



Neutral Citation Number: [2022] EWHC 1615 (Comm)

Case No: CL-2020-000216

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF**  
**ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24/06/2022

**Before :**

**THE HON MR JUSTICE BUTCHER**

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**Between :**

**NKD MARITIME LIMITED**

**Claimant**

**- and -**

**BART MARITIME (No. 2) INC**

**Defendant**

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**Mr Simon Rainey QC and Ms Claudia Wilmot-Smith (instructed by Brookes & Co.) for the  
Claimant**

**Mr Timothy Young QC and Ms Colleen Hanley (instructed by Wikborg Rein LLP) for the  
Defendant**

Hearing dates: 3-5, 9-12 May 2022  
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**Approved Judgment**

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**THE HONOURABLE MR JUSTICE BUTCHER**

## Mr Justice Butcher:

1. This case involves a dispute as to whether the termination of an agreement for the sale of a vessel was valid. The backdrop to the dispute is the onset of Covid-19 restrictions in India and one of the issues is whether lock down measures imposed by the Indian authorities constituted or gave rise to a relevant force majeure event.

### The Parties

2. The Defendant ('Bart') was, in March 2020, the owner of the 'SHAGANG GIANT', a converted Very Large Ore Carrier ('the Vessel'), which had been built in 1993. Bart wished the Vessel to be scrapped. To that end Bart entered into a contract to sell the Vessel to the Claimant ('NKD'), which is a company specialising in the acquisition of shipping tonnage for scrapping and / or recycling. It is unusual for vessel owners to sell directly to recycling yards; normally they sell to cash buyers, who sell to the recycling yards. NKD is the exclusive cash buyer for the Shree Ram Group, which operates recycling yards at Alang, India, and the intention was that the Vessel should be scrapped at Alang.

### The MOA

3. The contract between Bart and NKD for the sale of the Vessel was contained in a Memorandum of Agreement dated 5 March 2020 ('the MOA'). The MOA defined Bart as 'the Seller' and NKD as 'the Buyer'. Amongst the provisions of the MOA were the following:

*'The Seller agrees to sell and the Buyer agrees to purchase the Vessel ... on the following terms and conditions which, in particular, include an undertaking to recycle the Vessel in a safe and environmentally sound manner consistent with international and national law and relevant guidelines ...*

#### Ship Recycling Facility ...

*Ship Recycling Facility of Shree Ram and associated yards, to be declared latest 5 (five) days prior to Vessel's arrival at the Delivery Location. ...*

#### *1. Purchase Price & Payments*

##### *a. Purchase Price*

*The Buyer shall pay a rate of US\$ 366.00 (United States Dollars Three Hundred Sixty Six) per long ton lightweight, totalling US\$14,215,743.78 (United States Dollars Fourteen Million Two Hundred Fifteen Thousand Seven Hundred Forty Three and Seventy Eight cents) in cash ...*

##### *b. Initial Payment*

*Latest within 2 (two) Banking Days after the Buyer has counter-signed this Agreement by e-mail attachment, the Buyer shall pay 30% (thirty per cent) of the Purchase Price i.e. US\$4,264,723.13 (United States Dollars Four Million Two Hundred Sixty Four Thousand Seven Hundred Twenty Three and Thirteen cents) nett of bank charges, to the Seller ...*

c. *Balance Payment*

*The 70% (seventy per cent) balance of the said Purchase Price i.e. US\$9,951,020.65 (United States Dollars Nine Million Nine Hundred Fifty One Thousand Twenty and Sixty Five cents), less the Buyer's 3% (three per cent) address commission of US\$426,472.31 (United States Dollars Four Hundred Twenty Six Thousand Four Hundred Seventy Two and Thirty One cents), totalling US\$9,524,548.34 (United States Dollars Nine Million Five Hundred Twenty Four Thousand Five Hundred Forty Eight and Thirty Four cents), shall be paid with same day value nett of bank charges ... for the Seller to confirm receipt of payment within 2 (two) Banking Days of the Seller tendering Notice of Readiness for delivery to the Buyer and/or their representatives in exchange for the documents listed in Clause 4 hereunder.*

...

2. *Delivery*

a. *Delivery Location*

*The Vessel shall be delivered and taken over safely afloat at outer anchorage Alang, West Coast India, which shall be the "Delivery Location".*

*If, on the Vessel's arrival, the Delivery Location is inaccessible for any reason whatsoever including but not limited to port congestion, the Vessel shall be delivered and taken over by the Buyer as near thereto as she may safely get at a safe and accessible berth or at anchorage which shall be designated by the Buyer, always provided that such berth or anchorage shall be subject to the approval of the Seller which shall not be unreasonably withheld. If the Buyer fails to nominate such place within 24 (twenty four) hours of arrival, the place at which it is customary for vessel (sic) to wait shall constitute the Delivery Location. The delivery of the Vessel according to this paragraph shall constitute full performance of the Seller's obligations and all other terms and conditions of this Agreement shall apply as if delivery had taken place.*

*Upon delivery, the Vessel shall be recycled at a Ship Recycling Facility ...*

b. *Laydays and Cancelling*

*Expected time of delivery: 1<sup>st</sup> March 2020 to 15<sup>th</sup> April 2020 in the Seller's Option (hereinafter called the 'Laydays');*

*With cancelling at 1700 hours local time on 15<sup>th</sup> April 2020 in Buyer's option (hereinafter called the 'Cancelling Date') ...*

c. *Delivery Notices*

*The Seller and/or their agents will give 5, 3 and 1 (five, three and one) days approximate notice of arrival at the Delivery Location, in accordance with the terms and conditions of this Agreement.*

...

