoil*** at [63].

that occurs, that would be because any such term was a *"legal incident"* of the kind of contract in question and had not been *"expressly excluded"*: see ***Barton v Morris*** at [46]. See, for example, ***Foley v Classique Coaches Ltd*** [1934] 2 KB 1 where, *"by analogy to the case of a tied house"* and given the *"rule in the case of a tied house"* that obliged a brewer to supply beer to a publican at a *"reasonable price"*, a term was implied into a contract for the sale of petrol at a price *"to be agreed"* that, in default of agreement, the price would be a reasonable one (see pp. 10, 12 and 15).

iii. A market price

31. As to the implication of a term providing for "a market price", to the extent that such a term is merely a synonym for "a reasonable price" the same analysis set out above applies. Further, to the extent that "a market price" is said to be different from "a reasonable price", again no such term could be implied if it were inconsistent with the express terms of the contract.

iv. The determination of a reasonable or market price

32. To imply a term into a contract that, in default of agreement between the parties, the price is to be a reasonable or market price, there will have to be some objective criteria by which the Court is able to determine such a price: see ***Mamidoil*** at [73](vi). As such, if there are *"no objective criteria by which the court could assess what would be reasonable as to quantity or price…none of the essential terms governing the supply of goods could be determined by such criteria"*: see ***Chitty*** at **4-188**.

33. In the case of a contract for the sale of goods, for example, a reasonable price is *"usually ascertained by reference to the current market price at the time and place of delivery"*: see ***Benjamin's Sale of Goods*** at **2-047**. If there is no such thing as a market price for the goods in question or if such a price is not readily assessable on an objective basis, however, such a price should not be used as a proxy for a reasonable price: see ***Teekay*** at [160], [206]; and ***Mamidoil*** at [73](v).

34. In those circumstances, the Court will have to be able to determine a reasonable price by reference to some other *"objective benchmark…without reaching an alternative subjective view or descending into the commercial fray"*: see ***Morris v Swanton*** at [28]. If there is *"no reference point in the contract, or indeed externally to justify any conclusion on any basis other than guesswork"*, a Court should not embark *"on such a task at all"*: see ***Morris v Swanton*** at [37] (and see [45]).

35. Accordingly, where a reasonable price cannot be determined by reference to any market price, it may, for example, be capable of being determined by reference to the cost of production of the goods in question (see ***Benjamin's Sale of Goods*** at **2-047**) or by deciding *"what reasonable*

persons in the parties' positions would have agreed" provided always that *"there is sufficient evidence"* from which to make such a decision: see ***Formation and Variation of Contracts*** at **3.17**.

36. Finally, as to the implication of a term providing for a market price (cf. a reasonable price), such a term should not be implied where a contract does not contain *"any definition"* of the market price *"or any indication of the basis on which it is to be ascertained"*, *a fortiori* in circumstances where there is *"more than one possible approach"* to determining such a price and doing so is *"a matter of judgment"*: see ***Gillatt v Sky Television Ltd*** [2001] 1 All ER (Comm) 461 at p. 470B.

(3) The enforceability of an obligation to use reasonable endeavours

37. As with an agreement to agree, so too an agreement to use reasonable endeavours (or similar) to agree is unenforceable: see ***Dany Lions Ltd v Bristol Cars Ltd (No. 2)*** [2014] 2 All ER (Comm) 403 at [20] and [21]. This is because such an agreement lacks the necessary certainty. As Millett LJ said in ***Little v Courage Ltd*** [1995] CLC 164 at 169H:

> *"…an undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, or to try to agree, or to negotiate with a view to reaching agreement;* ***all*** *are equally uncertain and incapable of giving rise to an enforceable legal obligation"* (**emphasis** added).

38. Further, a "reasonable endeavours" obligation *"necessarily imports the idea that the endeavours of the parties may fail to result* [in agreement]*, but neither is necessarily in breach"*: see ***Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd*** [1997] CLC 329 at p. 339.

D. Ground 1(a) of appeal: a reasonable or market price?

39. As set out above, Ground 1(a) raises the question whether the parties *"agreed that a reasonable, or market, price was to be paid in relation to the 800 MT per year"* either (1) as a matter of construction, or (2) by implication under section 8(2) of the SOGA or (3) otherwise (ie at common law).

(1) KSY's primary case: the construction of the Contract

a. The Judgment

40. The Judge set out the principles of contractual interpretation as summarised in ***Arnold v Britton*** and construed the price provisions in the Contract as follows (Judgment/¶¶57, 118):

[Core/6/96, 113]

> *"a. For the first 400 MT per year, a price of €1,350/MT, invoiced at €1,600/MT but with free trucks being provided to reduce the effective price to €1,350/MT*

b. For the balance of 800 MT per year [ie the Open Price Provision]*, a price* ***to be agreed by the parties*** *by December of the year preceding the delivery year, invoiced at €1,600/MT, with the provision of free trucks to achieve the effective price* ***as agreed*** *by the parties"* (**emphasis** added).

