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Case No: CL-2021-000186

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26/05/2023

Before :

SIMON BIRT KC
(sitting as a Deputy Judge of the High Court)

Between :

Rhine Shipping DMCC
- and -
Vitol S.A.

Claimant

Defendant

Timothy Young KC and Patrick Dunn-Walsh (instructed by Rosling King LLP) for the
Claimant

Paul Toms (instructed by MFB Solicitors) for the Defendant

Hearing dates: 7, 8, 13 March 2023

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 26th May 2023.

Simon Birt KC :

1. This dispute arises out of a voyage charter (“**the charter**”) of the crude tanker *Dijilah* (“**the Vessel**”) between the Claimant (“**Rhine**”), as disponent owner, and the Defendant (“**Vitol**”) as voyage charterer. Rhine’s claim is for unpaid demurrage, which by the time of the trial had been agreed in the sum of US\$3,010,427 and therefore was not the subject of any dispute, save by way of set-off of the counterclaim. The trial was therefore only concerned with Vitol’s counterclaim, which is a claim for breach of the charter by way of delay to the Vessel in proceeding to one of the load ports (for which it is said Rhine was responsible under the terms of the charter). The counterclaim is for the sum of US\$3,692,106.72 (plus interest).
2. The delay to the Vessel was the result of the arrest in Ghana, at the suit of third parties, of various items of property on board the Vessel. The arrest of the property resulted in the Vessel being detained for some days until security was posted. There is a dispute between the parties as to whether, under the terms of the charter, Rhine is liable for the consequences of the detention and the delay that followed.
3. The resultant delay in the loading of the Vessel at its next port, Djeno, in Congo, is said by Vitol to have caused it to pay an increased price to the seller of the cargo there loaded. It is that increase in the price that forms the central element of Vitol’s claim against Rhine. In addition to issues on liability and causation, there were issues at trial as to the effect of certain of Vitol’s hedging arrangements on the recoverability of loss and as to remoteness of loss.

The evidence at trial

4. The only witness of fact was Mr Jordan Smith, a commercial analyst at Vitol, who was called by Vitol. He gave evidence as to Vitol’s internal risk management processes and how they were applied in this case. He explained the approach Vitol took to managing risk, including hedging, and how its internal system, known as Vista, was used to manage risk.
5. Mr Smith had tested positive for Covid-19 a day or two before he was due to give evidence. The parties agreed that the best way to deal with that in these circumstances was that Mr Smith give his evidence remotely via video-link, which took place without any difficulty. Mr Smith was a straightforward witness who did his best to assist the court in giving his answers.
6. At the start of the trial, Rhine had been seeking to adduce evidence from its own witness, Mr Surendra Gehlot (the managing director of another company called IKON Petroleum DMCC (“**Ikon**”), which was said to be related to Rhine) but had filed his statement only shortly before trial and therefore required permission to rely upon it and to call Mr Gehlot. Vitol objected to this late evidence and, during the course of the opening submissions (after Mr Toms, who appeared for Vitol, confirmed that Vitol was not as part of its case on remoteness of loss running any case based on knowledge of special circumstances under the second limb of *Hadley v Baxendale*), Rhine withdrew its application to rely upon it. Mr Gehlot therefore did not give evidence and his statement formed no part of the evidence at the trial.

7. Each party adduced expert evidence from experts in the field of oil trading (including hedging) to deal with two issues: (i) whether on-selling on the pricing terms used by Vitol for the cargo was unusual and (ii) the nature and effect of any hedging arrangements that Vitol had for the cargo, including whether their effect was to reduce any loss to Vitol resulting from the delay to the Vessel.
8. Rhine's expert was Mr Max Beckett, a partner at CJH Experts Ltd, with over 25 years of experience in the oil industry, having held senior management roles at several global oil traders. His experience includes oil trading, including managing the risks associated with trading, and he has developed and implemented complex price risk management and other hedging strategies.
9. Vitol's expert was Ms Liz Bossley, an oil markets trading consultant with over 45 years trading experience. She is CEO of the Consilience Energy Advisory Group Ltd (which she founded), a consultancy specialising in the physical oil and derivatives markets and associated activities, including oil transportation and refining.
10. The two experts were both obviously knowledgeable and experienced in their field, and both produced useful reports and, together, a helpful Joint Memorandum. They reached a considerable measure of agreement in their Joint Memorandum, for which they are to be commended.
11. Both were cross-examined, which process reinforced to a large extent the common ground between them. I deal below, when discussing Vitol's hedging arrangements, with their evidence in further detail.

Factual background

12. The charter was for the carriage of a cargo of min 260,000MT crude oil from 1/2 port(s) West Africa (Ghana-Angola range) to 1/3 port(s) Far East Singapore-Japan range. The second cargo was loaded at Djeno ("**the Djeno cargo**") and was the subject of purchase and sale contracts entered into by Vitol before it had entered into the voyage charter. The loss claimed by Vitol that is in issue in this case arises from the terms of those contracts.

The purchase and sale contracts for the Djeno cargo

13. On 3 March 2020, Vitol (as sellers) concluded a contract to sell 920,000 barrels of Djeno crude to Vitol Asia Pte Ltd ("**Vitol Asia**"), CIF Qingdao China, with an estimated arrival period of 20 – 31 May 2020 ("**the Vitol Asia contract**"). The sale price was agreed as the average of the settlement quotations for July-20 ICE Brent (ICE Index), for quotations between 27 – 28 May 2020, plus USD2.60 per BBL. This was therefore referable to the date of arrival for discharge, not the bill of lading date. In trading terms, Vitol were "short" at this point.
14. Subsequently, Vitol entered into (as buyers) a contract for the purchase of the Djeno cargo with TOTSAs Total Oil Trading SA ("**TOTSAs**") dated 26 March 2020 ("**the TOTSAs contract**"), which incorporated the Total General Terms and Conditions for FOB sales of Crude Oil, 2007 edition ("**the Total GTCs**"). Under Section VII.2 of the Total GTCs, Vitol was obliged to ensure that the Vessel arrived at Djeno for loading within the period 9-10 May 2020 (the "**Vessel Presentation Range**"), and under Section

VII.6, TOTSA was entitled to an indemnity from Vitol in respect of a breach of Section VII.2.

15. The TOTSA contract was amended on 2 April 2020 to revise the Vessel Presentation Range to 5-6 May 2020. (The TOTSA contract was amended again on 6 April 2020 in relation to the test of quality and quantity, though that is not material to the issues in dispute).
16. The price payable by Vitol under the TOTSA contract was determined by the bill of lading date for the Djeno cargo. The price was the average of the mean quotations published in the Platts Crude Oil Marketwise under the heading Brent Dated, based on the average of the first five quotations published after the bill of lading date, minus a discount of US\$4 per BBL.
17. The pricing terms of the TOTSA contract and the Vitol Asia contract were, therefore, different, in that (i) they were based on different pricing indices (Brent Dated vs ICE Index), and (ii) those indices were referable to different times, respectively, the bill of lading date and the deemed discharge arrival period.

The charter

18. The charter was dated 27 March 2020 and, as mentioned above, was for the carriage of a cargo of crude oil from West Africa to the Far East. It was on an amended BYVOY4 form, amended Vitol Voyage Chartering Terms 2006 and additional clauses.
19. The charter had a cancelling date of 30 April 2020, referable to the first loading port in Ghana. It did not contain any stipulation as to time for the arrival or loading at Djeno for the second parcel.
20. It contained the following terms on which Vitol's claim is founded:

(1) "OWNERS REPRESENT AND WARRANT

THAT AT THE TIME OF AND IMMEDIATELY PRIOR TO FIXING THE CHARTER, THE VESSEL, OWNERS, MANAGERS AND DISPONENT OWNERS ARE FREE OF ANY ENCUMBRANCES AND LEGAL ISSUES THAT MAY AFFECT VESSEL'S APPROVALS OR THE PERFORMANCE OF THE CHARTER." (The "warranty").

(2) "13. Third Party Arrest

In the event of arrest/detention or other sanction levied against the vessel through no fault of Charterer, Owner shall indemnify Charterer for any damages, penalties, costs and consequences and any time vessel is under arrest/detained and/or limited in her performance is fully for Owner's account and/or such time shall not count as laytime or if on demurrage, as time on demurrage." ("Clause 13").

The voyage

21. Vitol ordered the Vessel to load first at Offshore Cape Three Points (in Ghana) and then at Djeno (in Congo). The Vessel tendered a valid Notice of Readiness ("NOR") at Cape Three Points on 29 April 2020.

22. On 30 April 2020, various third parties, by an order of the Ghanaian Court, arrested the Vessel's bunkers and stores in connection with a dispute between those third parties and Al-Iraqia Shipping Services and Oil Trading ("Al-Iraqia", also sometimes abbreviated in the documents to "AISSOT"). Al-Iraqia is connected to Rhine, as further explained below, and was the bareboat charterer of the Vessel from its registered owners.
23. The third parties who had obtained the order for the arrest ("the Ghanaian Plaintiffs") were six vessel owners who had chartered their vessels to Al-Iraqia. The order to arrest was sought as security for claims brought in arbitration in London by the Ghanaian Plaintiffs against Al-Iraqia.
24. The order, which was dated 28 April 2020, had been made by the Superior Court of Judicature in the High Court of Justice, Western Region, Sekondi, Ghana. It was for the arrest of

"...all maritime assets described in the suit herein as the 2nd defendant and relating to the operations of the Vessel M/T "DIJILAH" i.e. the bunkers, lubricants unbroached provisions, ropes, paints & other consumables be arrested and kept pending the determination of the matter."

25. The order further stipulated:

"...the defendant shall in the alternative post a security in the form of Bank Guarantee in the sum of US\$12 million."

26. By email dated 30 April 2020, the Master of the Vessel was advised by the local customs authorities (by email from Edward Apaloo, Resident Officer, GRA-Customs Division, Offshore Cape Three Points) that officers from the Ghanaian Navy were to come aboard the Vessel which would then proceed to Takoradi anchorage. The email was headed with the subject line "DETENTION OF VESSEL (MT. DIJILAH)", and stated as follows:

"I have been authorised by the Assistant Commissioner of Customs (Upstream Petroleum Operations) to inform you that in view of a court order that is to be served you by the bailiff from a competent court of jurisdiction in Ghana, you are to allow the officers of the Ghana Navy to board your vessel. They are not to interfere with the loading operation but will detain and proceed to Takoradi with your vessel after the operation"

27. After completion of loading of the Ghanaian parcel of 949,417 bbls (127,991 mts) at 13.36hrs on 30 April 2020, the Vessel proceeded to Takoradi Anchorage. The Master sent an email advising Vitol and others that:

"...upon casting off from JAK FPSO, Ghana Naval Personnel have boarded the vessel and instructed us to Proceed [sic.] to Takoradi anchorage as per Court Order.

Vessel Proceeding towards Takoradi Anchorage."

28. The Vessel remained at Takoradi anchorage for some days whilst security was negotiated. Following the posting of security, on 7 May the Vessel was permitted by the local authorities to proceed on its voyage to Djeno.
29. The Vessel arrived at Djeno on 10 May 2020, tendering a valid NOR at 13.30hrs on 10 May, and loaded the Djeno cargo, which it completed on 12 May. The three bills of lading in respect of the three parcels comprising the Djeno cargo were issued on 12 May 2020.
30. The Vessel then proceeded to Qingdao, China, in accordance with Vitol's orders, tendering NOR at 07.36hrs on 13 June 2020. However, in consequence of following Vitol's discharging orders, the Vessel was idle for more than 30 days, and discharge was not completed until 18.30hrs on 25 August 2020 (at a different port, Huangdo). This gave rise to a substantial demurrage liability.
31. It is the delay to the Vessel in loading at Djeno, following the arrest of the property on board the Vessel in Ghana, that gives rise to Vitol's counter-claim. The result of that delay in loading was an increase in the price that Vitol had to pay to TOTSA under the TOTSA contract.
32. Before turning to the issues that arise on the counter-claim, there are three other relevant aspects of the factual background to introduce.

The relationship between Rhine and Al-Iraqia

33. The relationship between these two companies is relevant because it assists in understanding the circumstances leading to the arrest of the property on board the Vessel, and because it is material to the issue as to whether there was a breach of the warranty.
34. Al-Iraqia was (i) the bareboat charterer of the Vessel from Nera Shipping S.A. ("**Nera**"), the registered owners of the Vessel, pursuant to a Charterparty dated 12 July 2018, and (ii) the disponent owner of the Vessel under a time charter with Rhine dated 15 January 2020 ("**the Head Charter**").
35. It is clear from the documents disclosed in this litigation that Al-Iraqia is in some way connected with Rhine. However, Rhine adduced no factual evidence to explain the relationship between the companies.
36. That which was apparent from the documents included the following:
 - (1) On 9 January 2020, David Allen, described as "chartering manager" with an Al-Iraqia email address ("@aissot.com"), circulated an email entitled "AISSOT VLCC/RHINE RELETS VLCC UPDATE" stating: "*Note below ships under Rhine as per attached Q88 no change in tech management, disponent owner remains Aissot, Commercial Operator now Rhine Shipping DMCC.*" It then listed under the sub-heading "Rhine Relets" the vessels *Baghdad, Anbar and Erbil*, and under the sub-heading "AISSOT" the vessels *Dijilah, Basra, Kirkuk, Hillah, Karbala, Diyala and Ninawa*.
 - (2) The Vessel was chartered by Al-Iraqia to Rhine for a period of "minimum 1+1+1 years chopt +/- 30 days" in Rhine's option. No bank account was identified at

clause 9 of the Head Charter in respect of the payment of hire. The Head Charter was signed on behalf of Al-Iraqia by Mr Allen, and on behalf of Rhine by Cap. Pathak as “chartering manager”.

- (3) There were clearly common personnel between Al-Iraqia and Rhine. For example:
- (a) The email passing on the communications between the Master and the local customs authorities concerning the arrest was sent by Jyotish Nair (described by the brokers as a message from “owners”). That email came from a group email “operations@aissot.com” and Mr Nair signed off as “Head of Operations – Shipping” for Al-Iraqia. The email footer set out telephone, mobile and fax numbers, a personal email address for Mr Nair with Al-Iraqia and Al-Iraqia’s website domain. It was copied to David Allen of Al-Iraqia, again with an Al-Iraqia email address.
 - (b) By a further email sent later on 30 April 2020, it appears that the same individual (signing off as “Jyothish, Rhine Shipping”) sent an email from “operations@rhine-shipping.com” to brokers and to Vitol, copied to David Allen. It started “*Further to our last message ...*”, even though the previous message had been sent from an Al-Iraqia email address and with Al-Iraqia contact details, suggesting that Rhine and Al-Iraqia were acting as though they were the same or inter-changeable entities, or at least authorised to communicate on each other’s behalf.
 - (c) After the arrest, email correspondence (dated 5 May) included Vitol contacting Mr Allen, at his Al-Iraqia address, treating him as representing their counterparty.
 - (d) Jyothish Nair sent an email of 7 May, advising of release of the vessel. It was sent from “operations@rhine-shipping.com”, but the footer to Mr Nair’s email contained details of his own email address at Al-Iraqia (“J.N@aissot.com”) and a group email (“operations@aissot.com”) as well as a link to the Al-Iraqia website (“www.aissot.com”). A similar pattern was followed in an email from Mr Nair of 8 May 2020 asking whether there was a final quantity for loading at Djeno.
- (4) Al-Iraqia and Rhine appear to have instructed the same solicitors. Al-Iraqia’s London solicitors in the arbitration brought by the Ghanaian Plaintiffs were Lax & Co, who also represented Rhine in these proceedings (until the firm merged with Rosling King).

37. I will return later to the question how these matters figure in the issues in dispute between the parties.

The dispute between Al-Iraqia and the Ghanaian Plaintiffs

38. The Ghanaian Plaintiffs were owners of six vessels that had been bareboat chartered to Al-Iraqia. According to the claim submissions served by the Ghanaian Plaintiffs in the arbitration they commenced in London against Al-Iraqia:

- (1) The Ghanaian Plaintiffs had sought to sell the vessels, but negotiations had foundered in October 2019 upon the prospective buyers' reluctance (and/or their prospective lenders' reluctance) to take on the charters with Al-Iraqia. Specifically, *“the prospective lenders were not willing to take the risks they perceived to be presented by [Al-Iraqia] and sanctioned trades through the proxy movements of Iran inside Iraq aimed at circumventing US sanctions ...”*.
- (2) The Ghanaian Plaintiffs had become increasingly concerned as to the compliance of Al-Iraqia with the obligations under the sanctions clause in their charters, with the result that they wrote to Al-Iraqia pointing out a breach of charter, requiring compliance and seeking documentation. Deadlines were set for the production of documentation, which were missed.
- (3) Following further exchanges and conversations which did not allay the Ghanaian Plaintiffs' concerns and which did not remedy the existing breaches or constitute compliance with the sanctions clause, the Ghanaian Plaintiffs purported to terminate the charters on 24 December 2019 and again on 7 January 2020. However, Al-Iraqia refused to redeliver the vessels and continued to trade them.