*If for reasons beyond the Seller's control the Vessel has not arrived at the Delivery Location on or before 1700 hours local time on the Cancelling Date and the Seller and the Buyer have failed, having acted in good faith, to reach mutual agreement on an extension to the Cancelling Date then the Buyer shall have the right to cancel this Agreement provided written or telegraphic notice of such cancellation is given to the Seller by the Buyer within 48 (forty eight) hours after notice of such delay is given by the Seller to the Buyer. ...*

*d. Delivery Condition*

*The Buyer has accepted the Vessel without inspection. This Agreement is therefore outright and subject only to the terms and conditions of this Agreement.*

*The Vessel is to be delivered on an "as is, where is" basis ...*

*3. Notice of Readiness*

*The Notice of Readiness should be served to the Buyer or the Buyer's agent or the Buyer's nominated representative at the delivery port, complete with the documents referred to in clause 4.e. below, during regular business hours ...*

*4. Delivery Documents*

*a. Delivery Documents to be provided by the Seller:*

*i) Commercial invoice ...*

*ii) Original Bill of Sale made in favour of the Buyer ...*

*iii) A letter from the Seller undertaking full responsibility and consequences for any debts, loans, encumbrances ... incurred up to the date and time of delivery of the Vessel ...*

*iv) Letter of Undertaking from the Seller stating that they will immediately upon receipt of the Purchase Price of the Vessel in full, instruct the agents of the Vessel at Delivery Location, to deliver the Vessel to the Buyer ...*

*v) A Letter of Undertaking from the Seller stating that they will provide a deletion certificate from the authorities of the Vessel's port of registry within 8 (eight) weeks from the date of delivery of the Vessel to the Buyer ...*

*vi) Copies of the relevant pages of the Lightweight Proof ...*

*vii) Certificate of Ownership and Encumbrance or equivalent ...*

*viii) Minutes of the resolutions of the Board of Directors or Unanimous Written Consent of the Directors of the Vessel approving the sale...*

*ix) Power of Attorney authorising the Seller's representative(s) to act on their behalf ...*

*x) Photocopy of the Vessel's Certificate of Registry.*

...

*d) The Seller ... shall ... provide draft copies of the above documents (except document a(vii) to the Buyer) at least 5 (five) days prior to tendering Notice of Readiness. The remaining original documents are to be handed to the ... Buyer ... at the time of closing.*

*e) Prior to, or at the time of tendering Notice of Readiness, the Seller will give originals of the following documents to the Buyer or their agents for Buyer's information only:*

*- A letter addressed to the Buyer from the Seller, written and signed by the Master of the Vessel, confirming that all crew wages and dues are fully paid ...*

*- A document on board confirming the material of working propeller.*

*- A statement from the Seller's local agents stating that they have no pending dues against the Vessel at the time of delivery.*

*- Copies of the Lightweight Proof in the name or ex-names of the Vessel are to be onboard the Vessel at the time of delivery and handed to the Buyer's representatives.*

*The Buyer and/or their agents will also cooperate with the Seller and/or their agents to obtain the following documents from the relevant authorities:*

*- A Portworthy Certificate issued by an independent local surveyor.*

*- Pre-arrival documentation (identification of hazardous materials on board), clearances and certificates issued by all local and customs authorities, GMB, GPCB, AERB and Explosives Department.*

*The Seller are to provide necessary details and information for "Desk Review", as provided to the Seller by the Seller's agents, 7 (seven) days prior to the expected date of the Vessel's arrival at Alang, West Coast India.*

...

## *8. Buyer's Default*

*If any default is made by the Buyer to fulfil this Agreement and pay the Purchase Price within the time stipulate (sic) in Clause 1.c. ... the Seller has the right to cancel this Agreement in which case the Initial Payment referred to in Clause 1.b., if lodged, shall belong to the Seller automatically without the Seller having to seek any judgment or prove any loss. The Seller shall also be at liberty (but not bound) to resell the Vessel by public or private sale, and in such event any loss and all expenses arising from the resale of the Vessel in respect of which the Seller has exercised their option under this Agreement shall be recoverable by the Seller from the Buyer together with interest at 14% (fourteen per cent) per annum. If the Initial Payment has not been lodged or if the Initial Payment does*

*not cover the Seller's loss caused by the Buyer's non-fulfilment of this Agreement, the Seller shall be entitled to claim further compensation from the Buyer for any loss and expense.*

#### *9. Seller's Default*

*Should default be made by the Seller in the execution of a Bill of Sale or in the delivery of the Vessel and her outfit, as specified in this Agreement, the Initial Payment referred to in Clause 1.b. hereof shall be immediately repaid in full to the Buyer without prejudice to the Buyer's claim for compensation for the non-fulfilment of this Agreement.*

#### *10. Force Majeure*

*Should the Seller be unable to transfer title of the Vessel or should the Buyer be unable to accept transfer of the Vessel both in accordance with this contract due to outbreak of war between the nominated country of delivery and any other country, wreck, actual constructive or compromised total loss of the Vessel, restraint of governments, princes, rulers or people of any nation or the United Nations, act of God, then either the Buyer or the Seller may terminate this Agreement upon written or telegraphic notice from one party to the other without any liability upon either party and the Initial Payment referred to in Clause 1.b. hereof shall be released to the Buyer.*

*The suspension or termination of the activities of the Ship Recycling Facility shall not constitute a force majeure event under this Agreement and the Buyer agrees to pay for and take delivery of the Vessel in accordance with the terms and conditions of this Agreement and after delivery, the Buyer shall be at liberty to ballast the Vessel to another Ship Recycling Facility ... for Recycling.*

...