41. As set out below, the Judge's construction of the Open Price Provision as, in the first instance, an agreement to agree – ie before considering the question of implication of any terms - was correct for the reasons he gave. Insofar as KSY now says that the Judge was wrong to construe the Open Price Provision as an agreement to agree at all,[12] the short answer to this is that it was common ground before the Judge that this was the correct construction of the Contract.

42. In particular:

(1) As set out in the Particulars of Claim:

a. KSY's primary case was that the Open Price Provision provided for the price to be the *"Invoice Price with the parties* ***able to agree*** *(i) to an alternative price prior to the preceding December of each year…"* (**emphasis** added) (POC/¶11(e)).[13]

[Core/8/150]

b. KSY's (first) alternative case was that the parties *"were under an obligation to use reasonable endeavours* ***to agree*** *the number of free trucks* [and hence the price]*…in connection with the Remaining 800MT of Product per year"* (**emphasis** added) (POC/¶13).

[**Core/8/153]**

c. KSY's (second) alternative case was that, *"****if the parties were unable to agree*** *a price for the Remaining 800MT per year the Defendant would pay a reasonable price, alternatively (if different) the market price"* (**emphasis** added) (POC/¶14).

[Core/8/153]

(2) In other words, whichever way KSY put its case, it accepted that the Contract provided for the parties to agree the price for the 800mt between themselves, with the issue being what was to happen in the event of a failure to agree (on KSY's case either (a) the invoice price was to apply by default or (b) Citrosuco would have been in breach of a *"reasonable endeavours obligation"* or (c) a reasonable or *"(if different)"* the market price was to apply).[14]

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[12] See ASkel/¶¶5, 11 and 12 **[Core/3/25, 27, 28]**, which contend that, as a matter of construction, the price was not one subject to agreement at all but was to be a reasonable (or market price).

[13] This primary case was rejected by the Judge and there is no appeal against that decision (Judgment/¶¶112-119) **[Core/6/112-114]**.

[14] See also Reply and Defence to Counterclaim/¶10 **[Core/10/184]** and the Agreed Case Memorandum/¶9 **[Supp/2/13]**.

43. This is why, in its skeleton argument at trial, KSY said that the question to answer was *"What happens if agreement on the number of free trucks (and therefore the effective price) cannot be reached insofar as the 800 MT of product per year is concerned?"*[15] But this presupposed – contrary to Ground 1(a) of the appeal – that as a matter of construction, the Open Price Provision meant that the parties had to agree the price between themselves and not that it was to be some other unagreed price.

b. The construction of the Open Price Provision

44. In any event, the Judge's construction of the Open Price Provision was correct (i) as a matter of language (ii) construed in light of the relevant factual matrix.

(i) The language of the Open Price Provision

45. As the Judge held, the reference to an *"open price"* in the Open Price Provision could not have meant *"anything other than a price to be fixed by agreement between the parties"* (Judgment/¶114). **[Core/6/112]**

46. As to that:

(1) The natural and ordinary meaning of an *"open price"* is one that has been "left open" to be agreed. It can be contrasted with a *"fixed price"*, which means one that has been agreed.

(2) This is confirmed by the instruction that the price was *"to be fixed latest by December"*. The future tense was used because the *"open price"* had not yet been agreed but was to be agreed.

(3) There is no material difference between the expressions *"to be agreed"* and *"to be fixed"*. They are synonyms for each other (this may be common ground: see ASkel/¶26).[16] For example: **[Core/3/32]**

a. The verb *"fix"* was used in the Contract to describe the price at which the parties had already agreed to sell 400mt. It was used in the same sense in the Open Price Provision.

b. In emails between the parties prior to the conclusion of the Contract, the word *"fixed"* was used interchangeably with *"agreed"*, with the open price to be *"mutually agreed"*.[17]

c. As Ms Riga of KSY put it in her witness statement, *"The 2018 Contract was split into 400Mt at a fixed price and a further 800Mt to be provided at a price to be agreed"*.[18]

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[15] KSY's Trial Skeleton, ¶40 **[Supp/7/88]**
[16] KSY lists the words *"fixed"*, *"agreed"* or *"determined"* as synonyms for one another.
[17] See the emails dated 5.5.18 and 7.5.18 at Judgment, Appendix 2, p. 47 **[Core/6/125]**
[18] Riga2/¶3

d. In ***May & Butcher v The King*** (at p. 18), Lord Buckmaster read a clause requiring that a price *"shall be agreed"* as meaning it would *"be subsequently fixed between the parties"*.

47. Conversely, if the parties had intended that the price *"to be fixed"* for the 800mt was to be a reasonable or market price rather than a price to be agreed, they would have said so. They would not have used the words *"open price"* – which put no restriction or benchmark on the price *"to be fixed"* – but would have provided, in express words, for a *"reasonable or market price"*.