(The above summary is not intended to be a balanced summary of the parties' respective positions in the London arbitration. Indeed, it could not be because no disclosure was given of the defence submissions. Rather, it is a summary of the case brought by the Ghanaian Plaintiffs).

39. Claim submissions in the London arbitration were served by the Ghanaian Plaintiffs on Al-Iraqia's London solicitors (Lax & Co) on 20 February 2020.
40. On 24 April 2020, the Ghanaian Plaintiffs issued in Ghana an *ex parte* motion for an *“Order to arrest and detain the maritime assets ... namely; All property on board the M/T ‘Dijilah’ relating to its operation including Bunkers, Lubricating Oil, Paints, Ropes and other consumables presently on board the Vessel ‘Dijilah’ being the properties of the 1st Defendant as Bareboat Charterers ... pending the provision of a First Class Bank Guarantee in the sum of US\$71,635,259.84 to secure the Plaintiffs’ claim...”*. The Defendants were Al-Iraqia. Their statement of claim in Ghana (which bears the same date) summarised the dispute in the London arbitration, and identified the damages claimed as a sum in excess of US\$64 million (plus interest).
41. Al-Iraqia's defence in the Ghanaian proceedings denied breach of the sanctions clause and contended that the request for redelivery of the vessels was unjustifiable and wrongful. It averred that the bunkers on board the Vessel belonged to Rhine (as time charterers), and not Al-Iraqia.

Vitol's risk management system

42. This is relevant to the issues that arise in relation to loss.
43. The live evidence at trial mainly concerned the evidence relating to Vitol's approach to risk management and its Vista system, and what took place in relation to that system in this case. In large part (both in respect of the factual evidence, from Mr Smith, and the

evidence of the experts) this turned out to be uncontroversial. I summarise the position below.

44. Vitol has a “group trade capture” system called Vista. When a physical sale or purchase is made, the transaction and its salient details are recorded in Vista by Vitol “brokers” entering data from the commercial recap into a “physical capture” screen, either by themselves or by instructing a commercial analyst on their team to enter the information for them.
45. This physical deal will often be matched with a corresponding deal, e.g. where there are contracts for the purchase and sale of the same quantity of the same cargo of the same origin (which could actually be in respect of the same cargo), so that where Vitol enters a contract to purchase a cargo, and another contract to sell on that cargo, the purchase and sale will be grouped together on Vista. So, in the present case, Vitol’s “sell” position under the Vitol Asia contract was matched on Vista with its “buy” position under the TOTSAs contract. This matching is referred to within Vitol as a “Vista hedge”. However, is not a “hedge” in a specialised sense of being a transaction with a third party that is entered into in order to offset or eliminate a particular risk in the first transaction. Mr Smith explained that this just happened to be how the Vista system had been set up, with the term being the name of a particular screen within the commodity trading risk management system, and that it just referred to a group of transactions (he said, for example, there could be a purely speculative position in a particular ID and the system would still give it the label “Hedge PnL”).
46. The experts agreed that the use of the word “hedge” in “Vista hedge” does not have the same meaning as an internal or an external hedge. Rather, as they recorded in the joint memorandum: “*A Vista Hedge is the holding of a linked group of physical transactions, whose price risk is then managed by allocating transactions, internal or external, to that Vista Hedge by a central risk management desk, probably in consultation with the custodian of the Vista Hedge.*” For this reason, to avoid the potential for confusion, in his supplemental report, Rhine’s expert Mr Beckett adopted the term “Vista Match” as a more accurate description.
47. Once such a match has been made within the Vista system, it is then possible for Vitol to analyse the overall market or pricing risk inherent in a “Vista hedge” (i.e. a pair of matched transactions), and Vitol’s risk management procedure is applied to that risk to lock in profits and reduce the impact of subsequent market movements. Under this procedure, Vitol will first look to hedge the risk inherent under the pair of matched transactions internally, i.e. by entering a hedging transaction with another “portfolio” within the Vitol group as a counterparty. One of the reasons for this is that it is more efficient and economical for Vitol (as a large trader) to enter into such “transactions” internally, rather than to hedge its exposure on each matched transaction with an external counterparty.
48. The other portfolio within Vista acting as “counterparty” will typically be a group of other transactions which already contain unrelated “paper hedges” which themselves have arisen out of other Vitol transactions. The purpose of this internal “hedging” is both in order to calculate a notional profit and loss for a particular transaction and also to understand the overall risk for a group of transactions and, in turn, across the whole of Vitol. Once the internal hedge has been recorded in Vista, not only in the original Vista

hedge but also in the counterparty portfolio (which will typically contain a number of paper transactions), there may be risk in the counterparty portfolio which needs hedging. Vitol will then, in turn, assess the risk in that portfolio and decide whether to enter into a further internal hedge with another portfolio.

49. This internal hedging process is first done within a given sub-division, and then that sub-division's exposure is offset against other sub-divisions, in order to manage and pool risk efficiently across Vitol.
50. Mr Smith explained in his oral evidence that, once the purchase of an internal swap was booked within Vista by an analyst, "*they automatically create the offsetting position*" (in other words, the sale side of the same swap) in the other internal Vista portfolio. As he explained, the purpose of booking internal swaps in respect of Vista matches and then moving them into portfolios of paper hedges was to "*manage the exposure by centralising it in one place for a certain portfolio*". The process was such that:

"...the risk is internalised into a separate bucket, where the risk still remains. There is then a decision that is made on whether or not the risk that exists in a paper portfolio is then consolidated with other risks throughout the business, et cetera, and then the net of all of the risk ... there is a decision made to keep some of that risk or to get rid of some of that risk externally."
51. This set of internal processes allows Vitol to understand its overall exposure to the relevant risks. To the extent that Vitol is long or short on a net basis any particular position across its portfolio, Vitol may choose to use external hedges (i.e. with third parties) in order to protect its position as a whole or it may choose to maintain that market position. If a decision is made to take an external position with a third party, that will be entered in Vista and allocated either to a specific defined group of transactions or a generic pooling of risk. Mr Smith explained that an external hedge is only allocated to a specifically defined group of transactions if it is requested and required by the relevant broker. Otherwise, it is grouped across the portfolio and arbitrarily allocated to internal trades. This was a process Mr Smith described as a "book hedge", being where a trading house hedges the aggregate position of its book of trades from time to time, rather than by entering into individual hedges for each trade in its book.
52. I should add that where I refer to "internal" or "internally" I mean internally within Vitol (i.e. Vitol SA). Although Vitol is part of the wider Vitol Group, Mr Smith's evidence explained that the risk management tools referred to are applied internally to each Vitol company.
53. In the present case, the purchase from TOTSA and the onward sale to Vitol Asia were entered into the Vista system and were given the Vista ID number 1037645.
54. Vitol entered into both internal and external futures contracts to hedge against the risk of a decrease in the sale price under the Vitol Asia contract. They are not material to the issues that arise in this case.
55. Vitol also entered into a series of internal swaps ("**the Swaps**") to hedge against increases in the purchase price under the TOTSA contract occasioned by any delay in loading the Vessel. It is important to note that these were not swaps with external counterparties –

they were internal to Vitol. It is these Swaps and their effect that are centrally relevant to issues of causation and loss in this claim.

56. In terms of the mechanics of the Swaps, on 30 March 2020, Vitol recorded in Vista the notional purchase of a ‘swap’ by ID 1037645 in respect of the Dated Brent Price for the cargo to be purchased from TOTSA. That “purchase” was a notional “swap” in respect of five roughly equal parcels of cargo (totalling the quantity purchased from TOTSA) on each of the five pricing dates, i.e. 7, 11, 12, 13 and 14 May 2020, which would have been used to price the cargo under the TOTSA contract had the Vessel loaded between 5 – 6 May 2020.
57. The Dated Brent Swaps “purchased” on 30 March were purchased by ID 1037645 at a fixed price, namely the Dated Brent forward price as at 30 March for the 7 – 14 May pricing dates. The settlement price when the swap was closed out would be done automatically based on the average of the actual Dated Brent prices published by Platts on each of the 7 – 14 May pricing dates. The prices recorded in Vista, therefore, reflect market prices for external hedges at the time the various pricing risks under the Vista hedge arose.
58. The Swaps were allocated to a “counterparty” within Vitol SA, namely a group of transactions with ID 1038101 (with no external hedging occurring in this respect). In other words, logged within Vista was the purchase by ID 1037645 of a swap for the pricing dates 7, 11, 12, 13 and 14 May 2020 of the total TOTSA contract quantity from, as ‘seller’ of the swap, the group of transactions with ID 1038101.
59. The effect of these entries in the Vista system was to transfer the pricing risk arising out of the purchase of the TOTSA cargo from ID 1037645 to ID 1038101 to sit alongside the pricing risks already contained in ID 1038101 from other unrelated transactions. This assisted Vitol to understand its overall exposure across its book of trades within, at this stage, the sub-division to which the purchase of the Djeno cargo belonged.
60. As Mr Smith explained, the purpose was to “*consolidate [the risk] with a whole bunch of other risks that have been taken out of physical West Africa hedges and put into a paper one, so we can consolidate multiple risks across months and different types of cargoes.*”
61. After it became apparent that the Vessel’s arrival at Djeno would be delayed by reason of the detention at Takoradi anchorage, and therefore that the actual pricing dates under the TOTSA contract would be later than anticipated, a commercial analyst in Vitol took steps over a period of days to “roll” the Swaps that were already in place for the TOTSA contract, such that the pricing dates of the internal hedge matched the delayed anticipated dates for pricing under the TOTSA contract: the pricing dates but for the delay would have been 7, 11, 12, 13 and 14 May but, by reason of the delay, were anticipated to be 13, 14, 15, 18 and 19 May 2020.
62. The effect of this was that the Swaps (after the “rolling”) would close at dates that were anticipated to be the dates of the quotations used to determine the purchase price from Total (i.e. the “first five (5) quotations published after the [anticipated] Bill of Lading date”). In this way, the Swaps were kept specifically in line with the loading and the

physical sale under the TOTSA contract. But for the delay to the loading date the Swaps would not have been rolled in this way.

63. Mr Smith explained, and I accept, that there was nothing unusual from Vitol's point of view either about the pricing for the purchase and sale of the Djeno cargo or in relation to the internal risk management structure used by Vitol.
64. The rolling of the Swaps generated a gain within the Vista system for Vista ID 1037645 in the amount of US\$2,871,971. There would have been a corresponding loss within the Vista system for the counterparty ID 1038101.
65. Vitol had to pay TOTSA an additional US\$3,674,834 because of the late loading of the Djeno cargo (i.e. because the bill of lading date was 12 May rather than 6 May). The "loss" therefore recorded on the Vista system for ID 1037645 because of the late loading was US\$802,863 (i.e. \$3,674,834 - \$2,871,971).
66. As well as giving evidence that assisted in gaining an understanding of the working of the Vista system, both generally and in relation to the facts of this case, the experts gave evidence on the extent to which such arrangements were usual. There was, I have already noted, a large degree of agreement between them.
67. The matters on which they agreed included:
 - (1) The pricing terms of the Vitol Asia contract were not unusual.
 - (2) It is not unusual to purchase a cargo of oil on an event-triggered date (e.g. the date of the bill of lading, as with the TOTSA contract), such that the price is set effectively on a floating basis, and then to sell on an agreed fixed date (e.g. the Vitol Asia contract). However, it would be unusual to do so without the price risk having been hedged.
 - (3) The swap and futures trades entered into in relation to ID 1037645 made sense in the context of the particular deal's price risk.
 - (4) It is usual for a large trading house (such as Vitol) to have a central desk to manage price exposure. And it is usual for the central risk management desk in a large trading house to net off the offsetting price risk exposure within the company (i.e. within Vitol SA). The experts agreed that they would be surprised if an entity of Vitol's size did not consolidate its exposure and manage the whole in accordance with its central market price view and appetite for risk.
68. The experts also agreed that the relevant transactions to consider for the purposes of determining any change in profit or loss because of the change in the loading dates are the rolling of the Swaps.

Summary of the claims

69. It is common ground that after making allowance for US\$4 million already paid by Vitol for demurrage, a further sum of US\$3,010,427 is payable by way of demurrage subject

only to Vitol's counterclaim. As mentioned above, the counterclaim is made by Vitol in the sum of US\$3,692,106.72, and therefore if successful in full would (more than) extinguish the sums outstanding by way of demurrage.

70. Vitol alleges that, by reason of the arrest at Cape Three Points, Rhine is (a) liable to Vitol for breach of the warranty, and (b) liable to indemnify Vitol under clause 13. Rhine denies liability under both clauses.
71. Vitol contends that, by reason of the delay at Cape Three Points, the Vessel was delayed in its arrival at Djeno. Vitol alleges that, by reason of the Vessel's delayed arrival at Djeno on 10 May 2020, it was required to pay US\$24,562,783.57 for the cargo loaded at Djeno, rather than the US\$20,887,949.35 it alleges would have been payable had the Vessel arrived in time to load the Djeno cargo with a 6 May bill of lading date. (There was no dispute that those were the correct figures for, respectively, (i) the price that Vitol had to pay TOTSA for the Djeno cargo because the bills of lading were dated 12 May, and (ii) the price that Vitol would have had to pay TOTSA for the Djeno cargo had the bills of lading been dated 6 May). Vitol claims the difference between these sums (i.e. US\$ 3,674,834.22) as damages for breach of the charter.
72. Vitol also alleges that TOTSA made it clear that, if the Vessel did not arrive within the Vessel Presentation Range, the Terminal at Djeno would be in "high stock position" i.e. no further product could be transferred into the Terminal, and that TOTSA would hold Vitol responsible for the delays, cost, and consequences thereof. Vitol alleges that, by way of mitigating its loss (in the form of such liability to TOTSA) it reached an agreement with a third party, Mercuria Energy Trading SA ("**Mercuria**"), under which it paid Mercuria's costs (in the form of additional bunkers burned) of accelerating the arrival time of Mercuria's chartered vessel, the *Stena Superior*, so that it would load crude oil within the Vessel Presentation Range and thereby avoid the Terminal being in "high stock position". The Defendant claimed US\$17,272.50 under this head ("**the Mercuria loss**"). Although this was originally in issue, by the time of the trial Rhine had agreed that, if it was held in breach of charter, this element of the loss was recoverable.
73. Rhine contended that, even if it was in breach of charter as alleged, it was not liable for the claimed loss (except for the Mercuria loss):
 - (1) It put Vitol to proof that, even without the arrest at Cape Three Points, the Vessel would have loaded at Djeno in sufficient time to obtain bills of lading for the Djeno cargo dated 6 May 2020.
 - (2) Rhine contended that any loss suffered by Vitol had been reduced by Vitol's hedging arrangements in the amount of US\$2,871,971, and insofar as so reduced it was not recoverable from Rhine.
 - (3) It also contended that, even if Vitol's loss had not been so reduced in fact, the only loss that was recoverable as not too remote was loss that would still have been suffered if those hedging arrangements had so reduced the loss.
74. Therefore, Rhine contended that if Vitol were to succeed in establishing liability and if Vitol succeeded on the bill of lading date issue, it would be entitled on its counterclaim to US\$802,863 (being the difference between Vitol's claim of US\$ 3,674,834 and what

Rhine contended were the hedging gains of US\$2,871,971) plus the Mercuria loss of US\$17,272.50, giving a total of US\$820,135.50.

75. In its written closing submissions, there was a suggestion that Rhine was seeking to backtrack from this acceptance that, if Vitol succeeded on those issues, it would be entitled to the US\$802,863 (as well as to the Mercuria loss). However, at the end of his oral closing submissions, Mr Young (who appeared for Rhine) confirmed that he was not seeking to do that, and that Rhine continued to accept that if Vitol succeeded on those points, it was entitled to the US\$802,863 (as well as to the Mercuria loss).
76. There was no defence pleaded that any steps that were not taken by Vitol ought to have been taken in reasonable mitigation of its loss (and Mr Young confirmed in his oral opening submissions that no such defence was being run). It was not said that Vitol had failed to take reasonable steps to mitigate its loss.
77. I should also note that Rhine had also originally pleaded a further defence, namely that Vitol had suffered no loss because the additional price payable under the sale contract with TOTSA merely reflected the increased market value of the cargo purchased by Vitol at the time of loading; in other words, Vitol paid more for something worth more. This was not dealt with at all in Rhine's opening skeleton argument, and Mr Young confirmed in his oral opening submissions that it was not pursued. In the circumstances, I say no more about that point.