#### *12. Post Delivery Assistance*

*Once the Purchase Price has been received by the Seller at the Seller's bank and the Vessel is delivered, the Seller is to assist in moving the Vessel to the agreed Ship Recycling Facility for the period set out below, solely at the Buyer's risk and expense, for Recycling ...*

*The Seller is to ensure that the Vessel has sufficient fuel/diesel/lubricants/water remaining on board for 8 (eight) running days (including 1 (one) day steaming) after tendering Notice of Readiness. The Seller is also to ensure that at least 7 (seven) crew members including the Master and Chief Engineer remain on board for a period not exceeding 8 (eight) running days from the date of tendering Notice of Readiness, to assist in moving the Vessel at the Buyer's risk and expense. ...*

...

### 18. *Governing Law and Dispute Resolution*

*The interpretation of this Agreement shall be governed by the Laws of England and Wales and shall in all respects apply hereto as a contract made in England. ...*

#### The Indian Shipbreaking Code

4. As is apparent from the terms of the MOA itself, the intention was for the Vessel to be scrapped and recycled in India. Part of the relevant context of the MOA is the shipbreaking regime applicable in India at the material time.
5. This regime included the Indian Shipbreaking Code (Revised), 2013 ('the Shipbreaking Code'). This was laid down after a case involving a vessel reported to have large quantities of asbestos and hazardous material had caused litigation, and had prompted the Supreme Court of India to formulate rules and regulations for the governance of the ship recycling industry.
6. Under paragraph 3.1 of the Shipbreaking Code, ships for recycling are to notify the Maritime Rescue Coordination Centre of their intended date of arrival 7 days prior to arrival in the Indian Exclusive Economic Zone. Furthermore, under paragraphs 3.4 and 3.5 of the Shipbreaking Code, the ship owner is to submit to the State Maritime Board / Port Authority a document indicating his intention to send the ship to an authorised Ship Recycling Yard, with various specified documents, 'for a desk review thereof, including on the genuineness of the documents', at least 7 days prior to the arrival of the ship for recycling.
7. By paragraph 3.10 of the Shipbreaking Code it is provided that:  
*'After the desk review by the Port Authority/State Maritime Board (SMB) / State Pollution Control Board (SPCB) / Customs, a decision will be taken regarding anchorage of the ship by the Port Authority / the State Maritime Board concerned.'*
8. Paragraphs 3.11 – 3.31 provide that, once the relevant agencies are satisfied following a desk review, the ship may be anchored, and anchorage instructions will be issued by the State Maritime Board / Port Authority; the ship will then be boarded and physically verified by the relevant authorities (the identity of which would depend on the nature of the vessel); once all concerned authorities have given clearances, beaching permission will be given by the SMB / Port Authority; and the ship will then be beached, with the Ship Recycler having various responsibilities to ensure that the vessel is properly secured and that hazardous substances are removed.
9. Given that Alang is in Gujarat State, its relevant State Maritime Board is Gujarat Maritime Board ('GMB'), and the relevant Pollution Control Board is the Gujarat Pollution Control Board ('GPCB').

#### The Facts in Outline

10. In order to understand the nature of the issues between the parties, it is convenient to set out the basic facts as to what occurred. Most of these were not the subject of any dispute. Where there were factual disputes of relevance, I will return to them below.

11. After the conclusion of the MOA, and in accordance with clause 1b thereof, NKD paid to Bart the Initial Payment of US\$4,264,723.13 ('the Initial Payment').
12. On 16 March 2020 Bart, by the Vessel's managers Eastern Pacific Shipping ('EPS'), gave five days' approximate notice of the arrival of the Vessel 'at Alang outer anchorage on/about 21<sup>st</sup> March 2020'. On the same day, NKD confirmed to the brokers through whom the MOA had been concluded, that the recycling facility for the Vessel would be 'Shree Ram yard No. 9', and passed on a copy of a circular issued on that date by the GMB. That circular stated that, in light of the situation in relation to Covid, 'all ships coming to Bhavnagar / Alang must obtain PHO [Port Health Organization] clearance in advance and submit a copy of the same to this office. Without such PHO clearance no vessel will be allowed to enter the port area.'
13. On 17 March 2020, NKD concluded a MOA with Shree Ram Green Ship Recycling Ind. (Unit-II) LLP as buyer (the 'sub-MOA'), providing for the sale of the Vessel to the buyer for demolition / recycling only, for a total lump sum price of Eur 12,474,300. The Vessel was to be delivered 'at Alang Outer Anchorage'; and the buyer was to take delivery in the period 17 March to 30 April 2020, with 30 April being the cancelling date in buyer's option. Clause 16 provided:  
  