48. Further, clause 3 of the Contract also provided: *"Free trucks will be offered from the seller according to the* ***agreed*** *volume & price of each year"* (**emphasis** added). As to that:

(1) The adjective *"agreed"* described both the noun *"volume"* and the noun *"price"*. In other words, the natural and ordinary meaning thereof was that both had to be agreed.

(2) As 400mt was already *"fixed"* (both as to volume and price), the only thing left to be *"agreed"* was the *"open price"* for the 800mt (which, if agreed, would determine the *"agreed"* volume).

49. In other words, clause 3 recognised that the parties (a) left the *"open price"* for the 800mt to be agreed, which (b), in turn, meant that the *"volume…of each year"* was also to be agreed (ie as to the 800mt, that volume plus the number of free trucks KSY would have to provide on top of the 800mt to account for the difference between the invoice price and whatever *"effective price"* the parties agreed for the 800mt (as the Judge (rightly) put it: Judgment/¶¶116, 118(b)).

[Core/6/113, 114]

50. Further, an interpretation of the words *"open price to be fixed"* to mean that the *"open price"* was to be agreed between the parties is also consistent with two other features of clause 5.

51. **First**, the *"open price to be fixed"* had to be a precise price. The difference between that price and the invoice price had to be capable of calculation to determine (with precision) the number of free trucks (or free volume) to be provided by KSY (Judgment/¶116) (and see clause 5 – viz: *"Difference of price in free trucks"* (ie the difference between the invoice price of €1,600/mt and whatever *"open price"* was agreed for the 800mt)). **[Core/11/191]**

[Core/6/113]

52. As to the reference to *"free trucks"* in the Contract:

(1) The Judge held that, as a general *"concept"*, it meant *"a promotional pricing strategy used in contractual agreements. The mechanism is 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). As he also held, understood in

[Core/6/82]

this sense, a seller *"will offer the free trucks as a sort of unwritten rum or gentleman's agreement"* and a buyer would have *"no contractual entitlement"* to free volume (Judgment/¶46). **[Core/6/92]**

(2) Whilst the Judge said that there *"seems no reason to doubt"* that the individuals who negotiated the Contract understood the concept of free trucks in this sense (Judgment/¶9), as a matter of the construction of the Contract, that is <u>not</u> the sense in which the Judge held that the free trucks mechanism was used (Judgment/¶116). As the Judge held: **[Core/6/82]** **[Core/6/113]**

> *"It is clear from the terms of the contract that the free trucks mechanism referred to in the contract is not simply an optional process that the Claimant* [ie KSY] *can operate, but rather is central to the price. Subject to whether the price is agreed, the contractual obligation of the Claimant is to supply 800 MT of wesos plus whatever additional volume is necessary to render the price of the total supply that which the parties have agreed by way of price. Indeed, the position of counsel for the Claimant in closing submission was that provision of free trucks was not optional for the Claimant – and the amount of free trucks to be delivered flows inexorably from the price as the contract anticipates would have been agreed as indicated earlier".*

53. KSY is therefore wrong to imply that the Judge construed the free trucks mechanism in the Contract as being a mechanism that was to be used to adjust the contracted price in response to market price fluctuations (cf. ASkel/¶¶38(b) and 46).[19] He did not. Further, KSY has neither sought nor obtained permission to appeal against the Judge's finding in respect of the meaning of the free trucks mechanism as used in the Contract. Accordingly: **[Core/3/38,40]**

(1) KSY is wrong to say that the *"commercial purpose"* of the free trucks mechanism as used <u>in the Contract</u> was to provide a mechanism whereby the contractual price could respond to fluctuations in the market price (cf. ASkel/¶46). The Judge rejected this contention.[20] **[Core/3/40]**

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[19] This may be common ground: ASkel/¶38(b) **[Core/3/38]** does not say that this is how the Judge actually construed the free trucks mechanism in the Contract (ie what the Judge held at **[Core/6/113]** Judgment/¶116) but rather just refers to the Judge's finding that there *"seems no reason to doubt"* that that is how the men who negotiated the Contract *"understood"* the concept of **[Core/6/82]** free trucks (ie at Judgment/¶9).

[20] Ie The Judge rejected the contention at POC/¶12 **[Core/8/151]**, which set out KSY's (original) case that the free trucks mechanism as used in the Contract only meant that KSY could offer such additional volumes to reflect fluctuations in the market price *"as an incentive for further purchases and/or as a goodwill gesture"*.

[Core/6/113] (2) Instead, as the Judge (righty) held (Judgment/¶116), the starting point was that the parties were to agree a price between themselves, which would then determine the number of free trucks to be provided (ie the (free tucks) cart was to be behind the (open price) horse).

54. In summary, the *"open price"* therefore had to be a precise price as it was the difference between that price and the invoice price which was to identify the number of free trucks to be delivered.