The issues

78. The key issues which arise for determination are therefore:
 - (1) Whether Vitol is entitled to an indemnity under clause 13 of the charter.
 - (2) Whether there was a breach of the warranty.
 - (3) If the Vessel had not been detained, whether the bills of lading for the Djeno cargo would have borne the date of 6 May 2020. This also includes a question as to the correct approach to take in relation to this issue.
 - (4) Whether the system of "hedging" entered into by Vitol reduced the loss.
 - (5) If the loss was not thereby reduced, whether it was in part too remote to be recoverable, either (a) because it was outside the reasonable contemplation of the parties, or (b) because, even if within their reasonable contemplation, Rhine had not assumed responsibility for it. In either case, there was also an issue whether, if liability under the clause 13 indemnity was established, the rules on remoteness of loss applied.

Liability

The clause 13 issue

79. Clause 13 is entitled "Third Party Arrest" and provides in full:

“In the event of arrest/detention or other sanction levied against the vessel through no fault of Charterer, Owners shall indemnify Charterer for any damages, penalties, costs and consequences and any time vessel is under arrest/detained and/or limited in her performance is fully for Owner's account and/or such time shall not count as laytime or if on demurrage, as time on demurrage.

In the event of arrest/detention or other sanction levied against the vessel through no fault of Charterer, Charterer shall be entitled, in Charterer's option, to terminate the Charter. Termination or failure to terminate shall be without prejudice to any claim for damages Charterer may have against Owner.”

80. The first issue relating to clause 13 is whether or not it was engaged by the circumstances of the delay to the Vessel as a result of the arrest of the property on board in Ghana.
81. Vitol contends that it was so engaged. It says that the Vessel was detained as a matter of the ordinary meaning of the language of the clause. It relies on the meaning attributed to the word “*detained*” in *The Jalagouri* [2000] 1 Lloyd’s Rep 515 (at 519), a case considering the meaning of the word in an off-hire clause in a time charter, and says that there was a geographical and physical constraint on the Vessel’s movement in relation to her service under the charter, such that she was detained.
82. Rhine contends that clause 13 was not so engaged. It argues that, as an indemnity clause under which Rhine would be liable irrespective of whether it was at fault, it falls to be construed narrowly (for which proposition it relied upon *Lewison, The Interpretation of Contracts* (7th ed.), para 12.119). It says that the words “*levied against*” in the clause refer not only to “*other sanction*” but also to “*arrest/detention*” and that no detention was “*levied against*” the Vessel. Rather, it was the property on board the Vessel that was arrested, not the Vessel itself. Insofar as there was a “*detention*”, that was not levied against the Vessel (compared to examples where a detention may fairly be described as being levied against a vessel, such as Port State Control detentions).
83. The issue is whether what took place at Cape Three Points and Takoradi in Ghana was an “*arrest/detention or other sanction levied against the Vessel.*” In my view, it plainly was.
 - (1) The arrest was of the property on board, not of the Vessel. However, in support of that arrest and/or as a consequence of it, the Vessel was undoubtedly detained. The inevitable consequence of the property on board being arrested was that the Vessel would be detained, in the sense of being constrained or prevented from freely continuing on its voyage. Indeed, that is what took place. The local customs authorities in Ghana made it clear to the Master (in the email of 30 April 2020 with the subject line “*Detention of the Vessel*”) that officers of the Ghana Navy were to board the vessel, and would “*detain and proceed to Takoradi with your vessel after the [loading] operation.*” The consequence was that the local authorities and the Ghana Navy prevented the Vessel from continuing on its voyage to Djeno, and it was not permitted to leave Takoradi anchorage until security had been posted. In any ordinary use of language, the Vessel was detained.

- (2) Under the terms of clause 13, there was no additional requirement that the detention be “levied against” the Vessel in any sense other than that the Vessel was detained. The inclusion of those words did not mean that it was the Vessel that had to be the primary target of the particular arrest or other sanction in question, but simply that the Vessel had been arrested or detained or had some other sanction imposed on it. In any event, even if one had to identify, in order for the facts to fall within clause 13, a detention “levied against” the Vessel, there was such a detention here. The local authorities and Ghana Navy prevented the Vessel from leaving. That was a detention levied against the Vessel. It does not matter that the reason for the detention was in support of the arrest of the property on board. It was still a detention of (and “levied against”) the Vessel.
 - (3) Clause 13 reflects an agreed allocation of risk between owner and charterer in relation to the circumstances identified by the clause. There is no objectively obvious reason why Vitol would have been content to allocate to Rhine the risk of arrest or detention of the Vessel where the Vessel was the primary target of the arrest or detention, but itself to bear the risk of detention of the Vessel where that was as a result of the arrest of property on board the Vessel. The consequence for Vitol would be the same in either event.
 - (4) I have reached the above conclusions without reference to the decision in *The Jalagouri*, which dealt with the word “*detained*” in the context of a differently worded clause in a time charter. However, the above conclusions are entirely consistent with what was said by Tuckey LJ (at p. 519) in relation to the meaning of the word “*detained*” in the context of the clause before the Court in that case. There was a constraint upon the Vessel’s movements in relation to her service under the charter, and she was prevented from leaving Cape Three Ports other than to move to the Takoradi anchorage, and then prevented from leaving the Takoradi anchorage until security had been provided.
 - (5) I also bear in mind that the consequences of the facts falling within the scope of the clause are serious. They include not only an indemnity (which, if Vitol is correct on its further argument, covers non-remote losses and consequences, a point I address below) but also give Vitol the right to terminate the charter. However, the language is clear, and it is readily understandable why the parties would have provided for such consequences in the event of the Vessel’s detention, including its detention for the reasons it was detained here. This does not provide a basis to give the words triggering the indemnity an unduly narrow meaning.
 - (6) The above appears to me to be the case as a matter of the language of the clause whether or not (as Rhine contended) it is construed “narrowly”. The words plainly have the meaning set out above. Moreover, this is not a case where the indemnity would absolve Vitol from liability for its own breach of contract, nor one in which Vitol is seeking an indemnity in respect of the consequences of its own negligence (on the contrary, the indemnity only applies where there is no fault of the charterer), such that additional clear words would be required to cover the circumstances.
84. Although not relevant when considering the proper construction of the clause, and not taken into account in coming to the above conclusion, I note that the above is also entirely consistent with the views the parties took contemporaneously with the arrest, where as a

matter of practicality and reality they referred to the Vessel having been detained and the need for it to be released. For example:

- (1) In the Master's response to the email from the local customs authorities first notifying him of the arrest of the property on board and the direction to move to Takoradi anchorage he asked for the reason for "*detaining the vessel*".
- (2) In an email of 1 May 2020, Al-Iraqia's solicitors, Lax & Co, told the Ghanaian Plaintiffs' solicitors, Reed Smith, that their clients were arranging a P&I Club guarantee "*for the release of the [Vessel] from arrest...*".
- (3) Al-Iraqia's motion filed in the Ghanaian Court on 4 May 2020 sought to vary the security ordered (from US\$12million to US\$300,000) and also a consequential order "*for the release of the [Vessel] arrested by this Honourable Court on 28th April 2020*". The supporting affidavit referred to a variation of the order in respect of the type and quantum of security "*for the release of the Vessel*". Also on 4 May, a supplementary affidavit was filed indicating that Al-Iraqia was willing to put security up in the amount of US\$1,375,157.75 such that "*the interest of the Plaintiffs are adequately covered to enable the court to order a prompt release of the [Vessel]*."
- (4) Mr Lax, of Lax & Co (acting for Al-Iraqia and/or Rhine), sent an email dated 4 May 2020 to Vitol referring to lining up "*our arguments for getting the ship released asap.*"
- (5) On 5 May, Vitol wrote to Mr Allen (at an Al-Iraqia email address) referring to the need for a solution including "*the release of the vessel*".
- (6) On 6 May, Mr Lax told Vitol that the "*vessel is in the process of being released*".
- (7) On 7 May, Jyothish Nair emailed to brokers (passed on to Vitol) saying "*Dijilah is released from the Detention*".

85. The clause 13 indemnity is engaged here, and Rhine must indemnify Vitol under its terms. I will deal later in this judgment with the question whether or not that engages the rules relating to remoteness of loss.

The warranty issue

86. The warranty stated that Rhine represented and warranted:

"THAT AT THE TIME OF AND IMMEDIATELY PRIOR TO FIXING THE CHARTER, THE VESSEL, OWNERS, MANAGERS AND DISPONENT OWNERS ARE FREE OF ANY ENCUMBRANCES AND LEGAL ISSUES THAT MAY AFFECT VESSEL'S APPROVALS OR THE PERFORMANCE OF THE CHARTER".

87. This gave rise to two issues:

- (1) Did Al-Iraqia fall within the description of entities listed in the clause, in particular did it fall within the description “managers” or “disponent owners”?
- (2) Whether, at the time of and immediately prior to fixing the charter, Al-Iraqia was “free of any encumbrances and legal issues that may affect the Vessel’s approvals or the performance of the charter.”

Did Al-Iraqia fall within the warranty?

88. The background facts relating to Al-Iraqia have been set out above. It was the bareboat charterer of the Vessel, was involved in its management and operations at least to some extent, and appears to have been closely connected (at least insofar as they had personnel in common) with Rhine.
89. Rhine contended that Al-Iraqia was neither a disponent owner nor a manager within the meaning of the warranty:
 - (1) Rhine contended that the charter expressly defined “disponent owner” as “Rhine Shipping”. It said that was the crucial fact, and whether or not Al-Iraqia might otherwise have been described as a disponent owner was irrelevant.
 - (2) In relation to “managers”, Rhine said that there was no evidence that Al-Iraqia played any technical management role. In terms of commercial management, Rhine noted that “Commercial operator” was defined in the charter as being Rhine “c/o Al-Iraqia”, but said that did not substitute Rhine for Al-Iraqia in such a role.
90. Both of those points rely on the suggestion that “disponent owner” and “commercial operator” were defined terms in the charter, and therefore determine the meaning of the terms “disponent owners” and “managers” respectively in the warranty. However, that is not a safe basis on which to interpret the warranty.
91. What Rhine relied on as “definitions” were simply the opening lines of the fixture confirmation which identified the basic details of the parties and other entities. So “Registered Owners” was identified as Nera Shipping SA; Disponent Owners as “Rhine Shipping DMCC” and “Commercial operator” as “Rhine Shipping DMCC c/o Al-Iraqia Shipping Services and Oil Trading”. A broker was also identified (“Genesis Shipbrokers Ltd”).
92. It does not appear that these were intended to stand as definitions for those parties throughout the terms of the charter, or even in the recap. For example, the warranties were introduced with the words “Owners represent and warrant”, clearly intending to refer to Rhine (the party to the contract fitting the description “owners”), rather than using the term Rhine here suggests is a defined term, i.e. “Disponent Owner represents and warrants”. Other references to “Owners” in other warranties (putting aside for the moment the warranty at issue in this case) also appear to refer to Rhine, as the contracting party. Consistently, the identifications at the top of the recap were not expressed to be definitions.

93. Moreover, the use of the terms within the warranty itself is not consistent with their use as definitions. The term “managers” is not identified or defined at all. Its use in the warranty is clearly descriptive. As noted above, the term “Owners” is not identified either, but elsewhere it is used clearly to refer to Rhine (rather than, for example, to the registered owner, Nera Shipping SA). Even “Disponent owners” in the warranty is not the same as the “definition” that Rhine suggested it was, if only because in the “definition” it is singular but in the warranty it is used in the plural.
94. The terms used in the warranty, therefore, are descriptive of categories of entities. They are not necessarily confined to the particular identified parties in the first section of the recap.
95. The term “managers” is a general and wide one. There was no suggestion that Al-Iraqia were technical managers for the Vessel (and the Q88 attached to the charter identified the technical operator as Synergy Maritime) but they did have some involvement in the commercial management of the Vessel. As noted above, a number of the emails relating to the charter and the issues that arose were sent by individuals identified as Al-Iraqia personnel and/or from an Al-Iraqia email address. In particular, the initial (and many of the subsequent) communications which were sent via the shipbrokers concerning the detention of the Vessel came from Al-Iraqia in the person of Jyotish Nair who was its Head of Operations – Shipping and had a personal email address with Al-Iraqia and appeared also to have access to a general operations email address with Al-Iraqia. Whilst, on occasion, emails were sent to/from an email address identifying Rhine, those emails were sent by Mr Nair, and included the same contact details for him with Al-Iraqia.
96. Mr Allen, the Chartering Manager of Al-Iraqia, was copied to all the relevant communications. It is also of note that Mr Allen was named by Rhine (in the material attached to its Disclosure Certificate) as a custodian of its documents for the purposes of disclosure in these proceedings. The email he sent to the market on 9 January 2020 listing the various vessels suggested that Al-Iraqia was involved in (and perhaps directing) the operations of Rhine.
97. Consistently with this, the charter identified the “commercial operator” of the Vessel as Rhine “c/o Al-Iraqia...”, suggesting that Al-Iraqia was looking after this function for Rhine or on its behalf. Indeed, at paragraph 37 of its opening skeleton argument for the trial, Rhine asserted that Al-Iraqia was identified in the charter as “*commercial operator*”.
98. Also, the brokers, Genesis, referred in their emails with Vitol to communications with Al-Iraqia as communications with “owners” (for example, when passing on to Vitol Mr Nair’s initial notification of the detention on 30 April 2020, which had been sent from an Al-Iraqia address and with an Al-Iraqia footer) suggesting an understanding that Al-Iraqia were acting, as managers, on behalf of owners.
99. In light of those matters, as well as the points identified at paragraph 36 above, based on the documents at trial, Al-Iraqia were fairly described as “managers” of the Vessel.
100. Rhine chose not to call any evidence from a witness to deal with this point, to explain Al-Iraqia’s role in relation to the Vessel or the respective roles of Rhine and Al-Iraqia, or the relationship between them more generally. If Al-Iraqia had had no role in the management of the Vessel, it would have been relatively straightforward for someone to

say so. Even the witness statement of Mr Gehlot, which at one stage Rhine was seeking permission to adduce at the trial, did not cover this at all.

101. In closing submissions, Rhine sought to turn this back on Vitol, by emphasising that Vitol had opposed the application to rely on the late evidence of Mr Gehlot, and that had Vitol agreed to that evidence being given and Mr Gehlot being called at the trial they could have cross-examined him on these matters, such that it was not open to Vitol now to point to the lack of evidence from Rhine. This does not assist Rhine.

- (1) It was up to Rhine to put forward such evidence as it wanted to rely upon. It chose to adduce no evidence on this matter.
- (2) The evidence that Rhine had been going to adduce from Mr Gehlot would not have covered this. Nothing in his (short) statement dealt with the relationship between Al-Iraqia and Rhine, or even mentioned Al-Iraqia at all. Mr Gehlot did not say he worked for Rhine or for Al-Iraqia, but that he was the Managing Director of another company, namely Ikon. He said Ikon was under the same ownership as Rhine, which he described as the “shipping arm” of Ikon, such that Rhine’s transactions were generally approved by him. But it is difficult to see how that would have assisted either way on this issue.
- (3) Although Mr Dunn-Walsh, on behalf of Rhine, opened the application to rely on the late evidence from Mr Gehlot, it was then withdrawn before Vitol had to respond to it. It was a matter of Rhine’s choice not to proceed with the application.

102. As I have reached the conclusion that Al-Iraqia fall within the warranty by virtue of their description as “managers” within the clause, it is not also necessary to determine whether they also fall within the clause as “owners” or “disponent owners”. However, if I had needed to decide that, I would have held that they did fall within that description.

- (1) A “disponent owner” is someone other than the registered owner of a vessel to whom the right to control the employment of the vessel is ceded. As *Carver on Charterparties* (2nd ed, 2020) puts it at paragraph 1-008, “*the shipowner may cede control over the vessel’s employment to the charterer, which may either itself participate directly in maritime trade or in turn cede control of employment to a sub-charterer. In the latter case, the original charter is often termed the “head charter” and the charterer, in its relations with the sub-charterer, may be referred to as the “disponent owner”. The vessel may, indeed, be the subject of a chain of sub-charters*”.
- (2) As that passage suggests, where there is a chain of sub-charters, there may be more than one disponent owner. The language of “disponent owner” is used to describe any party making available to another party, pursuant to any type of charter, a vessel for a period of time or for particular voyage(s), who is not the registered owner of the vessel. Here, Al-Iraqia bareboat chartered the Vessel from Nera Shipping, and in turn time chartered it (as disponent owner) to Rhine.
- (3) It may well be that, often, the description “disponent owner” is apt only to describe the party under a particular charter which is acting, for the purposes of *that* charter,

as the disponent owner. However, it does not appear to me here to have been the intention so to confine it in the terms of the warranty.