*'In the event that there is delay in obtaining of desk review approval or approval for beaching by GMB, GPCB or any other approval required by authority then the cancelling date shall be extended pending receipt of the same. In the event that the approval are not received within 60 days of the vessel's arrival then either side shall have the right to cancel this contract without liability on either side. ...'*
14. On 18 March 2020 PHO clearance was obtained for the Vessel to berth at Alang. On the same date, Admiral Global Shipping Pvt Ltd ('Admiral'), Bart's local agents in Bhavnagar / Alang, submitted the application for 'anchoring permission (desk review)' in relation to the Vessel, accompanied by documents and information, to the GMB, the GPCB, Bhavnagar Customs, and the Atomic Energy Regulatory Board.
15. On 19 March 2020 an Addendum was entered into by the parties to the sub-MOA, changing the cancelling date to 15 April 2020. On 20 March 2020 EPS gave 1 day's approximate notice of arrival at 'Alang outer anchorage'. At 0520 on 21 March 2020, the Vessel contacted the Gulf of Khambhat Vessel traffic service (or 'VTS') and was told 'Do not enter VTS area. Stay outside VTS Limit'. The Vessel enquired of VTS Khambhat as to the reason for this, but no reason was given. At 0548 the Vessel contacted VTS Khambhat to ask for an anchoring position, and was advised 'to choose safe anchor position as per Master'. The Vessel then anchored outside VTS Khambhat limits.
16. At this point the Master of the Vessel informed Admiral as to what had happened. After receiving directions from Admiral, the Vessel then tendered to NKD a Notice of Arrival at 0730. It stated the location of the Vessel as being 'Alang Outer Anchorage, India', and said 'In accordance with the MOA, the Seller hereby tenders Notice of Arrival for delivery of the Vessel to the Buyer at the above stated Location, Date and Time.' At 16.34 on the same day, 21 March 2020, VTS Khambhat informed Admiral that the Vessel 'arrived 0730 Hrs / 21<sup>st</sup> Mar 2020 & anchored outside VTS Limits in Position 2022.80°N, 07138.46°E & awaiting instructions'.



17. On 21 March 2020, Mukesh Patel of Shree Ram had informed NKD that, given that the Vessel was now lying off Diu / Jafrabad, she could not be regarded as having arrived at the place of delivery. Mr Dheir of NKD equally informed the brokers of the MOA that the vessel was not 'at Alang Anchorage and has not been', 'so kindly arrange for it to enter Alang anchorage as per usual practise (sic) and then tender NOR', '[a]t present Buyers cannot acknowledge or accept NOR in vessels current location'. On 23 March 2020, via the brokers, EPS contended that the Vessel was anchored in the customary waiting area in view of the Covid situation; that all other vessels going for recycling at Alang were also waiting in the same area, and that there were three vessels ahead of the Vessel; and that Bart deemed the then current location of the Vessel to be the outer anchorage.
18. By 24 March 2020 the Vessel had shifted somewhat westwards, to a position rather nearer the coast, namely 20°55.014'N, 71°23.098'E, still just outside VTS Khambat limits.
19. On that same day, the Ministry of Home Affairs of the Government of India issued a lock down order in response to the threat of Covid. It was specified to be effective for a period of 21 days from 25 March 2020. It provided that the offices of central and local government should be closed, with certain exceptions which were to 'work with minimum number of employees', '[a]ll other [governmental] offices may continue to work-from-home only'. Commercial, private and industrial establishments, with very limited exceptions, were to remain closed. Paragraph 14 of the Order provided that 'All other line department officials in the specified area will work under the directions of [the local] incident commander.' There is no dispute that during the period of this lock down, recycling activities at Shree Ram and other recycling facilities at Alang were suspended.
20. On 26 March 2020 the Bhavnagar Superintendent of Police gave immigration clearance to the Vessel.
21. On the same date, EPS gave notice to NKD as follows:

*'Please note the Vessel arrived Alang on 21<sup>st</sup> March 2020 at 0730 hours LT ... She is currently anchored at the customary waiting area ... as instructed by the port authorities and awaiting immigration clearance/boarding parties attendance.*

*The Delivery Location stipulated in the MOA – outer anchorage Alang – is currently inaccessible due to the measures taken in India to contain the Covid-19 pandemic.*

*As per the MOA, "If the Delivery Location is inaccessible for any reason whatsoever, the Vessel shall be delivered and taken over by the Buyer as near thereto as she may safely get at a safe and accessible berth or anchorage which shall be designated by the Buyer". ON behalf of Seller, we request Buyer to nominate an alternate safe and accessible berth or anchorage for delivery within 24 hours of this notice, i.e. by 1800 hours Singapore on 27<sup>th</sup> March 2020.*

*PLEASE TAKE NOTE THAT if the Buyer fails to nominate such place within 24 hours of this notice, the place at which it is customary for vessels to wait shall constitute the Delivery Location and Seller shall be deemed to have fully performed its obligations*

*and all other terms and conditions of the MOA as if delivery had taken place within the Laydays and prior to the Cancelling Date. ...'*