55. **Second**, the *"open price"* also had to be fixed by a particular deadline (ie by *"December of the previous year"*). The Contract is, however, silent on how that (precise) price was to be fixed by that deadline if not by the agreement of the parties. Nor does the Contract set out any dispute resolution machinery by which a (precise) price could be fixed by that time if not by the agreement of the parties (eg there is no arbitration or even jurisdiction clause in the Contract).

56. Drawing those two points together – the requirement for the *"open price"* to be precise and for it to be *"fixed latest by December of the previous year"* meant that the parties must have intended that, consistently with the natural and ordinary meaning of the words *"open price to be fixed"*, the *"open price"* was to be agreed between them. Only agreement is likely to have been able to identify such a precise price within the deadline required by the Open Price Provision.

(ii) Factual matrix

57. The Judge's interpretation of the Open Price Provision as providing for the *"open price"* to be agreed between the parties applies *a fortiori* in light of the relevant factual matrix.

58. **First**, the Judge held that (1) the peak production period for pulp wash in Greece – which is where the pulp wash sold under the Contract was to be produced - is from December to March; (2) pulp wash has a limited shelf-life of 12 months from production; (3) sellers need to plan production and buyers need to identify uses for pulp wash in advance; so that (4) contracts for the sale and purchase of pulp wash are normally concluded before production.[21]

59. All of these factors explain why the *"open price"* had to be *"fixed latest by December of the previous year"*: ie so that KSY would know how many free trucks it would have to produce in its peak production period (December to March) and Citrosuco would know how much pulp wash in total it would be receiving so that it could plan to utilise it before its shelf-life expired. In other words, the number of free trucks (and thus the price) had to be fixed before production.

[21] Judgment/¶¶7, 50 **[Core/6/82, 93]**

60. **Second**, in comparison to an agreed price, neither (1) "a market price" nor, if different, (2) "a reasonable price" is something that is readily assessable for pulp wash.

61. As to (1), a "market price":

(1) As the Judge held, in respect of pulp wash, a market price was (and is) difficult to define (Judgment/¶124). As he noted, KSY's own expert *"replied that the market price of pulp wash was not readily identifiable with the words, "no, not at all""* (Judgment/¶49). The determination of a market price for pulp wash would always be *"a matter of the exercise of judgment by an expert"* and would depend on a number of variables (Judgment/¶¶109(c), 123 and 124).

[Core/6/115] **[Core/6/93]** **[Core/6/110,114, 115]**

(2) In its Reply and Defence to Counterclaim, KSY had said that the market price of pulp wash *"is correlated to the market price of orange juice concentrate and amounts to 70% of the price for orange juice concentrate"* (¶20). The Judge rejected this contention. Whilst he said such an approach *"may give a suitable basis for estimating the likely price…the reality will clearly depend on a series of other factors…All of these factors create uncertainty in the price of wesos"* (Judgment/¶125).

[Core/10/187] **[Core/6/115]**

(3) Further, (again) as the Judge held, there *"is no mechanism in the contract for arbitration or other methodology for determining the market price. That leaves the parties in the position where they cannot know what the relevant market price is…"* (Judgment/¶¶109(c) and 123). In other words, there was (and is) no such thing as a readily identifiable *"market price"* for pulp wash, and the Contract gave no clues as to how one was to be determined, if that was to be the price.

[Core/6/110, 114]

62. KSY has also not obtained permission to appeal the above findings of fact in respect of the difficulty of defining or identifying a market price for pulp wash.[22] Insofar as KSY now says that such findings are *"inconsistent"* with the evidence (ASkel/¶64 (see also ASkel/¶¶47)) it is (a) not entitled to do so without permission and (b) wrong in any event. Such findings were supported by the evidence and were not ones that no reasonable Judge could have made.

[Core/3/41,47]

63. In brief:

(1) Insofar as KSY relies on the table of ranges for the market price of pulp wash agreed by the experts to suggest otherwise, this is misconceived (ASkel/¶64). Whilst the prices set out therein are labelled as *"the market price"*, they were in fact no such thing. As the Judge subsequently held, *"there was no available market"* for pulp wash at the relevant times covered

[Core/6/119]

[22] KSY sought permission to appeal the Judge's findings in respect of ascertaining a market or reasonable price at paragraph 3(d) of its Grounds of Appeal but was not granted such permission **[Core/1/15] [Core/7/142]**.

by the table (Judgment/¶139). If there was no market, it follows that there was no market price either. As such, labelling the prices in the table as "the market price" is a misnomer.