- (a) The language in the warranty when read as a whole is intended to be broad: “the vessel, owners, managers and disponent owners”.
 - (b) That formulation is intended to ensure that there are no encumbrances or legal issues which affect the Vessel, any party in the charter chain above Vitol, or the managers of the Vessels.
 - (c) It would have been lacking in commercial sense for the warranty to be given only in respect of some of the parties who have agreed to cede control of, or the right to employ, the Vessel i.e. only the registered owner, the Defendant’s immediate counterparty and the managers. Legal issues and encumbrances affecting any party in the charter chain above Vitol (or otherwise involved in the operation of the Vessel) had the potential to “affect Vessel’s approvals or the performance of the Charter” (as the facts here demonstrate).
 - (d) It is also worthy of note that, in the same clause, “owners” was used to refer (and to refer only) to Rhine (in particular in the opening words “Owners represent and warrant ...”). If that use was also the intention in the warranty, it would raise the question why also “disponent owners” was included. I consider that the answer must be that the draftsmen were not being particularly precise in their use of language but had in mind to include a broad and all-encompassing phrase. (A possible alternative (if “Owners” means Rhine) is that by “disponent owners” they specifically intended to include parties in the chain above Rhine who were not the registered owner (which here could only be Al-Iraqia), though that seems unlikely as they then would not have included the registered owner at all within the clause).
- (4) I find, therefore, that Al-Iraqia fell within the description “disponent owners” in the circumstances and context of this warranty. In any event, if “disponent owners” were, on a proper construction, confined to Rhine, I consider that Al-Iraqia would have fallen into the description “owners”, which in those circumstances must have a broad reading to encompass parties in the chain above Rhine, given the matters I have set out above.

Encumbrances and legal issues that may affect the performance of the charter

103. The result is that Al-Iraqia fell within the warranty clause. That gives rise to the next issue, which is whether, at the time of and immediately prior to fixing the charter, Al-Iraqia was “*free of any encumbrances and legal issues that may affect the Vessel’s approvals or the performance of the charter.*”
104. The charter was agreed on 27 March 2020. At that point in time, the London arbitration was on foot (claim submissions had been served on 20 February 2020). However, those proceedings were brought against Al-Iraqia in relation to vessels other than the Vessel.
105. Thus Rhine contended that the arbitration could not be said to be in any way “capable of affecting” the approvals of the Vessel or performance of the charter, and emphasised that

the position had to be addressed as at the date of the charter (not with the benefit of hindsight, knowing what legal action the Ghanaian Plaintiffs subsequently took against the Vessel). It was suggested that this imported into the warranty a requirement that the steps taken by the Ghanaian Plaintiffs had to be foreseeable to some extent at the time of the charter.

106. The first problem with this contention as to foreseeability is that it was not pleaded. There was no pleaded allegation that the warranty contained such a requirement or that the factual position was such that such a requirement was not fulfilled. The latter point, in particular, to have been fairly tried, ought to have been pleaded, such that disclosure and evidence could have been given referable to it.
107. In any event, on the terms of the warranty, Rhine's submission was not correct – there was no requirement that particular steps had to be foreseeable. Rather, breach of the warranty requires:
 - (1) There to have been encumbrances or legal issues (affecting Al-Iraqia) that may affect the Vessel's approvals or the performance of the charter; and
 - (2) Those encumbrances or legal issues to have existed at the time of or immediately prior to the fixing of the charter.
108. The hurdle under the first of these is “may”, which is a low bar. It is sufficient that it was possible that the legal issue or encumbrance could affect the performance of the charter. There was no additional requirement of any particular degree of probability or of foreseeability. If there was a legal issue affecting Al-Iraqia, in existence at the relevant time which could possibly affect the performance of the charter, the warranty would be breached. That is the meaning of the words written in the warranty. Moreover, there is no need to read in some additional requirement of knowledge of particular facts (on the part of Rhine) or of foreseeability. Warranties are often promises about the existence of a specific set of facts or circumstances, making it clear that the warranting party is accepting responsibility if it turns out that set of facts or circumstances is not correct (whether or not that party knew the true position, or could have predicted as much, at the time it gave the warranty). Nor does the fact that it is also expressed in the charter as a representation mean that it must only encompass facts known to or foreseeable to Rhine.
109. Here, there was a legal issue affecting Al-Iraqia at the relevant time – namely, the London arbitration – and it was possible that issue could affect the performance of the Charter. Indeed, it did so. Rhine suggested that it only did so because of the “*ingenuity and wrong-headedness of the Ghanaian Plaintiffs*”. But (even if that description were correct) that does not matter. Rhine had accepted the risk of such conduct on the part of the Ghanaian Plaintiffs (even if it was “ingenious” and/or “wrong-headed”) insofar as it affected the performance of the charter.
110. In its opening skeleton argument, Rhine had also suggested that, in order to prove breach of the warranty, it was for Vitol to prove that the Ghanaian Plaintiffs had a *valid* claim against Al-Iraqia. This did not feature in Rhine's written closing submissions, and did not appear to be pursued as a separate point in its oral closing submissions. Rather, the references made in those submissions to the Ghanaian Plaintiffs actions being “wrong-headed” and “ill-founded” went to Rhine's points that they needed to have been

foreseeable at the time of contracting in order to fall within the warranty (which argument I have dismissed above). Insofar as Rhine had previously had a point that the claims needed to be valid in order to engage the warranty, Rhine was right not to pursue it. It was unclear what was meant by the suggestion that the claim had to be “valid” (e.g. it was unclear whether this meant it had to be ultimately successful, or correct as a matter of analysis, or arguable, or just brought in good faith) and there was no suggestion in the words of the warranty that any such test needed to be applied. It is irrelevant, as far as performance of a voyage charter is concerned, whether claims which are the basis for an arrest of property might turn out to be good ones or not. In any event, there was no evidence at the trial as to whether the claims were or were not good ones in any sense. The claim submissions in the arbitration were disclosed, but beyond that there was no evidence as to the outcome of the proceedings or the merits of the claims. Given this point was not pursued in closing by Rhine, I need say no more about it.

111. Accordingly, Rhine was in breach of the warranty.

The bill of lading date issue

112. Vitol’s case was that, but for the delay caused by the arrest in Ghana, the Vessel would have arrived at Djeno on or before 5 May 2020 and would have loaded the Djeno cargo “in the period 5-6 May 2020”, with the result that the bills of lading would have borne the date of 6 May (and the price paid under the TOTSA contract would have been calculated accordingly).

113. Although there was a suggestion in Rhine’s oral closing submissions that Vitol had not expressly pleaded that, absent the detention at Takoradi anchorage, the bills of lading would have borne the date 6 May, on the basis that that particular positive plea was missing from paragraph 32 of its counterclaim, it was clear from the whole of the counterclaim (including paragraphs 36 and 46) that this was Vitol’s case. Moreover, Rhine clearly understood that to be Vitol’s case because, at paragraph 46 of its opening skeleton argument, it identified Vitol’s case as “*but for the Arrest, the Vessel would have loaded the Djeno Parcel and, crucially, the bill of lading would have been issued on 6 May 2020.*”

114. The significance of the issue as to the date of the bills of lading is that if the bills of lading for the Djeno cargo had been issued, for example, on 7 May, the price payable by Vitol under the TOTSA contract would have been just under US\$1 million higher than if it had been issued on 6 May.

115. Vitol’s case was that the documents demonstrated that the Vessel would have loaded the Djeno cargo on 6 May but for the detention:

- (1) On 30 April – the day the Vessel was detained – the Master had given an ETA at Djeno of 1800 hours local time on 4 May and the appointed surveyors (BV Inspectorate, appointed by TOTSA and agreed by Vitol under the terms of the TOTSA contract) advised an expected berthing date of 5 May and a bill of lading date of 6 May.

- (2) The actual sailing time from departure from Takoradi anchorage to tendering NOR at Djeno was a little less than 3 days (7 May at 1715 hours to 10 May at 1330 hours). In other words, contended Vitol, had the Vessel sailed for Djeno shortly after disconnection of hoses at 1336 hours on 30 April, it would have met its ETA and there was no reason, in those circumstances, to hold that the expected bill of lading date would not, as advised by surveyors on 30 April, have been 6 May.
 - (3) Vitol was contractually obliged to be ready to load the cargo and tender NOR within the period 5-6 May (pursuant to section VII.2 of the Total GTCs incorporated into the TOTSA contract).
 - (4) The *Stena Superior* was due to load within the period 9-10 May but, by reason of the swap, took the Vessel's vessel presentation range of 5-6 May and on 4 May was advised that it would berth upon arrival based on an expected ETA of 6 May at 1200 hours. Since the Vessel would have arrived earlier, there is no reason to think that it would not have berthed on the first day of the loading window i.e. 5 May.
 - (5) The times taken for loading for each of the Sankofa parcel loaded at Cape Three Points and the Djeno cargo make clear that had loading operations started on 5 May, they would have concluded on 6 May.
 - (6) There was an email from the Terminal on 3 May which Vitol contended made clear that it was imperative that the loading operations took place prior to 7 May because otherwise it would be a high stock position at the terminal.
116. Rhine's pleaded case on this issue was a simple non admission. It put Vitol to proof, but there was no positive case pleaded by Rhine as to any alternative date which Rhine contended the bills of lading would have borne or as to any factors which it said would or might have led to later dated bills of lading or as to the approach that ought to be adopted in relation to this issue.
117. At the trial, Rhine sought to expand this non admission into a positive case that the date the bills of lading would have borne was dependent upon the actions of third parties such that the point ought to be analysed as a "loss of a chance" case (which it described as a mandatory analysis), which it noted was not the way that Vitol had pleaded its case (although Mr Young confirmed in his oral opening that he took no formal point about Vitol's pleading in this respect). Rhine also contended positively (again, going beyond its pleaded non admission) that, absent the detention, the bill of lading date would in all probability have been 7 May.
118. Given Rhine's contention as to the proper approach to this issue (viz. loss of chance) it is first necessary to consider whether that is the right approach here.
119. The approach in a loss of a chance case was formulated in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, and has been applied in numerous cases since then, including recently in *Assetco plc v Grant Thornton UK LLP* (by Bryan J at first instance [2019] Bus LR 2291 and by the Court of Appeal [2023] EWCA Civ 1151). In cases where a claimant's loss depends upon the hypothetical action of a third party, whether in addition to action by the claimant or independently of it, the claimant must prove on balance of probabilities what it would have done, but need only show that it had

a real or substantial chance of the third party acting in such a way as to benefit it to satisfy the requirement of causation, the evaluation of the chance being part of the assessment of the quantum of the damage (see e.g. Bryan J in *Assetco* at paragraph 415; cited by the Court of Appeal at paragraph 120).

120. It is also clear from *Assetco* that the loss of chance principle is mandatory, in the sense that it supplies the relevant legal analysis in the circumstances which engage it, rather than it being a principle which the claimant can choose to rely upon or not, depending on whether it works to the claimant's advantage (see paragraphs 408-411 of Bryan J's judgment, which was not challenged on appeal: see the Court of Appeal's judgment at paragraph 120). As Foxton J subsequently confirmed (albeit *obiter*) in *Nautica Marine Limited v Trafigura Trading LLC (The "Leonidas")* [2020] EWHC 1986 (Comm); [2021] 2 Lloyd's Rep 165 at 186 col 1 (paragraph 113), a claimant is not entitled to choose whichever approach best serves its interests.
121. In *Assetco*, having applied the loss of chance analysis, examined the facts and evaluated the chance of the relevant chance eventuating, Bryan J held that no discount on the quantum recoverable stood to be made. That was a case where, in relation to certain of the steps in the counterfactual analysis, the Judge assessed the chances at more than 90%, and said they did not have to be discounted. This was challenged on appeal, where the Court of Appeal (holding that the Judge was entitled to reach the view that no discount should be applied) said:

"206. ... Once a judge has assessed a chance as greater than 90%, an assessment that the chance is 93% or 96% or 99% lends a spurious degree of precision. It is not possible to assess the chances of the sort of events involved in the 2009 Counterfactual with such fineness. They are not events that can be tested in laboratory conditions. Having reached an assessment of greater than 90% for each contingency, he was, in my judgment, entitled in this case to treat it as being, in counsel for GT's phrase, a "racing certainty". This was not rounding up a 90% chance to a certainty but a conclusion that, within the confines of judicial decision-making, it was a certainty.

207. When this court in *Allied Maple* established that damages could be awarded on the basis of a loss of a chance, it recognised that such a degree of precision could not be achieved. Stuart-Smith LJ at pp.1613-1614 quoted from the speech of Lord Reid in *Davies v Taylor* [1974] AC 207 at 213 where Lord Reid said: "You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent certain: sometimes virtually nil. But often it is somewhere in between.". Stuart-Smith LJ continued: "...the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be"....

209. In my judgment, the proper analysis of the judge's reasoning is that he was satisfied that the chances of each contingency were so high that they fell to be regarded as certainties, not because of a principle or presumption that 90%

equalled 100% but because a distinction between certain and almost certain was in this case meaningless. It was a conclusion that was open to the judge, both as a matter of principle and on the authorities.”

122. The place to start in relation to the parties’ cases on this issue is with their statements of case. They reflect the cases in relation to which disclosure was given and evidence was served, and which the parties came to trial to meet.
123. As I have already noted, Rhine merely put Vitol to proof in relation to this aspect of the case. It did not plead that this was a “loss of a chance” case, nor did it identify particular hypothetical actions of third parties which it said would have led to a later bill of lading date or which it contended were otherwise relevant. It would have been better had Rhine identified in its pleading that it was contending this was a case in which the correct analysis was on the basis of “loss of chance”, in order to give appropriate notice to Vitol that that was the case being run. However, in terms simply of addressing the appropriate legal analysis, it is difficult to see how that ultimately caused a difficulty, because Vitol had an opportunity to address it in its closing submissions.
124. However, the failure to plead the issue goes beyond a failure to highlight the legal analysis. Rhine’s statements of case did not identify any particular factual matters which it alleged might have (on a loss of chance analysis), or would have (on a balance of probabilities test), resulted in the bills of lading not bearing a date of 6 May. If it had identified such factual matters, then the fact that the language “loss of chance” or similar was missing may not have mattered, being essentially one of legal analysis. However, Rhine had no positive case on any such factual matters. In those circumstances, it does not appear to me to be appropriate to permit Rhine to advance such factual propositions, even if as part of a “loss of chance” analysis, at trial.
125. Rhine sought to rely upon what was said in *Assetco* and in *The Leonidas* as to the loss of chance approach being “mandatory”. However, that does not seem to me to relieve a party of the burden of pleading its case as to any third party action, or other factors, that it contends may have led to a different outcome. The reference to “mandatory” in the loss of chance authorities refers to the fact that engagement of the relevant principles is not a matter of the claimant’s choice, but an approach that follows as a matter of legal analysis. However, it does not follow from the fact that the legal analysis is not a matter of the claimant’s choice that the examination of the potential contingencies turns into a “free for all”. As with most points in contentious commercial litigation, it is up to the parties to plead their respective cases. In relation to loss of chance, one might expect the statements of case normally to identify what the contingency was that is alleged to be subject to the actions of a third party and which might not have been fulfilled, and there can then be disclosure and evidence directed to that contingency and the relevant hypothetical third party actions, such that the court would have the material (with the benefit of the parties’ submissions) to work out what the chance of it being fulfilled might have been. In some cases, it may not matter. But in others, as here, identifying in a statement of case what are said to be the relevant factors that might have led to a different outcome would be an important step in terms of allowing the parties to work out what disclosure, witness evidence and, in some cases, expert evidence might be required for the court to evaluate the relevant chance(s).