22. This was met on the same day by responses from Brookes & Co, for NKD, which contended that the Vessel was not at the Delivery Location, was not at a customary waiting area, and that no valid NOR or notice of arrival had been served.
23. On 27 March 2020, the GMB Port Officer, Alang Ship Recycling Yard, wrote to Bhavnagar Customs and to the GPCB asking them to process the desk review 'so that further action for [the Vessel] can be taken'.
24. On the same date, a message was passed from EPS through the brokers stating that, since NKD had not nominated an alternative location, 'the Vessel's current location now constitutes the Delivery Location and the Seller has fully performed its obligations under the MOA in terms of arrival and laycan'.
25. On 30 March 2020 Bhavnagar Customs gave a No Objection Certificate to anchoring in respect of the Vessel, following Customs' desk review. What remained outstanding was approval from the GPCB. As to this:

(i) In a WhatsApp conversation which Mr Dheir had been having with NKD's local agents, Alang Shipping Services Pvt Limited ('Alang Shipping') on 28 March 2020, Alang Shipping had reported that:

*'The officers from GPCB will not board till 15<sup>th</sup> as all staff in hospital for medical wast[e] management / handling etc supervision due to Corona dangerous virus... Hence the anchoring permission also not be grant from GPCB for vessel might not be allow to inner anchorage ... As per the information, which have, the GPCB Permission for Anchoring and boarding will not be granted as they received verbal order from member secretary GPCB Ghandhinagar will follow 100% lock down upto April 14, 2020 till further order received from P.M. House. No Any Anchoring or boarding allow because ship breaking activity is not in essential category.'*

To this Mr Dheir had responded: 'Good'.

(ii) On 31 March Admiral notified the Vessel and EPS that they were trying to get permission from the GPCB, but:

*'As of present all the GPCB officials are fully occupied in handling and disposal of biomedical waste WRT to ones generated by cases of COVID 19 in order to avoid stage 3 of the spread (community transmission). ...'*

(iii) On 1 April 2020 Admiral made a request to the GPCB for anchoring permission for the Vessel, accompanied by documents. On 3 April 2020 Admiral notified the Vessel and EPS that they were trying continuously; 'However the officials are busy with covid 19 duty.'

(iv) On 3 April 2020 the Master sent a letter to the GMB and the GPCB asking them to assist in allowing the Vessel to proceed 'to inner anchorage', on the basis that provisions were running low and that the crew was unable to talk to their families.

(iv) On 8 April 2020 Vincent Tan of EPS wrote via the brokers to NKD asking for Buyer's cooperation 'to leverage on their local expertise and clout with these authorities' to get the necessary documents and clearances.

(v) On 13 April 2020, Admiral reported to EPS that the Port Officer had had a meeting with them and the buyer, and had said that due to its size and prevailing conditions he wanted the Vessel provisioned at its current location; that Admiral had objected that the costs would be very high; and that the buyers had said that they would bear the additional costs. In light of this, 'the port officer has informed that the provisions be supplied at present location.'

26. On 13 April 2020 the Vessel tendered NOR to NKD, stating its location as 'Alang Outer Anchorage, India as per VTS instructions', together with various documents. Brookes & Co replied on the same day saying that the NOR was not valid, as 'the Vessel was nowhere near Alang outer anchorage', and the Vessel had not provided all the documents required under clause 4 of the MOA.

27. On 14 April 2020 the Prime Minister of India addressed the nation, and announced that the lock down would be extended until 3 May 2020, and 'all restrictions that have been imposed in various sectors, and on various activities, will continue to remain in force.' This was given the force of law by Order No. 40-3/2020-DM-I(A).

28. Later on 14 April 2020 Brookes & Co on behalf of NKD sent a Notice of Termination of the MOA, pursuant to clause 10 thereof. It referred to the lock down imposed on 25 March 2020 and extended on that day, and continued:

*'The restraint imposed by the Government of India constitutes an event of force majeure which, as has been acknowledged by the Sellers, has prevented and is preventing the Sellers from transferring title to the Vessel in accordance with the terms of the MOA and has prevented and is preventing the Buyers from accepting the transfer of the title in accordance with the terms of the MOA.'*

*Please accept this as the Buyers' notice of their termination of the MOA as a result of an event of force majeure pursuant to cl. 10 of the MOA. We ask that you release to our clients the deposit they have paid pursuant to cl. 1(b) of the MOA.'*

29. On 15 April 2020, EPS on behalf of Bart sent a message denying that there had been a force majeure event, denying that NKD were entitled to cancel the MOA, and stating that the purported termination was itself a repudiation which Bart accepted. The Vessel sailed from the area in which she had been anchored outside the VTS limits of the Gulf of Khambat, towards Karachi.

30. Also on 15 April 2020 the Union Home Secretary of India issued Consolidated Revised Guidelines on the measures to be taken for the containment of Covid-19. These provided that, with effect from 20 April 2020 certain identified activities would be permitted, and that these limited exemptions were to be 'operationalized by States/UTs/district administrators'. The exceptions included industries in rural areas, which were permitted to operate; and offices of State / Union Territory Governments were permitted to work with restricted staff, and 'delivery of public services shall be ensured, and necessary staff will be deployed for such purpose.'