(2) Further, at best the experts were only able to agree price ranges in the table because *"prices could not be 100% precise"* for pulp wash (Judgment/¶49). As to that: **[Core/6/93]**

a. The process by which the experts had determined those price ranges involved a number of stages, namely: (i) determining a market price for frozen concentrated orange juice (FCOJ) from various sources (formal and informal); (ii) choosing an applicable percentage to apply for the correlation between the market price for FCOJ and a price for pulp wash;[23] (iii) identifying an appropriate exchange rate; and (iv) adding on packing and transportation costs.[24]

b. As KSY's expert agreed, *"there was room for commercial parties to disagree based on their own judgment"* at every stage.[25] As he put it, *"The only thing you cannot negotiate are the customs"*.[26]

(3) In other words, as the Judge was entitled to hold, the ranges for "the market price" of pulp wash agreed between the experts using a rough formula for the correlation between the price of pulp wash and FCOJ were far from setting out an objective market price for pulp wash (Judgment/¶125). As the Judge said, the *"reality will clearly depend on a series of other factors"* (Judgment/¶125); but those are *"commercial factors on which the court could not sensibly reach a determination based on objective criteria"*: see ***Morris v Swanton*** at [45]. **[Core/6/115]**

64. As to (2), a "reasonable price":

(1) The starting point is that, in practice, the "reasonable price" claimed by KSY was the so called market price (see POC/¶32 – viz: *"…the Claimant claims a reasonable price…being its market price at the relevant time"*). See also ASkel/¶¶11 and 52, which make it clear that there is no difference in terms of the figure or basis of calculation between the "reasonable" or "market" price contended for by KSY (ie they amount to the same thing). **[Core/8/156]** **[Core/3/27,42]**

[23] Whilst the experts agreed with a correlation of *"around 70%"* (Judgment/¶125) **[Core/6/115]**, KSY's expert had said in his expert report that *"the price correlation could be between 65% to 80%"* **[Supp/3/27]**.

[24] See Transcript Day2/136/16-146/3 **[Supp/13/167-168]**. Such costs being necessary to include to produce a like-for-like comparison with the contract price, which was to include packing and transportation.

[25] See Transcript Day2/146/1-4 **[Supp/13/170]**

[26] See Transcript Day2/145/20-22 **[Supp/13/170]**

(2) As a result, it follows that "a reasonable price", if understood to mean "a market price", suffers from the same difficulty of definition or identification as the latter (Judgment¶/123). If, however, "a reasonable price" is to mean something different from "a market price", there is no definition or criteria in the Contract for determining the same and no other basis for the Court to determine what would have been reasonable (Judgment/¶123).

[Core/6/114]

[Core/6/114]

65. Drawing that together – ie the need to have fixed a precise price before production of the pulp wash from December to March each year, and the difficulty, if not impossibility, of doing so if that price was to be something as prone to disagreement as a "reasonable" or "market" price rather than an agreed price – the above factual matrix explains why the language of the Contract should be construed in its natural and ordinary way as an agreement to agree. Again, only such agreement would sensibly have been expected to produce a result in time; conversely, a term fixing the price as a "reasonable" or "market" price could have been expected to give rise to the risk of a dispute with the price unknown in time and, perhaps, even years later.

66. Finally, and in any event, the Judge did not hold that the commercial purpose of the Open Price Provision in the Contract was to *"the price to reflect movements in the market"* (cf. ASkel/¶45). On the contrary, he held that the purpose of that provision was to *"allow either party to pursue its own commercial ends in negotiating the price"* (Judgment/¶123). Further, the fixed price of €1,350/mt for the 400mt was not based on any agreed or defined market price as at the date of the Contract.[27] There was (and is) therefore nothing in the factual matrix to suggest that the *"open price to be fixed"* was (alone) somehow to be determined by reference to some (undefined and unidentifiable) "reasonable" or "market" price rather than to be agreed.

[Core/3/40]

[Core/6/114]

(2) KSY's first alternative case: section 8(2) of the SOGA

67. If the Judge was correct to construe the Open Price Provision as requiring the *"open price"* to be agreed between the parties (Judgment/¶118(b)), that is fatal for KSY's first alternative case based on section 8 of the SOGA. As to that:

[Core/6/114]

[27] KSY contended that this price was *"a negotiated "promo initiative""* below the market price (Reply and Defence to Counterclaim, ¶8(b)(iii)) **[Core/10/182**] whereas Citrosuco considered this to have been an *"excessive"* price (Judgment/¶33) **[Core/6/89]**.

(1) The Judge held that *"In so far as the contractual terms expressly include a mechanism for determining the price, namely the agreement of the parties, such a term would not be implied under the Sale of Goods Act 1979"* (Judgment/¶121). He was right to do so. **[Core/6/114]**

(2) As set out above, a term cannot be implied into a contract under section 8(2) of the SOGA where *"there is a provision that the two parties are to agree"*; the SOGA *"provides for silence"* and in such a case, *"there is no silence"*: see ***May & Butcher v The King*** at p. 21.

68. Put another way – under the Open Price Provision, the price was *"left to be fixed in a manner agreed by the contract"* for the purposes of section 8(1) of the SOGA (ie it was to be fixed by the parties' agreement). Accordingly, as the price was *"determined as mentioned in sub-section (1)"*, section 8(2) of the SOGA cannot apply. KSY's reliance on the SOGA is therefore mistaken.