126. However, even if permitted to advance the arguments it sought to do on loss of a chance, Rhine's position does not improve. The evidence that there was that addressed what would have taken place at Djeno if the Vessel had not been detained at Takoradi anchorage supported Vitol's case:
- (1) As set out above, before the detention, the Master's ETA at Djeno was 1800 hours local time on 4 May. That was consistent with the fact that its actual sailing time (from departure at Takoradi) to Djeno after the detention was a little less than 3 days (7 May at 1715 hours to 10 May at 1330 hours). If the Vessel had sailed for Djeno shortly after disconnection of hoses at Cape Five Points at 1336 hours on 30 April, it would comfortably have met that ETA. There was no evidence (or even suggestion) that the conditions it would have been sailing in were materially different from the actual conditions a few days later, or anything else to suggest that the voyage would have taken a different amount of time.
 - (2) In its closing submissions, Rhine accepted that the Vessel would probably have arrived off Djeno at about 1800 hours on 4 May (all going well weather permitting). However, the evidence goes further than that – there was no evidence to suggest that all would not have gone well or that the weather would not have permitted.
 - (3) Vitol was contractually obliged to be ready to load the cargo and tender NOR within the period 5-6 May (pursuant to section VII.2 of the Total GTCs incorporated into the TOTSA contract). There was no evidence to suggest it would not have tendered NOR within that range or even earlier. Under section VII.5, TOTSA was obliged (subject to the compliance by Vitol with its obligations) to commence loading as soon as reasonably practicable (and if NOR was tendered prior to the beginning of the Vessel Presentation Range, laytime of 36 hours would start at 6am on the first day of the Vessel Presentation Range, under sections VIII.1 and VIII.2).
 - (4) On 30 April, TOTSA's appointed surveyors advised an expected date/time for pilot on board of 5 May 0800 hours, and identified an expected bill of lading date of 6 May.
 - (5) The actual time that it took for the Vessel to load the Djeno cargo was just over 33 hours (from 1930 on 10 May to 0436 on 12 May; NOR having been tendered at 1330 on 10 May). That included two short periods where the terminal suspended loading for "shore tank change over" and despite a slower loading rate than the Vessel had requested. (For comparison, the time it took to load the previous parcel (of Sankofa crude), which was of approximately the same quantity as the Djeno cargo at Offshore Cape Three Points was slightly speedier. The loading of the Sankofa parcel had taken just over 24 hours (from 1254 on 29 April to 1312 on 30 April; NOR having been tendered at 0600 on 29 April).)
 - (6) If the Vessel had arrived at its ETA of 1800 on 4 May, and if the timings had followed as they actually did on 10-12 May, the bills of lading would have borne the date of 6 May. There would have been time to spare for this to be achieved, given that the entire operation, from arrival to completion of documents took less than 41 hours on 10-12 May, and the loading itself just over 33 hours. Even if the Vessel did not berth until some point during the morning (or even the early

afternoon) of 5 May (which was the first day of the loading window under the TOTSA contract), the bills of lading would still have borne the 6 May date.

- (7) There is no reason, in those circumstances, to conclude that the bills of lading date would not, as advised by surveyors on 30 April, have been 6 May 2020.

127. Rhine's central contention, by way of submission, which (as I have already noted) was not part of its pleaded case, was that the Vessel would not have been accepted to load until some point on 6 May, such that the bills of lading would have likely been dated 7 May.

- (1) Rhine relied upon a series of emails to Vitol from agents: the first dated 29 April noting "*No berthing prospects available as per time being*"; the second dated 30 April stating "*No berthing prospects available as per time being. Tentative POB [pilot on board] the 05th of May {TBC}*"; the third, dated 2 May, contained the same language, although that was after the vessel had been detained and was on the basis of a revised ETA from the Master of 5 May at 0600. These messages do not assist. They simply record that, as at the time they were sent, the agents did not have information as to the prospects for the berthing of the Vessel.
- (2) Rhine sought to undermine the email dated 30 April, from BV Inspectorate, providing an expected bill of lading date of 6 May by saying there is no evidence as to who the particular writer was, what source of information they had, what information was available to that source or how reliable it was. It is right to say there was no such evidence, but against the background of the case against Vitol being one of a bare non admission, that is not surprising. There is nothing to suggest it was not a genuine estimate based on information that the writer from BV Inspectorate thought was reliable. The email continued, "*Will revert with developments as soon as available*", but that does not assist either way. The lack of background information in relation to this email may require less weight to be placed upon it, but it does not undermine it altogether.
- (3) In its written closing submissions, Rhine raised a number of rhetorical questions, such as: what vessels would have been ahead of the Vessel if she had arrived on 4 May? What priorities would have been given by TOTSA (perhaps based on demurrage rates)? These are matters of speculation. Rhine advanced no positive case (still less any evidence) about other vessels ahead of the Vessel at Djeno, or that priorities would have been given to other vessels by TOTSA. Even in the context of a loss of a chance case, the analysis needs to proceed by reference to evidence about particular actions or events that might or might not have taken place. Simply raising questions that have not been positively answered by Vitol in their evidence does not demonstrate a real (as opposed to a speculative) chance of something else happening.
- (4) Rhine also placed reliance on an exchange concerning the *Stena Superior*, the vessel that, after the Vessel had been detained, replaced it in the 5-6 May presentation range. The exchange was between Daria Stolyarova, of Vitol, and Rafal Fiszczuk, of Mercuria. It involved confirming the details for the swap of the arrivals of the two vessels at Djeno. During the course of the exchange, in an email on 4 May at 16:43, Ms Stolyarova informed Mr Fiszczuk:

“We received confirmation on mt Stena Superior for 05-06 May loading.

We were also advised, that the terminal instructed MT STENA SUPERIOR (DJENO ex RC LAYCAN 09-10/05) to arrive and tender NOR on 06th may.

Was mt Dilijah confirmed for loading 09-10 May?”

Mr Fiszczuk responded later the same date:

“We have just received the below from our suppliers ...

QTE

From Djeno :

We were informed that there will be no vessels substitution so the loading program is as follows:

- MT STENA SUPERIOR (laycan 09-10/05) shall tender NOR on 06th may 12h (in accordance with ETA) and will berth upon arrival (no need to send revised doc instructions)
- MT DIJILAH (laycan 05-06/05) will arrive after her laycan and will be berthed after MT STENA SUPERIOR. ...”

There were also some exchanges relating to Vitol covering Mercuria’s “speed up” costs that were incurred in ensuring that the *Stena Superior* reached Djeno in time.

- (5) Those exchanges obviously took place in the scenario where it had already become clear that the Vessel would not meet its pre-detention estimated ETA on 4 May, or the 5-6 May window at all, and where arrangements had had to be made to swap the vessels. *Stena Superior* had needed to speed up in order to reach Djeno to effect the swapped arrangements (and Vitol had to cover the costs thus incurred by Mercuria) and was only going to arrive on 6 May. The sentence relied upon by Rhine (that the “terminal instructed” the *Stena Superior* “to arrive and tender NOR on 06th May”) has to be read against that background. In circumstances where the *Stena Superior* was having to speed up to reach the terminal during the window and where the terminal had previously made it clear that it would not accept a vessel arriving after 1500 hours on 6 May there is no reason to read the email as a refusal by the terminal to accept the vessel earlier than 6 May. That was not something that was by then a realistic possibility. It is more likely that the terminal was requiring the 6 May arrival and NOR (with berthing upon arrival) because it was in a “high stock” position. In any event, given that these exchanges took place towards the end of 4 May in circumstances when the vessels were being swapped and the *Stena Superior* was having to speed up to arrive by 6 May, it does not shed any light on what the terminal’s position would have been under the original arrangements, and does not suggest that the Vessel could not have berthed earlier than 6 May had it arrived on 4 or 5 May.

- (6) Rhine also said that Vitol had provided no evidence of berth availability, as well as not calling evidence from Vitol personnel who were more closely involved with the fixture than Mr Smith or from TOTSA. It is right to say no evidence had been led from any witness on this issue or evidence by way of documentation sought from TOTSA or the terminal. However, given that all that Rhine had done was put Vitol to proof, and given that the documentary record relied upon by Vitol showed that had the same timings been followed on 5-6 May as actually took place on 10-12 May the 6 May bill of lading date would have been achieved, I do not consider that this is a criticism that has any material force in the circumstances of this case.
128. It was not entirely clear in their closing submissions whether (despite their contention that the proper analysis was of loss of a chance) Rhine was contending that the bill of lading date would (on a balance of probabilities) have been 7 May or that (following a loss of chance analysis) there was a real chance it would have been 7 May such that Vitol's damages should be reduced. It may have been they were seeking to cover both bases. Either way, the above points do not assist Rhine. To avoid any doubt, if it were to be determined on a balance of probabilities, I find (based on the material I have addressed above) that the bill of lading date would have been 6 May. If it were to be determined as loss of a chance, there is nothing in the points that Rhine made that goes beyond speculation. The evidence does not amount to a real chance that a 6 May bill of lading date would not have been obtained.
129. In relation to the loss of a chance analysis, as set out above, where a claimant's loss depends upon the hypothetical action of a third party, the claimant must prove on balance of probabilities what it would have done, but need only show that it had a real or substantial chance of the third party acting in such a way as to benefit it to satisfy the requirement of causation (the evaluation of the chance being part of the assessment of the quantum of the damage). Here, there was no real dispute that, insofar as causation was dependent upon the acts of Vitol, it was satisfied. Insofar as dependent upon the action of a third party (e.g. TOTSA or the terminal), there was certainly a real or substantial chance of the third party acting in such a way as to lead to a 6 May bill of lading date.
130. In terms of the evaluation of the chance that the third parties would have so acted in the assessment of quantum, based on the material I have addressed above, there ought to be no discount. In summary:
- (1) The evidence is clear and undisputed as to how long the loading took place at Djeno just less than a week later. If the same timings had followed on 4-6 May, the bills of lading would have borne a 6 May date.
 - (2) There was, on analysis, no evidence that the timings would have been different on 4-6 May. The points that Rhine sought to make by reference to the emails referred to above do not assist with the relevant question. The obvious inference, therefore, is that the timings would have been the same on 4-6 May.
 - (3) All that Rhine pointed to in seeking to suggest something else might have happened were certain potential factors that might have been different. But that is no more than speculation. There was no evidence, for example, that the vessel would or might have had to wait longer, or that loading would or might have taken longer,

or that TOTSA would or might have deliberately delayed matters (as seemed at one point to have been suggested). All of those points are no more than speculation. They amount to casting around for things that might have been different. But they are matters that do not amount to a real or substantial chance of things panning out differently in terms of timing.

- (4) There is, therefore, no evidence that the timing would not have been the same, and there is no reason to conclude that the timing might have been different. The position here is one in the realm of the “virtually certain”, or the “something over 90%” level of certainty that was referred to in *Assetco*. Either way, the conclusion on the material presented at trial must be that there is no discount to be applied for any “chance” that the bills of lading might not have been dated 6 May.

Should the “gains” made on the rolling of the Swaps be brought into account?

131. Rhine contends the “gains” made on the rolling of the Swaps reduced the loss suffered by Vitol as a result of the delayed loading of the cargo at Djeno such that the amount of US\$2,871,971 is not recoverable, and the loss suffered was only US\$802,863.
132. Before considering the authorities relied on by the parties in relation to the effect that hedging might have on the recovery of loss, I will explain in a little further detail what the arrangements here were.
133. I have set out above some of the details relating to the Vista system and the arrangements that were put in place in relation to this transaction. There are some points it is important to note which arose from the evidence.
134. In relation to the Swaps, and the rolling of the Swaps, which were the key internal transactions for this issue, they were not transactions entered into with any other legal entity. They were entirely internal to Vitol. They were entries in the Vista system which had the effect of transferring the risk in question from ID 1037645 to ID 1038101.
135. They were not the product of a negotiation with another trader within Vitol, akin to the conclusion of a contract between two separate legal entities. Rather, within the relevant Vista hedge, the analyst would input the same related hedging transactions as would be entered into with a third party or an exchange if the risk was being hedged externally, and the sale side of the swap was simply allocated to a “counterparty” within Vitol, namely (for the rolling of the Swaps) the group of transactions with ID 1038101. As Ms Bossley explained at paragraph 17 of her supplemental report:

“...where the notional hedging position input in the internal management system as a result of a physical transaction is the purchase of a swap, the “seller” of that swap does not have to agree in any active way to sell the swap. Rather a particular position is allocated automatically to the “seller” of the swap as part of the book accounting exercise, which transfers paper risk within the company for the ultimate purpose of identifying the company’s net exposure. The “seller” is simply the risk management portfolio into which the risk is moved, in this case 1038101, rather than another trader.”

136. In this case, once the Vista hedge was entered involving the purchase of cargo priced by reference to Dated Brent quotations, the commercial analyst recorded within Vista the notional purchase by the Vista hedge ID 1037645 of Dated Brent swaps for settlement (i.e. closing out) on the anticipated pricing dates at the fixed price which would have been payable had an external swap been concluded on that date. The sale side of that swap was automatically allocated, as in effect a reverse book entry of the purchase, to a portfolio of paper transactions arising out of unconnected physical transactions within the same Vitol sub-division, namely ID 1038101, with Vista recording that that ID 1038101 had “sold” the notional swap on the same terms and, therefore, at the same fixed price as ID 1037645 had “acquired” it.
137. Mr Smith confirmed in his oral evidence that the purpose of this exercise was not to look for “matching” physical transactions. For example, he explained that Vista “*doesn’t automatically look for matches throughout the entire company*”, that “*Vista does not under any sort of intelligent way match positions*”, and that “*there is not necessarily an offsetting position we are looking for.*” The purpose of transferring the risk through the internal swaps was not to match or correlate with a pre-existing risk in ID 1038101, but rather so that the risk could be managed along with a series of other risks derived from other unrelated physical transactions which had also been transferred into the same ID through similar internal hedging transactions.
138. When the internal “hedge” was, therefore, generated and recorded within Vista, that was not a function of the matching of equal and opposite transactions (whether physical or derivative i.e. hedges/swaps) or of the negotiation and agreement by two different entities or portfolios to conclude such a swap, rather it was an essentially automatic process which formed the first stage in Vitol’s process of seeking to identify its net risk exposure. This first stage being the transfer on paper internally of the pricing risk emanating from the TOTSA contract from ID 1037645 to the portfolio with ID 1038101. That portfolio, ID1038101, contained other hedges entered into in a similar way – in other words, internal hedges entered into to remove from other Vista Hedge IDs a particular risk, and to place that risk into ID 1038101. As Mr Beckett confirmed in cross-examination, those other Vista Hedge IDs would have contained physical trades, concluded in the ordinary course of trading, and had not been made for the purpose of managing pricing risk associated with the Vista ID 1037645.
139. The purpose of this exercise was, ultimately, for Vitol to identify its net total pricing risk exposure across its entire book of physical trades, in order to decide what, if anything, to do about it. Principally, in respect of any net risk, whether to hedge externally that net position or to run (having understood the nature and extent of the risk) an unhedged position. That process was directed to identifying and managing the risk arising out of a series of physical trades which (apart, potentially, from the initial matching) are likely to have been unconnected and not concluded for the purposes of mitigating or managing the specific price risk on any individual trade, such as the TOTSA contract.
140. Ms Bossley confirmed in her oral evidence her view that the Vista system was a monitoring system that allowed the central risk desk or other appropriate centralised function within Vitol to understand Vitol’s overall exposure to the different risks, such that it can decide whether to do anything about those net risks.

141. Mr Smith explained in his statement, by reference to the entries disclosed from the Vista system, that there was no external hedge that related directly to the relevant transactions in this case. He drew attention to the fact that, in relation to the price risk on the Vitol Asia contract, where what was being hedged was the risk by reference to the ICE Index, as well as internal hedges there were some transactions with Mizuho Bank, which acted as a clearing house for Vitol. Those entries were part of an external transaction, but that was an external hedge that had not been entered into specifically for the purpose of hedging this single trade or group of transactions, but was part of a larger external hedge entered into in relation to Vitol's overall net position, and was subsequently assigned arbitrarily to this transaction. In relation to the hedges relating to the purchase of the Djeno cargo by Vitol (i.e. the TOTSA contract), however, the hedges were all internal, and there was no external hedging. It was not suggested to Mr Smith that he was wrong about any of that.
142. Apart from the evidence that there was no external hedge entered into specifically in relation to this transaction, there was no attempt to "follow" any element of the risk through the Vista system any further than ID 1038101. In respect of the pricing risk on the TOTSA contract, there may or may not have been further internal transactions, for example, entered into by ID 1038101 by way of hedge with a yet further internal Vista ID. However, the parties agreed there were ultimately three possibilities as to how the risk could have ended up being dealt with. First, the risk may have been offset by one or more other transactions within the Vista system, second there may have been a decision to seek an external hedge based upon the net risk ultimately remaining after internal offsetting of the risk, or third there could have been a decision (which probably would have needed to be specifically authorised) to run a speculative position on the net risk remaining.
143. Mr Young's case in opening was that, if there had been a positive decision to speculate or to hedge externally, there would have been evidence from Vitol about that, which there was not. When he asked Mr Smith about it, Mr Smith confirmed that there was no identifiable external hedge in relation to this risk (i.e. the pricing risk on the TOTSA contract), nor was there any indication that any positive decision was made about the retention of this risk. The case that Mr Young put to Ms Bossley in her cross-examination, with which she agreed, was that in the absence of any positive decision to externally hedge or speculate in relation to a particular risk, the inference was that the risk was offset within the Vista system. Thus, as Ms Bossley also largely agreed, the most likely position as to what might have happened to the risk transferred by the Swaps into ID 1038101 was that there were a sufficient number of countervailing positions within Vitol that there would be no need for the risk management desk to take a decision about external hedging or speculating.
144. I accept, therefore, that the likely position is that risk transferred into ID 1038101 by the rolling of the Swaps was offset within the Vista system by opposite risks which had, ultimately, originated with other physical trades. That risk would be unlikely to be offset by a single transaction that was equal and opposite on precisely the same dates, but by a complex mix of other transactions (which may well, in other respects in relation to other risks those transactions gave rise to, be offsetting yet further transactions that Vitol had entered into).