31. On the following day, and without prejudice to the Buyers' Notice given on 14 April 2020, Brookes & Co gave notice of cancellation of the MOA under clause 2(c) thereof.
32. On 21 April 2020 there was a further modification of the Indian lock down rules regarding movement of persons, whereby the sign on and sign off of Indian seafarers at Indian ports, and their movement for that purpose, was permitted.
33. On 22 April 2020, the Bhavnagar Shipping Agents and Stevedores Association wrote to the Collector, Bhavnagar, requesting him to order the GPCB 'to grant the necessary permission for Anchoring, Desk Review Formalities of the vessel (sic) which are lying at Bhavnagar anchorage and seeking permission of boarding and clearance from GPCB'. There was reference to a couple of the relevant vessels being dead vessels, 'and much expenses is caused'.
34. On 23 April 2020, the *Deccan Herald* newspaper reported that Alang ship recycling was returning to normal, with some 60 units having resumed work in the past two days, that a vessel called 'Seafrost' had been beached on 21 April 2020, and that there were six other vessels at the 'outer anchorage' awaiting procedures so that they could be beached. There was a quotation ascribed to the Port Officer, saying that the number of yards operational was almost back to pre-Covid levels, and 'we are following all the conditions which were mandated to reopening such as keeping safe social distancing, hygiene, among others.'
35. On 24 April 2020, the Bhavnagar Shipping Agents and Stevedores Association wrote to the District Magistrate of Bhavnagar, referring to its previous request, and thanked him for 'the special permission granted for the lying vessels at Alang anchorage'.
36. Bart had proceeded to re-market the Vessel. On 27 April 2020, NKD made an offer to purchase the Vessel at US\$ 320 per 1/t, less 3%, delivery Alang with 29 May 2020 as the cancelling date.
37. By Order No. 40-3/2020-DM-I(A), dated 1 May 2020, the Indian Government announced new guidelines on lock down measures, which were to take effect from 4 May 2020 for a period of two weeks. These included the introduction of a risk profiling system, which would involve the identification of red, green and orange zones. The list of these would be shared by the Ministry of Health and Family Welfare with States and Union Territories, who could suggest additional districts as red or orange zones, but could not lower the classification of any district. Subject to a core list of prohibited activities, which did not include activities relevant for present purposes, the activities which were prohibited depended on whether the area in question was in a Red, Green or Orange Zone, and any activities which were not prohibited by regulations applicable to the relevant Zone were permitted.
38. On 6 May 2020, Bart agreed to sell the Vessel to Best Oasis Ltd at US\$ 277 per long ton, for delivery at 'Bhavnagar anchorage' and with a cancelling date of 15 June 2020. On 21 or 22 May 2020, the Vessel proceeded from Karachi towards Alang. On 26 May 2020 there was delivery of the Vessel to Best Oasis Ltd, and on 27 May 2020 Captain Chauhan, who had been Master since January 2020, disembarked.

The Actions

39. Each of NKD and Bart commenced proceedings in this Court against the other. Those actions were consolidated by order dated 5 June 2020.
40. Statements of Case were served. The essential dispute which these pleadings revealed, as focused and developed at the trial, is as follows:
  - (1) NKD claimed that the lock down imposed by the Indian Government on 24 March 2020 had precluded Bart from being able to transfer title in accordance with the MOA. This had meant both that the necessary clearance from GPCB could not be obtained with the result that the Vessel could not proceed to 'outer anchorage Alang' and had thus not reached her Delivery Location; and that a physical examination of the Vessel by the relevant personnel and authorities did not and could not have taken place, with the result that no Portworthy Certificate, or other clearances and certificates to the effect that the Vessel's physical condition conformed to the documentation provided for desk review, could be issued. For those reasons a NOR could not be tendered, and no transfer of title in accordance with the MOA was possible. NKD had therefore been entitled to terminate under clause 10 of the MOA.
  - (2) As a result, NKD was entitled to the return of the deposit which it had paid, in the sum of US\$4,264,723.13, pursuant to the express terms of clause 10 of the MOA.
  - (3) By contrast, Bart contended that clause 10 of the MOA was not applicable. Bart had not been unable to transfer title in accordance with the MOA. Specifically, transfer of title did not require 'delivery' of the Vessel at all, and certainly not at any particular place.
  - (4) In any event, even if delivery was a necessary feature of transfer of title in accordance with the MOA, Bart had not been unable to deliver the Vessel by reason of the force majeure event relied upon by NKD, namely restraint of governments. The Vessel had arrived at the Delivery Location, namely at the outer anchorage Alang. That was where she anchored after she was ordered by VTS Khambat not to come within the VTS area but to choose a safe anchoring position. Alternatively, if that was not the 'outer anchorage Alang', then this was a case where the second paragraph of clause 2(a) of the MOA was applicable, because as the 'outer anchorage Alang' had been inaccessible, the Vessel had got as near thereto as she could safely get, no berth or anchorage had been nominated by NKD, and she had anchored at 'the place at which it is customary for vessel to wait'. The position where she had in fact anchored was thus deemed to be the Delivery Location, and her delivery there constituted full performance of Bart's obligations. There were no other features of the Indian Government's response to Covid which made Bart unable to transfer title to the Vessel in accordance with the MOA.
  - (5) On that basis, NKD's notice of termination was a repudiation of the contract. That repudiation was accepted by Bart. In the circumstances, Bart was entitled to retain the Initial Payment and to damages in the amount of the losses and expenses occasioned by NKD's default, including its losses and expenses arising from the resale of the Vessel, to the extent they exceeded the Initial Payment. These were quantified, in Bart's PDC as US\$3,769,365.59; and on that sum, Bart contended,

contractual interest at 14% per annum was also due; and together these amounts overtopped the Initial Payment.