(3) KSY's second alternative case: an implied term at common law

69. If a term cannot be implied into the Contract that the *"open price"* was to be a reasonable price under section 8(2) of the SOGA, KSY nevertheless says that the Judge was wrong not to imply a term that the price was to be a "reasonable" or "market" price at common law.[28] KSY says that such a term is to be implied into the Contract in fact (ie by applying the test for the implication of such terms as set out in ***Marks & Spencer*** (ASkel/¶22 and see POC/¶14)). **[Core/3/31 and Core/8/153]**

a. The Judgment

70. The Judge summarised the principles applicable to the implication of terms in identical terms to those now relied upon by KSY (see Judgment/¶58 and ASkel/¶22). He also set out the principles summarised by Rix LJ in ***Mamidoil*** at [69] and Chadwick LJ in ***BJ Aviation*** at [19] to [24], which it was (and is) common ground set out applicable guidance on the proper approach to an agreement to agree and the implication of terms (Judgment/¶¶54, 55). Finally, the Judge set out a passage from ***Benjamin's Sale of Goods*** at **2-047** on which KSY relied (and relies: see ASkel/¶12) after noting that *"the courts are well used to determining what is a reasonable price where there is a contractual obligation to do so"* (Judgment/¶89). **[Core/6/97 and Core/3/31]** **[Core/6/94-96]** **[Core/3/28]** **[Core/6/105]**

71. There was no error in the Judge's identification of the applicable principles.

72. Next, the Judge applied those principles. He held that the parties intended that a total of 3,600mt of pulp wash would be bought and sold under the Contract (ie including the 800mt

[28] Citrosuco assumes that KSY contends for such an implied term *in the event* that the parties failed to agree a price albeit Ground 1(a) is not expressed in those terms (see POC/¶14) **[Core/8/153]**.

[Core/6/102] per year at *"open price"*) (Judgment/¶80). He therefore held that this was a case where the Court [Core/6/100] ought to try to imply a term, if possible, to enable the contract to be carried out (Judgment/¶70 [Core/6/104] (and see ***Mamidoil*** at [69](iv)) (albeit holding (rightly) that the Court could be less troubled if it was unable to do so as only part of the parties' bargain would fail (Judgment/¶86)). [Core/6/116] Nevertheless, he held (Judgment/¶128):

> *"…whatever approach one takes and* ***however hard one strives*** *to establish a contractual term as to the price for the balance of 800 MT of wesos per year for which a price was not agreed, one is left with a contract where there is an agreement to agree on the issue of price. None of the alternative suggestions is* ***capable of filling the gap****"* (**emphasis** added).

73. Again, there was no error in the Judge's application of the principles and (unsurprisingly) his resulting decision not to imply a term was the right one.

b. The reasons why a term cannot be implied into the Contract

74. For the following reasons, the Judge was right not to imply a term that, in the event the parties did not agree the *"open price"*, the price was instead to be a "reasonable" or "market" price.

75. **First**, in circumstances where no term can be implied into the Contract that the price was to be a reasonable price under section 8(2) of the SOGA, on the basis that to do so would be inconsistent with the price having been *"left to be fixed in a manner agreed by the contract"* for the purposes of section 8(1), an identical term cannot be implied in fact at common law for the same reason (ie as this would also be inconsistent with the express terms of the Contract).[29]

76. Further, insofar as KSY relies upon ***Foley v Classique Coaches*** and ***Queensland Electricity Generating Board v New Hope Collieries Ptry Ltd*** [1989] 1 Lloyd's Rep. 205 PC to suggest [Core/3/34] otherwise (ASkel/¶29), that is wrong. Firstly, each case must be decided on its own facts and the construction of its own agreement: see ***Mamidoil*** at [69]. Further:

(1) As to ***Foley v Classique Coaches***, as set out above, the term implied into the agreement in that case was a term implied by law by analogy with the rule in the case of a tied house. As such, that term formed part of the contract in question unless the parties had expressly excluded it, which they had not done. On that basis, such a term was not inconsistent with the provision of the contract providing for the price to be agreed. In any event, that case

[29] Insofar as necessary, Citrosuco relies on this point at paragraph 1 of section 6 of its Respondent's Notice **[Core/2/18]**.

is distinguishable on the facts as here, *inter alia*, there was no equivalent part performance in respect of the *"open price"* volumes and no arbitration clause: see ***Chitty*** at **4-176**.

(2) As to ***Queensland Electricity Generating Board***, that case concerned a long-term coal supply contract governed by the law of Queensland. The SOGA did not, and could not, have applied to it. In any event, that was a case where the contract set out the matters to be reflected in the new pricing structure to be agreed and all the Court implied was that *"the terms of the new price structure are to be fair and reasonable as between the parties"* (p. 210 (lhc)). Further, such implication was made as a result of the *"kind"* of agreement in question and, primarily, because the parties had agreed an arbitration clause in wide terms (p. 210).

77. By contrast, if reference to other decisions were at all useful, this case is indistinguishable from ***May & Butcher v The King***. The result should therefore be the same.