145. Before dealing with the effect of the rolling of the Swaps on the loss suffered by Vitol, I will address the points that the parties made in reliance on the authorities relating to hedging.

Authorities relied on in relation to hedging

146. Rhine contended that profits made from hedging by Vitol are to be taken into account in reduction of its loss. Vitol, on the other hand, contended that profits made on an external hedge are *res inter alios acta* and are to be disregarded when assessing loss (and *a fortiori* in relation to an internal “hedge”). Each party referred to and relied on different authorities and commentaries in text books.
147. Rhine relied upon the decision in *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm); [2010] 1 CLC 284, where Blair J held that, in a claim by an oil trader (Glencore) against its supplier, gains made from the closing out of hedge transactions were properly to be taken into account in assessing its recoverable loss. He held (at paragraph 78):

“...having accepted Transworld’s breach as bringing the contract to an end, Glencore not only did but was required to mitigate its loss by closing out its hedges. To have allowed them to run on would have been to speculate in the movement of the price of oil, which Glencore has asserted is no part of its business for present purposes. By doing so, in the words of its own expert, it established its loss. I agree with Transworld that the position as regards the hedges is not *res inter alios acta*, nor is it equivalent to insurance. Hedging is on the evidence an integral part of the business by which Glencore entered into this contract for the purchase of oil, and since the closing out on early termination established a lower loss than would otherwise have been incurred, that has to be taken into account when determining recoverable loss. To put it another way, if the seller had duly performed the contract Glencore would have closed out its hedges at the then current prices, and there is no reason to put it in a better position in the case of non-performance.”

That appears to have been a case concerning “external” hedging arrangements.

148. Rhine also relied upon what is said at paragraphs 16-166 to -167 of *The Law of Contract Damages* (3rd ed.), Kramer:

“Hedging contracts, entered into with third parties to minimise or eliminate the risks of interest rate or market movements, are commercially similar to insurance.

In cases of oil sales, however, hedging is an inevitable adjunct of every such sale and accordingly the hedging contract and reasonable action under it (including closing it out when the contract of sale it was to hedge fell through, rather than keeping it open as a market speculation) are to be taken into account in measuring loss and is not *res inter alios acta*, and may be reasonable mitigatory conduct the costs of which would then be recoverable. The same may be true in other industries. ...”

149. That passage cites the decision of Christopher Clarke J in *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm) (as does the passage relied upon by Vitol from *Voyage Charters*, set out below). That was a claim between two oil traders relating to a quality defect in a cargo of naphtha purchased by Choil from Sahara. As a consequence of Sahara's breach (which caused the party to whom Choil had agreed to sell the cargo, Petrogal, to reject it), Choil was left with a long open position on naphtha. Choil hedged its position by selling a quantity of Brent equivalent to the naphtha cargo in question (there being no live naphtha market for hedging purposes, and the naphtha market being likely to follow the Brent market: paragraph 157). If the market had fallen over the relevant period, Choil would have lost on the value of the physical cargo, but gained on the hedge; as it turned out, the market rose, so that Choil gained on its physical cargo, but lost money on its hedge. It sought its losses attributable to hedging.
150. Christopher Clarke J recorded (at paragraph 156) that trading companies such as Choil "*habitually hedge in order not to be caught with open positions in a volatile market*", and that "*Sahara was well aware of the likelihood of Choil hedging, and the reasonableness of it doing so*". He went on to hold (at paragraph 161) that:
- "In my judgment Choil is prima facie entitled to recover \$ 2,285,428.15 as representing losses attributable to a reasonable attempt at mitigation. There is, in principle "no sensible or commercial reason why the Court should not take into account the costs of the hedging instruments": *Addax Ltd v Arcadia Petroleum* [2000] 1 Lloyd's Rep 496. In that case Morison J would, if he had been concerned with the claimant's position with their suppliers, have taken into account the hedging costs. In the present case the effect of Choil being left long in naphtha was to expose it to the risk of severe losses if the market dropped. It was reasonable for it to protect itself against those losses by hedging in the way that it did."
151. Both *Glencore* and *Choil* suggest that hedging is capable of being taken in to account, at least if undertaken in a reasonable attempt to mitigate loss, both as something that has reduced the loss suffered and as something that might generate costs which themselves are recoverable as loss.
152. Vitol in turn relied upon the ambivalence in the statement in *Voyage Charters* (5th ed.) (Young *et al.*) at paragraph 21.51:
- "There is some suggestion that the effect of a trader's hedging arrangements may be relevant in an assessment of his net recoverable loss, although this is by no means clear, still less established."
153. Vitol also placed reliance on a decision of the High Court of Singapore in *Prestige Marine Services Ltd v Marubeni International Petroleum (S) Pte Ltd* [2011] SGHC 270 where the claimant seller of a physical cargo of High Sulphur Fuel Oil had additionally entered into certain "paper" transactions, the profits it made on which the defendant buyer (which was in default) contended ought to be taken into account in reduction of the loss. Vitol rely on what the Judge said (at paragraph 53) to the effect that the claimant in that case bore the risk of its paper transactions, could not have held the defendant liable for any losses, and did not need to account to it for any profit. However, what was said there needs to be seen in the context of what else was decided in that case. It was a decision refusing permission to appeal from an arbitration award, in relation to which one of the

questions of law said to arise (“the second question of law”) related to the arbitrator’s decision that damages should not be reduced by a profit made by the claimant from swap transactions, the question said to arise being whether a party suffering loss from a breach of contract has no duty to mitigate its loss until after the contract had been terminated (see paragraph 50). The court refused leave, holding that question was flawed, because it assumed that the alleged profit from the swaps was a result of an attempt to mitigate loss resulting from the breach, which was not the case (paragraph 51). It also refused leave on the basis that various aspects of the arbitrator’s decision were not challenged, including the finding that there was no causative link between the breach of contract and the alleged profits (paragraph 52). What was additionally said (*obiter*) at paragraph 53, including the passage relied on by Vitol, must be seen in that light. In particular, the Judge there described the paper transactions as speculation, which given the finding that there was no causative link between them and the breach of contract, was entirely understandable. But it does not shed light on the approach to be adopted if the transactions in question were an attempt to mitigate loss resulting from the breach and if there was a causative link between the profits and the breach of contract.

154. Vitol also referred to the decision of the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313, in particular what was said by Lord Sumption at paragraph 11:

“The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant’s loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank plc v John D Wood Commercial Ltd* [2000] 1 WLR 857, paras 92—93 (Mance LJ). Or because the benefit is derived from steps taken by the claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, 13, Lord Reid derived them from considerations of “justice, reasonableness and public policy”. Justice, reasonableness and public

policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits.”

155. Hedging may take various forms, and it is important to identify the nature of the particular transaction in question in each case. Where a party has entered into a hedging transaction with a third party (an “external” hedge, as it has been referred to in this case) and has done so in consequence of the breach in order to mitigate its loss, the above passage from Lord Sumption’s judgment in *Swynson* suggests that profits made on such a hedge are to be brought into account in reduction of the loss. A benefit received as a result of such a hedge would not be one that arose independently of the circumstances giving rise to the loss. This also reflects the decisions and reasoning in *Glencore* and in *Choil*. Similarly, if such a hedge turns out to be loss-making for the claimant, it may be that the loss is recoverable from the defendant as a cost incurred in pursuit of reasonable mitigation.
156. The position in respect of profits made as a result of hedging transactions entered into before the breach and which are not thereafter adjusted in the light of the breach of contract (e.g. by being closed out early or by being “rolled”) may be different, but I do not need to consider such transactions in this case. Here, the “profits” (insofar as they can be so described) which Rhine contends ought to be taken into account are those made on the rolling of the Swaps, which only took place as a result of the breach of the Charter.
157. If, therefore, the transactions by which the Swaps were “rolled” in this case had been transactions entered into in consequence of the breach of the charter and had been with third parties, such that Vitol had been made better off by them, the profits made on them would be taken into account in reduction of Vitol’s loss. However, the transactions by which the Swaps were rolled were not external transactions, but were internal to Vitol. That gives rise to the further issue as to whether or not it matters that the transactions were internal, rather than external transactions with a third party, to which I now turn.

Authorities relevant to internal hedging

158. One of Rhine’s responses to Vitol’s point that the Swaps were internal, was to advance the contention that, even if the Swaps were proved to be internal, there was no reason why a legal person could not contract with itself, and for that (internal) contract to be a real, binding agreement with real effect. In support of that proposition, Rhine relied upon *Bremer Handelsgesellschaft mbH v Toepfer* [1978] 1 Lloyd’s Rep 643 (Donaldson J); [1980] 2 Lloyd’s Rep 43 (CA). However, that case does not support such a proposition. In fact, it confirms the opposite to be the case.
159. In that case, the sellers had offices in Hamburg and in Munich that were in the habit of trading independently of each other. The Hamburg office sold to the Buyers 2 parcels of 500 tonnes of soya bean meal c.i.f. Rotterdam. On separate dates the Hamburg office “sold” to the Munich office 1000 tonnes of soya bean meal, and the Munich office “sold” to the Hamburg office 1000 tonnes soya bean meal, in each case c.i.f. Rotterdam. There arose a dispute between the sellers (through the Hamburg office) and the Buyers as to whether the Hamburg office had served on the Buyers a notice of appropriation within the appropriate time and the sellers’ case depended upon the arrangements of “sale” between the Hamburg office and the Munich office being properly described as “buying”

and “selling” such as to constitute the Hamburg office (in selling to the Buyers) a “subsequent seller” for the purpose of the GAFTA 100 form (“the GAFTA terms”).

160. Donaldson J and the Court of Appeal (in upholding the decision of the arbitrators) held that, against the background of a particular recognised practice where the Hamburg and Munich offices traded independently and, sometimes, with each other, and that this was at all material times known in the trade, it was right to describe the Hamburg Office as a “subsequent seller” in its sale to the Buyers for the purposes of the GAFTA rules (see Donaldson J at the foot of 651 col 1; and Megaw LJ at 48 col 1; Lawton LJ at 50 col 1).
161. That was, as explained by Donaldson J and by the Court of Appeal, a decision about the proper interpretation of the contract between the Sellers (through the Hamburg Office) and the Buyers, in particular the relevant parts of the GATFA terms incorporated into that contract.
162. The Court of Appeal emphasised that the arrangements between the Hamburg and Munich offices were not contracts of sale. See Megaw LJ at 44 (col 2):

“The Hamburg and Munich offices have from time to time conducted what can be described as transactions with one another, under which the Hamburg office has, in what is in form a contract of sale, purported to sell soya bean meal to the Munich office; and the Munich office has purported to buy soya bean meal from the Hamburg office. Those transactions are not, in English law - and English law governs this case, but I see no reason to suppose that German law is different - enforceable contracts of sale, because, just as an individual cannot make a contract with himself which could have any conceivable legal effect, so also different branches of the same corporate legal entity, not themselves separate legal entities, cannot make contracts with one another. That would be precisely the same, in legal analysis, as an individual purporting to contract with himself...”

163. And at 47 (col 1):

“...the submission by the buyers is that transactions between Munich and Hamburg are not contracts in law. That is accepted on all hands. For reasons that I gave at the outset of this judgment, one cannot contract with oneself, even if one is a body corporate and one has what one chooses to regard as being different branches.”

164. Lawton LJ also confirmed (at 50, col 1) that no contracts of sale in the legal sense were formed in the arrangements between the Hamburg and Munich offices:

“Once the [GAFTA] Board of Appeal found that there was a general trade practice to regard these inter-office transactions as part of a "string", they were entitled to apply the word "buyer" and the words "subsequent seller" to such transactions, albeit no contracts of sale in the legal sense came into existence when they took place.”

165. The Court of Appeal confirmed, therefore, that a legal person cannot contract with itself.

166. The same conclusion was reached by Mr Justice Warren in *Barnet Waddington Trustees (1980) Limited v The Royal Bank of Scotland plc* [2015] EWHC 2435 (Ch). That was a case about whether borrowers under a loan agreement were liable to indemnify the bank against any “loss” it had suffered as a result of the bank’s internal hedging arrangement. The internal swap in that case was made between two departments within the bank, namely Corporate Banking and the sterling rates Markets desk. It was not, confirmed Warren J, a contractual arrangement (see paragraph 26). Similarly, although Corporate Banking had obtained the money it had agreed to lend to the borrowers “*by borrowing it from the Bank’s Group Treasury ... at a floating rate*” this, too, was not a contractual arrangement since Group Treasury was also a department of the Bank. As Warren J explained: “*There was no borrowing in the ordinary sense of the word as giving rise to an enforceable obligation by one person (the borrower) to repay money loaned to another person (the lender) when the loan fell due for repayment. The “borrowing” and the floating rate “interest” payable were virtual constructs for the internal financial and accounting purposes of the Bank.*” (See paragraph 27).
167. It is also notable that the passage in *The Law of Contract Damages* on which Rhine placed reliance, in support of the proposition that hedging arrangements are to be taken into account in cases of oil sales, starts by referring to hedging contracts “*entered into with third parties*”. There is no reference to “internal” contracts or arrangements, and no suggestion in that passage that the author has such arrangements (i.e. arrangements other than those “*entered into with third parties*”) in mind.
168. Accordingly, the internal swaps are not legally recognised as binding contracts. They were internal arrangements within Vitol, and they do not affect Vitol’s profit or loss.

Conclusion on the effect of the rolling of the Swaps on the recoverable loss

169. It is clear, in light of the above, that the rolling of the internal Swaps by which the pricing risk on the TOTSA contract arising from the delay was transferred from Vista ID 1037645 to ID 1038101 merely transferred the risk between Vitol portfolios, and did not make good any loss to Vitol.
170. However, Rhine’s case did not end with the mere fact that there had been an internal swap. As noted above, Rhine established that the likely position was that the risk transferred into ID 1038101 by the rolling of the Swaps was offset within the Vista system by opposite risks which had, ultimately, originated with other physical trades (however complex the mix of other transactions was that gave rise to the match of this particular risk). It therefore contended that that or those other physical transactions, or the part(s) of them which together represented the matching risk, had reduced or mitigated the risk in question and therefore Vitol’s loss.
171. But that does not assist Rhine. What the likely factual position demonstrates is that a trader the size of Vitol may well not have to hedge externally, or have to adopt a speculative position, in relation to such price risks, because its book of business is sufficiently large and diverse that there can usually be found within it sufficient other transactions that carry opposite risks. But those other transactions are not entered into for the purpose of hedging the transaction in question, and Vitol’s decision to enter into them is in no way caused by the price risks to which Vitol is exposed on the transaction in

question, still less by a breach of contract that causes loss in relation to the transaction in question.

172. If or to the extent that the risk taken out of ID 1037645 by the rolling of the Swaps was offset within the Vista system (e.g. by a paper transaction, derived from a different physical transaction, that happened to mirror it in whole or in part), that would simply be the system identifying that there existed separate transactions with risks that offset each other that Vitol had entered into. The physical transactions in question would be separate and independent from each other – neither of them entered into for the purpose of hedging or mitigating risks or potential loss on the other – but rather physical trades entered into in the course of ordinary trading operations. Unlike an external hedge, one transaction would not have been entered into for the purpose of managing the specific pricing risk arising from an identified risk from an existing transaction. There may be no connection between the underlying physical transactions at all, except that they both had been entered into by Vitol. Rather, the paper hedges in question, which the system might “match” to offset risk, are derived from physical transactions which simply happen to sit in Vitol’s book as part of its ordinary trading operations.
173. This position is not equivalent to that found in the *Glencore* or *Choil* cases referred to above, where external hedges had been entered into or closed out as a result of the breach of contract. Moreover, applying what Lord Sumption said in *Swynson*, it is clear that benefits from the other physical transactions in question are *res inter alios acta*. Those other physical transactions, to the extent they gave rise to a benefit to Vitol, did so independently of the circumstances giving rise to the loss on the Djeno cargo transaction. Any such benefit had nothing to do with the charter, with the delay to the Vessel or the reason why it had been delayed. It was not derived from steps taken by Vitol in consequence of the breach of charter. Nor did it derive from a contract made for the benefit of Rhine.
174. I should also deal with a small number of further points made by Rhine in relation to this issue.
175. There was, during the course of Rhine’s closing submissions about what the Vista system showed, a sense of complaint that further information about transactions within the Vista system showing what had happened to the risk in question had not been disclosed. That, however, is immaterial in circumstances where I have accepted the factual case advanced by Rhine as to what happened to the risk (i.e. that it was likely ultimately offset against risks arising from other transactions within the system). In any event, as far as I was told at the trial, there had been no attempt on the part of Rhine to seek further disclosure relating to the Vista system, or to interrogate it (by way of further information request, for example) as to what other risks were transferred into ID 1038101 or how those risks were dealt with. That may not be surprising given Rhine’s case, which at least in opening was based upon the fact of the Swaps entered into by ID 1037645, and the submission that whether they were internal or external transactions made no difference to the analysis. Mr Young expressly submitted in his oral opening submissions that it was only necessary to look at the position in relation to Vista ID 1037645 and not to go further. Consistently, Mr Beckett’s evidence in his supplemental report was that whatever happened in relation to the “other side of the risk” (i.e. the risk that was put into ID 1038101) was irrelevant. In any event, there was nothing entered in to Vista in relation to ID 1037645 to suggest there was an external hedge in respect of a relevant risk, even

a portfolio level hedge that had been (as Mr Smith described it would have been) arbitrarily allocated to various trades (and as was the case in respect of the Mizuho hedges in relation to the Vitol Asia side of the transaction). Mr Smith's evidence was that there was no such external hedge in relation to the TOTSA contract price risk, and he was not challenged in relation to that. In all those circumstances, any point that Rhine was seeking to make about lack of disclosure does not go anywhere.