41. The fundamental issue is, accordingly, whether NKD's Notice of Termination was valid and lawful. If it was, then NKD is entitled to the release of the Initial Payment. If it was not, then it was in breach and Bart can keep the Initial Payment and potentially recover compensation in excess of it.

### The Hearing

42. At the trial, Both NKD and Bart called factual and expert witnesses.
43. NKD called four factual witnesses:
- (1) Mr Narinder Dheir, the sole director, a shareholder and CEO of NKD.
  - (2) Mr Jayesh Rajnikant Sonpal, the director and shareholder of Alang Shipping.
  - (3) Mr Naresh Kumar, the sole proprietor of Compass Shipping Agency. Mr Kumar's evidence explained the impact of the lock down measures imposed by the Indian government - in response to Covid - on the arrival of ships at Alang.
  - (4) Mr Batukbhai Balabhai Patel, a Partner of Shree Ram Green Ship Recycling Industries (Unit 2) LLP.
44. With the exception of Mr Kumar, all of NKD's factual witnesses submitted statements, gave live evidence and were cross-examined. I refer to the position of Mr Kumar in paragraph [82] below.
45. Bart also served witness statements for four factual witnesses.
- i) Captain Rajesh Chauhan, Master of the Vessel.
  - ii) Mr Gak Yong Tay, the Commercial Director at EPS and the Commercial and Technical Manager for the Vessel.
  - iii) Mr Kamal Joshi, a Manager at Admiral.
  - iv) Mr Quentin Soanes, Chairman of Sterling Shipping Services Limited, the broker appointed by Bart to handle the sale of the Vessel.
46. With the exception of Mr Soanes and Mr Joshi, all of Bart's factual witnesses gave live evidence and were cross-examined. NKD did not require Mr Soanes or Mr Joshi to attend or be cross-examined.
47. In general terms, the factual witness evidence did not contribute very greatly in relation to material matters to what was apparent from the contemporary documents. I should, however, record that I found Captain Chauhan's evidence to be particularly concise and helpful.
48. Both NKD and Bart adduced expert evidence on:

- (1) Questions in relation to practices and procedures in and around Alang, and in relation to ship recycling there, including the role of VTS, and the location of '*outer anchorage Alang*'. NKD relied on the expert evidence of Captain Sudhir Chadha, who is a retired Port Officer, and Bart relied on the expert evidence of Mr Shashank Agrawal, who is an Indian qualified attorney, who specialises in maritime and transportation law and in particular ship recycling and demolition.
- (2) Issues relating to the response to Covid-19 in India, including:
  - (i) The measures imposed by the Indian government in response to Covid-19, including the various lock downs;
  - (ii) The impact of those measures on the Alang authorities and their working practices;
  - (iii) Whether such measures could and/or did impact the parties' performance of their obligations under the MOA, and whether any such impact changed over time;
  - (iv) Whether such measures impacted the parties' ability and/or inability to transfer or accept title of the Vessel under clause 10 of the MOA.

NKD relied on the expert evidence of Mr Prashant Asher, who is a practising Indian attorney, and Bart again relied on the expert evidence of Mr Shashank Agrawal.

- (3) The market price of scrap steel at outer anchorage Alang across the relevant time period. NKD relied on the expert evidence of Mr Michael Needham, and Bart relied on the expert evidence of Mr Nicholas Willis. In the event the parties agreed that these witnesses did not need to be called to give evidence.

#### The Questions relevant to the fundamental issue

49. There was no significant difference between the parties as to the questions to be resolved in determining the fundamental issue which I have set out above, though each approached them in a different order.
50. I consider that these questions are helpfully analysed as being four in number, as follows:
  - (1) What is the proper construction of 'transfer of title in accordance with this contract' in clause 10 of the MOA? In particular, is it a requirement of such 'transfer of title' that there should have been delivery of the Vessel?
  - (2) If 'transfer of title in accordance with this contract' imports the notion of delivery, was there a requirement that the delivery should have been at a particular place, and if so, was Bart unable to effect such delivery? Specifically, had the Vessel arrived at 'outer anchorage Alang'? If not, was the second paragraph of clause 2(a) applicable?
  - (3) Was there *inability* on the part of Bart to transfer title in accordance with the MOA *due to restraints of governments*?

(4) Was any inability on the part of Bart to perform the MOA due to lack of cooperation from NKD?

I will address these questions in turn, in the order given above.

Construction of ‘transfer title in accordance with this contract’