78. **Second**, even if there were room to imply a term in fact notwithstanding that an identical term cannot be implied under section 8(2) of the SOGA, such a term would be unworkable given:

(1) As set out above, the *"open price to be fixed"* had to be a precise price to enable the calculation of the exact volume of free trucks KSY would be obliged to produce on top of the 800mt. As KSY's expert agreed, however, it was not possible to come up with *"a precise figure"* for
[Core/6/93] a market or reasonable price for pulp wash (Judgment/¶49). As that demonstrates, a wide yardstick of reasonableness may not appropriate for an implied term in a case where – as here – a precise figure has to be specified: see ***Teekay*** at [201].

(2) As also set out above, the *"open price"* had to be fixed *"latest by December of the previous year"*. The parties therefore had up until the end of each December to try to agree. If they failed, however, there would then be no time before the deadline to fix a reasonable or market price instead; *a fortiori* given the difficulties of doing so (see ***BJ Aviation*** at [29]).[30]

79. In other words, for the Contract to work the parties had to know a precise price by a certain deadline. As it is, however, almost 6 years after that deadline has passed (ie December 2018) the parties still do not know the precise price, and hence the volume of free trucks that were meant to have been produced and delivered, for 2019. That is fatal for the implied term.

80. Further, the Contract provided no mechanism to determine a reasonable or market price if the parties failed to agree the *"open price"*, let alone a mechanism that could have done so *"latest by*

[30] Insofar as necessary, Citrosuco relies on these points at paragraphs 2(a) and (b) of section 6 of its Respondent's Notice **[Core/2/18]**.

December of the previous year". There was no arbitration clause (or even a jurisdiction clause) in the Contract. The fact that the parties provided no such mechanism is because they cannot have intended that the *"open price"* would be determined otherwise than by their agreement.[31]

81. **Third**, as the Judge (rightly) held, an implied term to pay a reasonable or market price would be too imprecise on the facts of this case (ie a contract for pulp wash) (Judgment/¶¶123-125). **[Core/6/114-115]**

82. At the outset, this is unsurprising in circumstances where even KSY has put forward no fewer than 9 figures for a reasonable or market price for pulp wash in December 2018 alone.[32] Those figures range from €1,201/mt to €1,501/mt (ie a difference of €240,000 over 800mt). Further, the prices KSY now puts forward as a candidate for a reasonable or market price (ie €1,243/mt or €1,203/mt or €1,202-1,260/mt: see ASkel/¶52) are different from its pleaded case (ie €1,430/mt: see POC/¶32) and different to what it contended for before the Judge.[33]

83. In brief, the number of alternative figures put forward by KSY for a reasonable or market price aptly shows why an implied term providing for such a price in this case would be too imprecise.

84. Further, the fact that a reasonable or market price may be a sufficiently precise criteria for the Court to imply such a term in other circumstances does not mean the same is true in this case (cf. ASkel/¶33). As to that: **[Core/3/36]**

(1) As set out above, KSY's case was that there was an ascertainable market price for pulp wash and that that price could also be used as a reasonable price.[34] Put another way – KSY

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[31] Insofar as necessary, Citrosuco relies on this point at paragraphs 2(c) of section 6 of its Respondent's Notice **[Core/2/18]**.

[32] In summary, (1) figures of €1,305/mt or (2) €1,501/mt in an email dated 10.11.19 (see Judgment, Appendix 2, p. 52) **[Core/6/130]**; or (3) a figure of €1,201/mt in an email dated 17.12.19 (see Judgment, Appendix 2 p. 53) **[Core/6/131]**; or (4) a figure of €1,430/mt in POC/¶32 **[Core/8/156]**; or (5) a figure of €1,289/mt in its expert's first report (see Judgment/¶48) **[Core/6/92]** or (6) a range of €1,203-1283/mt agreed in the experts' joint memorandum (see Judgment/¶47) **[Core/6/92]** or (7) a figure of €1,243/mt or (8) €1,204/mt or (9) a range of €1,202-1260 (see Askel/¶52 and Fn. 22 **[Core/3/42]**, which says that either (a) the middle of the range from the table at Judgment/¶47 **[Core/6/92]** can be used or (b) the bottom of that range or (c) the price could be set at the midway point in the relevant delivery period (ie June 2019)).

[33] Further, as to the suggestion that Ms Hogan of Citrosuco calculated a price for pulp wash in November 2018 that was the same as the lowest figure used in the experts' range for December 2018, this is misguided. The Judge did not make any finding at all as to how Ms Hogan had come up with her figure but recorded that *"She did not accept that she was aware of a market price for wesos"* without suggesting that this evidence was not to be accepted (Judgment/¶39) **[Core/6/90]**.

[34] See POC/¶32 **[Core/8/156]** and Reply and Defence to Counterclaim/¶20 **[Core/10/187]** (and see Transcript/Day4/p.11/ 23-25: *"…it was an agreement to pay a reasonable price fixed at the end of the year preceding deliveries, which I say is the market price…"*) **[Supp/15/188]**.

did not say that a reasonable price was to be calculated on a different basis to a market price. In this case, those were two ways of saying the same thing.