176. Much of the focus of Mr Beckett's evidence was on how the trader responsible for the initial deal would see matters. From their point of view, once the risk had been hedged (whether internally or externally) it would have been laid off, such that they no longer carried that risk within their portfolio. That is no doubt correct, and reflected the experts' agreed position, but that does not assist in relation to working out the position of Vitol (as opposed to that of a particular portfolio within Vitol) where some or all of the hedges are internal. This reflected Mr Beckett's view that there was no fundamental difference between an internal and an external hedge. In relation to a particular portfolio, or a particular trader's book of business, that may be a correct way to view it, but when it comes to considering the position of Vitol as a whole, it is not.
177. Mr Beckett, and in turn Rhine, also placed weight on what Vitol have said publicly about its attitude to risk. They relied on a public statement in which Vitol had explained that it aimed "to maintain a conservative approach to market risk, addressing the volatility inherent in the commodity markets with business policies and practices based on sound risk management and capital preservation. This includes the hedging of directional price risk where possible." They also relied on a letter to the Sunday Times from 2008 in which the then Managing Director had stated that "Vitol is not in the business of taking large positions speculating on the rise or fall of market prices, Vitol's business model includes moving physical oil in the global market, identifying global arbitrages in location, timing and quality, and using sophisticated hedging to manage market risk."
178. Mr Beckett suggested it was improbable that Vitol was saying such things publicly, but failing to implement such a strategy which, he suggested, was the burden of Vitol's case here. However, it was not Vitol's case or evidence that it failed to implement such a strategy. What was said publicly was entirely consistent with what Vitol said it did, and what the evidence demonstrated it did, in relation to this transaction. The difficulty with Rhine's position on this point was that they were reading too much into what was said. Vitol's publicly stated position was not that it externally hedged every transaction individually. Its approach to addressing risk involved a detailed and sophisticated system, which may have included but was not confined to external hedging.
179. In summary, the rolling of the Swaps, therefore, made no difference to Vitol's financial position. They were internal entries that mimicked external swaps, but which did not hedge Vitol at all. They internally transferred risk to a different portfolio such that any profit on the rolling of the Swaps to ID 1037645 was mirrored by a loss to ID 1038101. There may or may not have been further internal swaps entered into by ID 1038101 but, if there had been, they also could have made no difference to Vitol's financial position. Any physical transactions that the Vista system regarded as matching the risks transferred by ID 1037645 in the rolling of the Swaps were *res inter alios acta* and not to be taken into account in determining the loss arising from the breach of charter.

180. Rhine contended that if Vitol recovered the full value of its claim, it would be over-compensated. I do not accept that. Vitol suffered the loss arising from the increase in the price of the Djeno cargo under the TOTSA contract because of the delay to loading (which was caused by the breach of charter and/or which loss falls within the indemnity). It does not over-compensate Vitol in relation to that loss not to deduct the “profits” recorded within the Vista system from the rolling of the internal swaps because those were not actually profits to Vitol – they were internal entries showing profit to the transaction carried out under ID 1037645, but reflecting mirror entries in another internal Vitol portfolio. Insofar as the “profits” on the rolling of the internal Swaps reflected profits made on one or more physical transactions entered into by Vitol (the risks on which transactions effectively, through the system of internal swaps, offset the price risk on the TOTSA contract within the Vista system) those other physical transactions were not entered into for the purpose of hedging the risks on the Djeno cargo transaction, still less for the purpose of mitigating the loss following Rhine’s breach of charter, but rather were entered into in the ordinary course of trading and for commercial reasons unrelated to the transaction contained in ID 1037645; Vitol was entitled to retain profits made on any such other physical transactions. They were *res inter alios acta*, and profits on them are not to be brought into account to reduce the loss.

Remoteness

181. Rhine also contended that if Vitol’s internal hedging arrangements did not operate to reduce its loss, then that amount of the loss suffered which would not have been suffered if the hedging arrangements had reduced the loss was too remote to be recoverable. In other words, Rhine contended that the only part of the loss caused by the movement in price which was recoverable as not being too remote was that which was not “reduced” by the internal rolling of the Swaps.
182. Rhine so contends (i) on the basis such loss was not of a type that was within the parties’ reasonable contemplation at the point of contracting, and (ii) on that basis that, even if within the parties’ reasonable contemplation as a type of loss that might be suffered, it was not loss of a type for which Rhine assumed responsibility (in reliance upon the decision in *The Achilleas* [2009] 1 AC 61).
183. Vitol contended that the none of the loss claimed was too remote, and was therefore recoverable in a claim for breach of contract. It also contended that the clause 13 indemnity was not, in any event, confined to losses within the rules on remoteness of loss for breach of contract, such that the losses suffered by Vitol were recoverable under the indemnity regardless of whether they fell within the rules on remoteness of loss.

Reasonable contemplation

184. Rhine contended that, as a carrier, it would anticipate that a charterer would, by similarities of trading terms or by hedging, “lock in” gains and exclude loss by subsequent market movements. It argued that the loss that Vitol sought to recover was a loss to which it exposed itself by (i) entering sale and purchase contracts on different pricing terms and (ii) failing to hedge its risk or, at least, failing to hedge its risk in a way that was in practice effective to reduce its exposure to market movements. Rhine said that was unusual, and therefore not something within the parties’ reasonable

contemplation. It therefore contended that, if Vitol's internal hedging did not in fact reduce its loss, it was not reasonably foreseeable that Vitol would trade on that basis, that loss incurred as a result was too remote to be recoverable, such that Vitol's claim was effectively capped at the amount it would have lost by reason of the delay if it hedged its position externally (Rhine being content to assume that such external hedges would have produced the same profit as was recorded for the internal hedges).

185. Vitol contended that there was nothing unusual about the arrangements it had entered into in relation to the Djeno cargo, whether in terms of the pricing terms of the physical sale and purchase contracts or of the arrangements it entered in the Vista system in terms of internal hedging. It said that the pricing terms and the internal hedging arrangements were usual or ordinary, such that the loss suffered as a result was within the reasonably contemplation of the parties and recoverable.
186. There was no dispute as to the approach in law on this part of the analysis. The general statement of principle is to be found in *Hadley v Baxendale* (1854) 9 Exch 341, Alderson B at 354-355:

“... where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the claimants to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under this special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.”

187. In *Czarnikow v Koufos (The “Heron II”)* [1969] 1 AC 350, at 382G-383A, Lord Reid described the proper test as being whether the loss in question is:

“...of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach ... the words "not unlikely" ... denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable.”

188. As mentioned at the start of this judgment, Mr Toms confirmed that Vitol had no case based on special knowledge under the “second limb” of *Hadley v Baxendale*. The question, therefore, was whether the loss claimed was of a type which was or may reasonably be supposed to have been in the contemplation of the parties at the time of contracting. The parties largely addressed this question through the expert evidence that was adduced at trial.

189. As noted above, the parties had permission each to adduce expert evidence in the field of oil trading. The experts addressed what was and was not usual in relation to pricing terms and hedging arrangements. Relevantly, they agreed that:
- (1) The pricing terms of the Vitol Asia contract were not unusual.
 - (2) It is not unusual to purchase a cargo of oil on an event-triggered date (e.g. the date of the bill of lading, as with the TOTSA contract), such that the price is set on effectively a floating basis, and then to sell on an agreed fixed date (e.g. the Vitol Asia contract). However, it would be unusual to do so without the price risk having been hedged.
 - (3) It is usual for a large trading house (such as Vitol) to have a central desk to manage price exposure. The experts agreed that they would be surprised if an entity of Vitol's size did not consolidate its exposure and manage the whole in accordance with its central market price view and appetite for risk.
 - (4) It is usual for the central risk management desk in a large trading house to net off the offsetting price risk exposure within the company (i.e. within Vitol SA).
190. In summary, the expert evidence amounted to a recognition that the pricing terms on the contracts for the sale and purchase of the oil were usual, and that the internal risk management processes (including the "netting off" of offsetting price risk internally within the company) within Vitol were usual. In other words, the system of internal hedging carried out within Vista was usual.
191. Rhine emphasised that the experts had agreed that it would be unusual for an oil trader not to hedge the price risk in such a situation. However, that is not the end of the analysis or the scope of the experts' agreement. Simply saying that it was usual to "hedge" is not, in the context of this case, very informative without an identification of what is meant by the reference to a "hedge". It was clear from the experts' evidence that it was usual, within a large trading house (such as Vitol), to net off offsetting price risk internally, i.e. to use a system of internal hedging. The agreement that it is usual to "hedge" must be understood with that in mind. In other words, it was usual for a large trading house, such as Vitol, to hedge internally. Therefore, when the experts were agreeing that it would be unusual for an oil trader not to hedge the price risk, they were not saying that it would be unusual for an oil trader (or at least a large trading house, such as Vitol) not to hedge the price risk externally.
192. Rhine also contended (as I have already noted above in relation to the submissions on the effect of hedging) that there had been a public statement by Vitol senior management (in 2008) to the effect that Vitol was not in the business of taking large positions speculating on the rise or fall of market prices, and that it used sophisticated hedging to manage market risk. However, that does not take things any further. It confirmed what Vitol's overall corporate strategy was, and that it used sophisticated hedging to manage market risk. But it said nothing about whether, in respect of any given transaction, Vitol might enter into an external hedge, or manage the risk internally.

193. Rhine also appeared to suggest that because it was a carrier of crude oil, rather than a trader, its level of knowledge of Vitol's operations ought to be circumscribed accordingly. On the evidence presented at trial, this suggestion was not maintainable:
- (1) There was, in fact, no evidence at all about the knowledge or understanding of carriers of crude as a class concerning trading or hedging arrangements made by oil traders, or of Rhine in particular.
 - (2) This argument amounted to a submission that Rhine ought to be fixed with a certain amount of knowledge about Vitol's operations, but not full knowledge, such that it could take advantage of what it contended it should be taken as having known. It amounted to saying that the analysis should proceed on the basis that Rhine had within its knowledge the fact that a trader like Vitol would have hedging arrangements, but not that its hedging arrangements might only, in respect of a particular transaction, be internal.
 - (3) But there was no basis on the evidence for drawing the line in that place. As I say, Rhine had adduced no evidence at trial as to the level of knowledge or understanding that a carrier or shipowner would normally have. The only evidence put forward at the trial in terms of knowledge or understanding about trading arrangements came from the experts. I have summarised their evidence above. But there was nothing in their evidence that addressed, for example, differences in knowledge or understanding between traders and carriers, and indeed they may well not have had particular expertise or experience to address that specific point.
 - (4) Rhine sought to take advantage of the agreement between the experts as to what was usual, but only up to a point. It sought to rely on their agreement that hedging was "usual" in saying that it was therefore within the reasonable contemplation of the parties that hedging would be undertaken with the result that loss from market movements would be excluded, such that if any loss was actually suffered that was outside the reasonable contemplation of the parties. But when it came to the experts' agreement that *internal* offsetting of risk was usual by a trader such as Vitol, such that lack of external hedging was not unusual for any given transaction, it said that it was not reasonably foreseeable to a carrier for Vitol to trade on that basis. There was no basis on the evidence for Rhine to seek to draw a line in that place, such that it would be effectively fixed with part of what was usual, and not the whole.
194. There was therefore no evidential basis upon which Rhine could say that, as a carrier, Rhine would not reasonably anticipate that a charterer would not, through external hedging, exclude loss by market movements in the price of oil.
195. I also add that the expert evidence was, as I have mentioned, from experts in the field of oil trading. That was the field of expertise for which permission was given in the Order of Andrew Baker J dated 21 January 2022 made at the CMC. Neither party suggested at trial that it had sought permission to put in expert evidence addressing the usual knowledge of a carrier, as opposed to an oil trader. Nor did either party put in any factual evidence at trial specifically seeking to deal with such an issue. In those circumstances, it would not be appropriate for the court to speculate on what the usual knowledge of a carrier of crude, as opposed to an oil trader, might be – how much of a large oil trader's

usual internal or external hedging arrangements might be known to or understood by a carrier – but it must proceed on the basis of what the evidence shows are the usual arrangements.

196. The only conclusion that can therefore be reached on the basis of the evidence put forward at the trial is that the loss claimed by Vitol was of a type that was usual in respect of a charter such as this, and was reasonably within the contemplation of the parties at the time of contracting.

Assumption of risk

197. Rhine also contended that even if it reasonably contemplated that Vitol might suffer a loss that was not reduced by way of external hedging arrangements, such loss was nonetheless irrecoverable because it was not loss of a kind for which Rhine had assumed responsibility. Rhine suggested that this may be “*that relatively rare case where the “assumption of risk” analysis identified by the House of Lords [in *The Achilles*] is singularly appropriate.*”
198. As is well-known, the majority of the House of Lords in *The Achilles* explained that a defendant might escape liability for a loss that was not unlikely if it was not reasonable to assume that the defendant had undertaken responsibility for it. That principle, and some of the subsequent cases considering it, were summarised by Males J (as he then was) in *Louis Dreyfus Commodities Suisse v MT Maritime Management (The “MTM Hong Kong”)* [2016] 1 Lloyd’s Rep 197 at paragraphs 52 to 55:

“52. Damages for breach of contract will not be recovered where the damage suffered is too remote, that is to say not within the reasonable contemplation of the parties at the time they made the contract: see *Hadley v Baxendale* (1854) 9 Exch 341 and subsequent cases. Traditionally, therefore, when an issue of remoteness arises, the question has been whether the loss claimed was of a kind or type which would have been within the parties' reasonable contemplation: see *The Sylvia* at [23]. More recently, however, a principle of remoteness has been developed to the effect that even if a loss is within the parties' reasonable contemplation, there may be cases in which “the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses”: see *The Achilles* [2008] UKHL 48, [2009] 1 AC 61 at [9].

53. This development was summarised by Toulson LJ in *Siemens Building Technologies Ltd v Supershield Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep 349 at [43]:

“*Hadley v Baxendale* a remains a standard rule but it has been rationalised on the basis that it reflects the expectation to be imputed to the parties in the ordinary case, i.e. that a contract breaker should ordinarily be liable to the other party for damage resulting from his breach if, but only if, at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach. However, *South Australia* and

Transfield Shipping are authority that there may be cases where the court, on examining the contract and the commercial background, decides that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties.”

54. The principle may therefore be regarded as a principle of remoteness, as in *The Achilles* itself, or as a matter of construction or implication, as in *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] PNLR 17 at [24], where Sir David Keene said:

“I too agree with the summary of the law provided by Toulson LJ in *Supershield*, although I would put it in slightly different language. It seems to me to be right to bear in mind, as Lord Hoffmann emphasised in *The Achilles*, that one is dealing with the law of contract, where the situation is governed by what has been agreed between the parties. If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term to determine the answer. Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract breaker escapes liability. Such was the case in *The Achilles*.”

55. As explained by Hamblen J in *The Sylvia* at [40], such cases are likely to be relatively rare. They will arise “where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations”. They are, therefore, at least in the usual case, likely to depend on evidence and factual findings.”