(2) As the Judge held (see above), however, there was no such thing as a readily ascertainable market price for pulp wash (Judgment/¶¶123-125). KSY does not have permission to challenge that finding of fact and cannot now do so. In any event, given the evidence of KSY's own expert to that effect (Judgment/¶49) such a finding was (plainly) justified.

[Core/6/114-115] **[Core/6/93]**

(3) Insofar as KSY (now) says that a reasonable price could have consisted of 70% of the price of FCOJ (ASkel/¶50), this is misconceived in circumstances where:

[Core/3/41]

a. KSY's pleaded case was (and is) that a market (cf. a reasonable) price of pulp wash *"amounts to 70% of the price for orange juice concentrate"*;[35] and

b. The Judge held that a price based on a rough 70% correlation between the price of FCOJ and pulp wash was too uncertain to determine a market price (Judgment/¶125).

[Core/6/115]

(4) KSY cannot now try to resurrect its case on the 70% correlation under the guise of putting this as a reasonable price instead. It still suffers from the same flaw (ie uncertainty). Further, even adopting that formula as a starting point, determining a reasonable price would then involve matters of commercial judgment, which the Court could not answer without impermissibly descending *"into the commercial fray"*: see ***Swanton v Morris*** at [28].

(5) In those circumstances, there was (and is) no objective criteria to determine a reasonable price in this case. Where – as here – a market price cannot be used, as one is not readily assessable, a reasonable price must be based on some other objective criteria. KSY could have put forward a case for the assessment of a reasonable price based on some other such criteria (eg costs) but chose not to do so (and it is now too late for it to do so).

[Core/3/43] 85. Accordingly, it is no answer to say now – as KSY does (ASkel/¶57) – that the Court is able to determine what a reasonable price was by deciding *"what reasonable parties would have agreed in the circumstances"*. This was not the way the case was pleaded and there was therefore no evidence addressing what the price would have been on such a basis.[36] As such, the Judge was (plainly) right to find that he could not determine any price on this basis (Judgment/¶¶123).

[Core/6/114]

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[35] See Reply and Defence to Counterclaim/¶20 **[Core/10/187]**; Agreed Case Memorandum/¶9 **[Supp/2/13]**.

[36] Eg evidence of what the parties would have taken into account in any price negotiation, such as the costs of production, stored volumes, storage capacity, other contracts, future demand etc…

E. Ground 1(b): an obligation to use reasonable endeavours to agree?

86. As set out above, Ground 1(b) raises the question whether 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"* either (1) as a matter of construction or (2) by way of an implied term.

87. The starting point is that KSY says that *"there was an implied term to exercise reasonable endeavours to agree the number of free trucks (and therefore the price)"* and that this *"essentially comes to the same conclusion* [as an implied term providing for a reasonable or market price] *albeit via a different implied term"* **[Core/3/28]** (ASkel/¶12). As to that:

(1) First, insofar as KSY now puts its case on Ground 1(b) solely on the basis of an implied term, that is no doubt in recognition of the fact that there are no words in the Contract out of which to construe an express obligation to use reasonable endeavours to agree the *"open price"* and hence the number of free trucks consequent thereon.

(2) Second, the suggestion that this implied term comes to the same conclusion as an implied term providing for a reasonable or market price is a *non sequitur*. As set out above, an obligation to use reasonable endeavours *"necessarily imports the idea that the endeavours of the parties may fail to result* [in agreement]*"*: see ***Phillips Petroleum v Enron*** p. 339.

88. In any event, as the Judge (rightly) held, a term that the parties were to use reasonable endeavours to agree the *"open price"* would be too uncertain to be implied into the Contract **[Core/6/115]** (Judgment/¶126). In brief, that is because it is well-established that an obligation (whether express or implied) to use reasonable endeavours to agree is too uncertain to be enforceable: see ***Dany Lions v Bristol*** at [20] to [21]; and see ***Little v Courage*** at 169H.

89. Finally, insofar as KSY relies upon what Longmore LJ said (obiter) in ***Petromec v Petroleo Brasiliero*** **[Core/3/37]** [2006] 1 Lloyd's Rep. 121 at [117] and [118] to suggest otherwise (ASkel/¶36), that is wrong. The facts of that case were very different. The express term in question was a clause of a contract providing for the parties *"to negotiate in good faith"* in respect of *"the extra costs"* (not **[Core/3/37]** the price (cf. ASkel/¶36)) of upgrading a vessel to conform with certain agreed specifications, which costs would have been *"comparatively easy to ascertain"* (at [86] and [114]). This is a far cry from a case where – as here – a party is contending for an implied term to use reasonable endeavours to agree the price of a commodity in a sale of goods contract.

F. Conclusion

90. For the reasons set out above, the Court is invited to dismiss the appeal with costs.

TOM CORBY

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