199. Males J’s comment in the last of the paragraphs quoted above that such cases are likely to be relatively rare is also mirrored in *Chitty on Contracts* (34th ed.) at paragraph 29-151, where the learned editors express the hope that “*the approach adopted by the majority in The Achilles will be applied by the courts only in exceptional circumstances, such as those emphasised by Lord Hoffmann in that case; and this seems to be the trend of the subsequent authorities.*”
200. Whether one sees this as part of the principle of remoteness of loss or views it as a matter of construction or implication, the starting point is that where a type of loss is within the reasonable contemplation of the parties, it is ordinarily recoverable. However, there may be cases where there are particular factors demonstrating that would not reflect the expectation or intention reasonably to be imputed to the parties, such that the implied assumption of responsibility is rendered inappropriate.
201. There was no evidence advanced by Rhine at trial specifically to deal with this point. There was no case advanced along the lines (as had been advanced, for example, in *The*

Achilleas) that there was a general understanding in the market that a shipowner would not be liable for the type of losses claimed here. In *The Achilleas* itself, Lord Hoffmann stated that “cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual, but limitations on the extent of liability in particular types of contract arising out of general expectations in certain markets, such as banking and shipping, are likely to be more common.” Here, as I say, there was no evidence to the effect that there was a “general expectation” in the market that shipowners would not expect to bear this type of loss.

202. In fact, to a large extent, Rhine’s case on assumption of responsibility was a rerun of its case on whether the loss was of a kind that was within the reasonable contemplation of the parties. For example, in its written opening for trial, having referred to the fact that in *The Achilleas* Lord Hoffmann was influenced by considerations of the “general understanding in the shipping market” as to how liability was restricted, Rhine stated that, here, the general understanding in the oil trading industry is that traders hedge their pricing risk and that to the extent they fail to do so, that is not something for which Rhine undertook responsibility. However, as I have already explained, the agreed expert evidence was that the general understanding in the oil trading industry was that larger trading houses have internal risk management systems, of the type Vitol has. It is not therefore unusual not to conclude an external hedge for a particular transaction. If, therefore, in that part of their written opening Rhine was referring to external hedging only, then it was contrary to the expert evidence and the point fares no better than the point based upon reasonable contemplation. If, on the other hand, it encompassed both external and internal hedging (i.e. all the transactions entered on the Vista system by Vitol) then it would not assist Rhine in its argument on this point, because Vitol did not fail to undertake internal hedging.
203. It is important to note that (i) Rhine was not basing its case as to assumption of risk on a contention that oil price movements were difficult to predict, nor (ii) was its case that it assumed no responsibility at all for loss suffered by reason of a change in the price of oil:
- (1) (i) became clear during oral closing submissions. Although a number of Rhine’s written submissions had suggested that reliance was being placed on the suggestion that market movements in the price of oil were difficult to predict and so potential loss difficult to quantify, in his oral closing submissions Mr Young stated that was not a case that he was making. Rather, the point he relied upon in support of the assumption of responsibility argument was “that a shipowner would contemplate that the charterer/trader would hedge market movements and thus market movements would drop out.” That, however, illustrates the difficulty with Rhine’s case on this issue, because it is based on the same premise as the “not within reasonable contemplation” argument that I have rejected above.
 - (2) (ii) is apparent from the amount for which Rhine did accept it is liable (on the basis that Vitol succeeds on liability and on the 6 May bill of lading point). The case advanced by Rhine is not that it has no liability at all for losses caused by movements in the relevant oil price index. It accepts that, if it is held liable, it is liable in the sum of \$820,135.50 (in addition to the smaller amount of the Mercuria loss). That is a loss that arises from the pricing terms of the TOTSA contract and the delay in loading that therefore affected the price Vitol had to pay, albeit that is not the entirety of the loss. Rhine’s case is that it is only liable insofar as the loss

would not have been suffered had the internal Swaps been external swaps with third parties. Rhine accepts that it is liable for the part of the loss that would have been suffered even if the hedging had been external. In other words, it accepts that it did assume responsibility for loss (where caused by its breach of contract) arising from the change in the price of oil to the extent that that loss would not have been made good by external hedges. It follows that it is part of Rhine's case that it was willing to assume responsibility for a change in the oil price insofar as Vitol engaged in an external hedging strategy (as it says was within the contemplation of the parties). However, as I have already examined, on the expert evidence presented at trial, there is no basis for concluding that the parties' contemplation was that Vitol would engage in an "external" hedging strategy; rather, it was that they would engage in hedging, which may well be internal. Similarly, there is nothing in the evidence (either by reference to Rhine in particular or to the market more generally) to suggest that Rhine was assuming responsibility for oil price changes but only to a limited extent (namely, to the extent they would be limited by external hedging).

204. It is not, therefore, the exposure to the movement in the price of oil itself that Rhine is saying was outside the scope of its assumption of responsibility. Rather, it is the failure of Vitol to execute its hedges externally such that its loss was in part actually reduced. That is Rhine's real complaint here, and that is really a complaint about failure to mitigate, not about assumption of responsibility. It is a submission about Vitol's failure to take steps to reduce its loss. However, as I have noted earlier, Rhine pleaded no case on failure to mitigate, and specifically disavowed one in its oral opening (as well as in its written closing at paragraph 45). In circumstances where what Vitol did was not only accepted to be reasonable, but also (as I have held) usual and within the contemplation of the parties, there is nothing to suggest that there was some part of that risk for which Rhine did *not* assume responsibility.
205. Although, therefore, Rhine referred to what was said in *The Achilles* about the loss claimed there being difficult to quantify (see Lord Hoffmann at paragraph 23 and Lord Hope at paragraph 36), it was not the fact that loss might be suffered as a result of the movement of the price of oil that was the real gist of the case on this point. As explained above, Rhine's case was not that a shipowner never assumes responsibility for a loss based on market movements experienced by reason of a breach of charter. Rhine accepted it was liable for part of the loss caused by market movements. (Mr Toms also made the point that a shipowner's liability for delay in delivering a cargo will generally be the difference between the market value of the cargo on the date on which it would have arrived at the discharge port, but for the breach, less the market value on the date on which it in fact arrived, giving the example of *The Heron II* [1969] 1 AC 350, illustrating that shipowners can be liable for loss caused by a change in the market price of the cargo).
206. Moreover, a reasonable carrier of crude would have understood at the time of contracting that a delay in the performance of the charter could result in movements in the price of the cargo based upon market movements, and that the market price of crude was quite volatile, with prices capable of changing over a short time period. That was confirmed by the expert evidence, and Rhine did not suggest otherwise. As I have already held, it was within the contemplation of the parties that Vitol's hedging might well not be external. Therefore, even if it is difficult to quantify market movements or to predict them in advance, given the state of knowledge, if a carrier of crude chooses to contract on terms which put some responsibility upon it in respect of delays but which do not seek to

manage its exposure to loss based upon market movements in the price of crude, there is no good reason why the court should conclude that it did not assume responsibility for such loss.

207. One theme of Rhine's argument on this point was the contention that, on Vitol's case, Rhine said that it would effectively be an insurer of Vitol against price rises in the event of delay but with no premium. That way of describing it does not seem to me to further the analysis. Rhine is not, on Vitol's case, an "insurer" against any and every rise in the price of oil in the event of delay. It is only liable if it is in breach of contract in the first place (and then subject to the other rules of recovery for breach of contract, including remoteness of loss) or liable under the specific indemnity contained in the Charter (according to its terms). It is no more an "insurer" than any contract breaker who has to make good loss caused by its breach of contract or a contracting party that has given an indemnity who has to indemnify according to its terms. Moreover, it cannot be said, at least not definitively, that Rhine did not collect a "premium" in return for assuming such risk. Rhine was, of course, paid for the charter, and so paid for its undertaking the obligations and risks provided for (both expressly and implicitly) in the charter. Mr Toms pointed out that under the charter Rhine received in excess of US\$5 million in freight and a demurrage rate of US\$100,000 per day (which, on the facts, resulted in an additional US\$7 million), but the particular amount does not matter. There was no evidence as to how these figures were arrived at, the extent to which they reflected market rates, or whether any other matters were taken into consideration. Rhine was paid those sums in return for which it undertook various obligations and assumed various risks. In seeking to identify what those risks were, it is of no assistance to assert, at least against the background as to there being no evidence about how the price was reached, that there was no particular "premium" paid for a particular risk.
208. Similarly, Rhine described the charter on Vitol's case being "an unlimited one-way bet" which gave Rhine no relevant information of the bet or other advantage. Again, this is an oversimplification, and seeks to remove the particular point here from its context in the charter. As with the insurance analogy, calling it a "bet" removes from the analysis the point that Rhine is only liable where it is in breach of charter or where (as with the indemnity) otherwise the charter so provides. It is not a mere "bet" on the change in the oil price in the event of any delay to the vessel's loading. Moreover, saying that the "bet" gives Rhine no information is also an oversimplification. I have held, above, based on the expert evidence that it was within the reasonable contemplation of the parties that, if the Vessel was delayed in loading the Djeno cargo, Vitol might suffer loss because of a rise in the oil price and that its risk management arrangements might well be internal. That is, therefore, something that Rhine can be taken to have known. It could also therefore inquire for additional information and/or to seek to make provision in the charter for information, or indeed for a different allocation of risk, by way of negotiated terms.
209. Rhine also referred to the fact that, when the charter was concluded, the Presentation Date under the TOTSA contract was 9-10 May, and it was only subsequently changed to 5-6 May. However, the Presentation Date under the TOTSA contract was not communicated to Rhine (and there was no evidence that Rhine had ever asked about it) such that this cannot make a difference to an analysis of the position between Vitol and Rhine under the terms of the charter. If Vitol had informed Rhine about the original set of dates as part of the process of fixing the charter, that may have affected the analysis

(if, for example, it had amounted to a material representation), but inquiring into such a hypothetical (when other facts could then also have been different) does not assist.

210. Rhine also relied on the fact that the charter contained no reference to any particular dates for loading at Djeno. It contained no reference to the requisite dates for loading beyond the cancelling date referable to the first loading port in Ghana (which the Vessel met). However, that does not say anything about whether Rhine was not assuming responsibility for loss from market movements caused by any delay. If there had been such a reference, depending on the terms of the clause in question, that may have given Vitol an additional route in terms of establishing liability, or it may have meant that Rhine would have borne liability for delayed loading which was not a breach of the indemnity clause or the warranty on which Vitol have founded their claim here, but its absence does not mean that Rhine was not assuming responsibility for a particular type of loss when liability for breach of charter was established. Rhine did take on obligations where it could clearly be seen a breach might cause delay in loading (and an indemnity which might in certain circumstances encompass the consequences of a delay in loading), and Rhine can be assumed to have realised that if there was delay in loading, the oil price might have changed and therefore Vitol might thereby have suffered loss.
211. In summary, it does not appear to me that (to adopt the phrase used by Lord Hoffmann in *The Achilles* at paragraph 9) there is anything in the context, surrounding circumstances or general understanding in the relevant market that shows that Rhine would not reasonably have been regarded as assuming responsibility for losses of the type that were suffered in this case. There is nothing to suggest that the “standard approach” (as identified by Toulson J in *Siemens Building Technologies Ltd v Supershield* in the passage cited by Males J in *The MTM Hong Kong*, above) would not reflect the expectation or intention reasonably to be imputed to the parties, i.e. that the contract breaker should ordinarily be liable to the other party for damage resulting from his breach if at the time of making the contract a reasonable person in his shoes would have had damage of that kind in mind as not unlikely to result from a breach.

Scope of recovery under clause 13

212. As noted above, there was an issue between the parties as to whether or not the scope of the indemnity under clause 13 of the charter is subject to the rules on remoteness of loss that apply to a claim in damages. Vitol contended that, as an indemnity clause, it was not limited by those rules, but was subject only to the requirement of causation, whereas Rhine contended that the normal rules of remoteness in relation to a breach of contract claim applied.
213. Given that I have found, as set out above, that the losses claimed by Vitol are not too remote to be recoverable as damages for breach of contract, the amount recoverable in this case does not turn on this issue. However, given that the parties addressed argument to it, I set out my view below.
214. In their arguments on this issue, both parties referred to and relied upon the judgment of the Court of Appeal in *Total Transport Corporation v Arcadia Petroleum Ltd (The “Eurus”)* [1998] 1 Lloyd’s Rep 351. In that case, the clause in question did not use the word “indemnity” or “indemnify” but stated that “*Owners shall be responsible for any*

time, costs, delays or loss suffered by Charterers due to failure to comply fully with Charterers voyage instructions” (provided such instructions were in accordance with the charterparty and custom of the trade).

215. In his judgment, Staughton LJ identified that the word “indemnity” is used in two senses (see 357 col 1). It may mean simply damages awarded for tort or breach of contract. Alternatively, it may refer to all loss suffered which is attributable to a specified cause, whether or not it was in the reasonable contemplation of the parties. He emphasised that there was no fixed rule in relation to the question whether an indemnity would be limited by a test of remoteness, and indeed rejected a suggestion in the then current edition of *Voyage Charters* to the effect that remoteness would always be irrelevant to an indemnity obligation (see 361 col 1). Rather, he endorsed what was said in *Halsbury’s Laws of England* (4th ed.): “*The extent of a person’s liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances*” (see 360 col 2).
216. It was relevant to his interpretation of the clause in *The Eurus* that the “indemnity” in question was triggered by what would in any event have been a breach of contract, such that damages would in any event have been payable. Staughton LJ could not see a reason why the parties would have wished to provide that, for some breaches of contract, loss would be recoverable whether or not it was within the reasonable contemplation of the parties, while for all other breaches the ordinary rules as to damages in a contract case would apply (see 358 col 1 and 361 col 1, and Sir John Balcombe at 363 col 2). However, he does not appear to me to have been laying down a rule to the effect (as appeared in argument to have been suggested by Mr Toms) that where an indemnity is, or can be, triggered by facts or circumstances that would not necessarily have been a breach of contract, the normal rules of remoteness of loss as in a damages claim would not apply to the indemnity. Rather, it is a question of construction, dealt with in the same way as any contractual provision, following the approach explained by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 (in which case the clause in question was an indemnity clause).
217. The words, in terms of the scope of the indemnity, of clause 13 are wide: “*shall indemnify Charterer for any damages, penalties, costs and consequences*”. There is no suggestion in the words themselves that they are limited to non-remote consequences.
218. There was no suggestion by either party that the events that triggered the indemnity would necessarily otherwise be a breach of the charter. They might in some circumstances be a breach (e.g. if the circumstances also gave rise to a breach of the warranty, as was alleged in this case), but equally in others they might not. This is not a situation equivalent to that in *The Eurus* where the indemnity would only be payable in circumstances where there would in any event, in the absence of the indemnity clause, be a breach of charter giving rise to a claim for damages. The indemnity here was in that sense self-standing.
219. There is nothing in the terms of the indemnity to suggest that it intended to incorporate the rules on remoteness of damage for breach of contract. If, as a result of a detention, for example, the charterer had suffered a penalty, there would be no reason to conclude that fell outside the scope of the indemnity, even if unforeseeable. Rhine argued that use of the term “damages” in the list of matters which were covered by the indemnity

suggested that the rules on remoteness of loss were engaged. But that does not follow. The clause is not saying that the owner will pay to the charterer damages in respect of the charterer's loss (which, if that was what the words said, may imply engagement on the rules of remoteness of loss). Rather, it stipulates that the owner is to indemnify the charterer in respect of any damages for which the charterer is held liable (which were caused by the detention). In addition, the indemnity is not confined to "damages" but extends also to the other items in the list, in particular to "any ... consequences", which is an all-encompassing term. It is clear that the indemnity was intended to cover any liability Vitol might incur or any loss it might suffer as a result of the detention.

220. It is also clear that the parties regarded the circumstances triggering this indemnity as a serious matter. Not only did they give rise to the indemnity (and also the consequence that any time under detention should not count as laytime or time on demurrage), but under the terms of the clause they also gave the charterer the option to terminate the charter. There is even less reason, against that context, to seek to limit the indemnity to non-remote consequences.
221. Accordingly, I find that the clause 13 indemnity was not limited by the rules on remoteness of damage.
222. As a post script to this issue, Mr Young warned about coming to the above conclusion because of potentially wide implications. He observed, for example, that time charterers would usually be regarded, as a matter of implication, as giving shipowners an "implied indemnity" against the consequences of complying with their orders, and that over-reliance on the word "indemnity" could have "severe impacts on that area of the law." I should emphasise, therefore, that my conclusions in relation to clause 13 of the charter are based on the terms of clause 13 and the facts and circumstances of this case insofar as they are admissible on the question of construction. They do not suggest that an express indemnity in any contract will always be interpreted to include losses that would fall outside the remoteness rules for breach of contract, still less do they deal with anything in relation to the scope of the implied indemnity identified by Mr Young.

Conclusion

223. The result is that I find Rhine liable under both the clause 13 indemnity and under the warranty, and that the various arguments it has mounted against recovery of Vitol's claim fail. Rhine is therefore liable to Vitol in the sum of US\$3,692,106.72 (being US\$3,674,834.22 in respect of the increased price under the TOTSA contract plus US\$17,272.50 for the Mercuria loss) plus interest.
224. I ask the parties to draw up an order reflecting that, as well dealing with the agreed outstanding balance due from Vitol by way of demurrage (as recorded at paragraph 69 above).