51. NKD submitted that the phrase ‘to transfer title of the Vessel ... in accordance with this contract’, imported a requirement that the Vessel should be delivered, and furthermore that that delivery should be at the Delivery Location or a contractually-sanctioned substitute location. It was argued, by NKD, that the contract evinced a clear intention for title to pass on delivery. Specifically, the NOR was to be served ‘at the delivery port’, and was to be accompanied by the documents in clause 4(e). These included a portworthy certificate from a local surveyor, and all the specified pre-arrival documentation, including clearances from the local authorities. Unless there was a valid NOR, which required the presentation of these documents, NKD’s payment obligations would not be triggered and there would be no transfer of title to the Buyer.
52. Bart, on the other hand, submitted that ‘delivery’ was not a necessary requirement of ‘transfer of title’. Clause 10 had, in relevant part, conspicuously not referred to ‘delivery’ but had deliberately used a different term. There was no requirement that a valid NOR should necessarily be accompanied by the portworthy certificate or the ‘pre-arrival documentation’ referred to in the last two bullets of clause 4(e), and therefore no basis for saying that a ‘transfer of title in accordance with [the MOA]’ could not take place without the Seller being able to tender those documents.
53. In my judgment Bart is correct in relation to this. The issue is one of construction of part of the force majeure clause 10, which provides for the circumstances in which an inability to perform will lead to the termination of the entire contract. It would be unsurprising if the parties had agreed that only inability to perform certain key obligations under the contract would have that effect.
54. In the present case, the obligation specifically identified is that of transferring / accepting the transfer of title to the Vessel. In the MOA, the terms ‘transfer of title’ and ‘delivery’ are both used, but are not used as interchangeable or as synonymous. Thus in clause 14, there is provision for the Buyers to nominate a person ‘to take delivery and transfer of title of the Vessel...’. When clause 10 refers to ‘transfer of title’, and not to ‘delivery’ in the opening clause, this must be taken to be deliberate. ‘Transfer of title’ would require only payment of the price, delivery of the Bill of Sale, and deletion from the relevant ships’ register. There was no condition precedent to transfer of title that there should be a Protocol of Delivery and Acceptance: by clause 4(c) it was expressly provided that a Protocol of Delivery and Acceptance was to be executed ‘after’ payment, but did not specify a particular time after it.
55. That the parties were conscious of, and intended, a difference between the legal requirements of transfer of title and of delivery is supported by the fact that, in the context of ‘Seller’s default’ under clause 9, a distinction is drawn between a default by the Seller in the execution of the Bill of Sale, on the one hand, and in the delivery of the Vessel and her outfit, on the other.



56. While NKD places reliance on the words ‘in accordance with this contract’, I do not consider that they have the effect for which NKD contends. NKD argues, in summary, that these words import the notion of delivery in accordance with the contract. But the use of the phrase would be an indirect and unlikely way of importing the notion of delivery in accordance with the contract, in circumstances where ‘delivery’ has been used elsewhere in the MOA in contrast to ‘transfer of title’, and where it is not used here. There is no need to read the words ‘in accordance with this contract’ as referring to delivery, in that they can be read as referring to the provisions of the contract which deal with transfer of title itself.
57. Nor do I regard the conclusion for which NKD contends to be established by reference to the requirements for the documents which need to accompany the NOR. In my judgment clause 4 is drafted as it is in order to provide that the provision of the documents referred to in the last two bullets of clause 4(e) is not a prerequisite of a valid NOR. The last two bullets are preceded by a provision which requires cooperation by the Buyers and Sellers to obtain such documents from the relevant authorities. It appears to me implicit that if such cooperation cannot obtain the relevant documents, then those documents do not have to accompany the NOR, and are not a precondition to its validity.
58. This is strongly supported by a consideration of how clause 4 interacts with clause 2. Under clause 2(a), second paragraph, it is provided that, if the outer anchorage Alang, being the defined ‘Delivery Location’ is inaccessible, then another location can be deemed to be the Delivery Location, and delivery of the Vessel at that other location would ‘constitute full performance of the Sellers’ obligations’ and all other terms and conditions of the MOA would apply ‘as if delivery had taken place’. If, in accordance with NKD’s submissions, and as I find for the reasons explained below, the ‘outer anchorage Alang’ was the Inspection Anchorage, and if, as the evidence indicated, it was only at the Inspection Anchorage that the portworthy certificate and physical inspections by the authorities would take place, then there would clearly be the possibility that the Vessel might be deemed to be at a (substituted) Delivery Location under clause 2(a), but the documents in the last two bullets of clause 4(e) would not be available. Given that clause 2(a) provides that delivery at the substituted Delivery Location has the effect that the Seller’s obligations are deemed fully performed and all other terms and conditions apply as if delivery had taken place, it appears clear that the Seller must be entitled, in such a case, to tender a valid NOR. That can only be so if the provision of the documents in the last two bullets of clause 4(e) is not a prerequisite of a valid NOR.
59. On this basis I conclude that clause 10 cannot be invoked by showing an inability to deliver the Vessel in accordance with the delivery provisions of the MOA, if there was no relevant inability to transfer title.

**Was there delivery in accordance with the contract?**

60. If I am wrong in relation to the question I have just addressed, it is necessary to consider the second question of whether the requirement of delivery in accordance with the contract imported a requirement of delivery in a particular place; and if so, was Bart unable to effect delivery in that place.

61. NKD's primary case on this question was that the MOA required delivery at the 'outer anchorage Alang', which might also be called the 'Inspection Anchorage'. This was the area which Captain Chadha, in his evidence, had marked out as 'PQRST', with coordinates:

P: 21°40' N / 72°21.5' E

Q: 21°40'N / 72°25' E

R: 21°42.5' N / 72°25' E

S: 21°42.5' N / 72°.22' E

T: 21°44.5' N / 72°22' E.

On no view, NKD submitted, had the Vessel reached that Delivery Location. Furthermore, no alternative Delivery Location had become relevant under the second paragraph of clause 2(a).

62. Bart's argument was, as already briefly referred to above, that the Vessel had arrived at the outer anchorage Alang when she was told not to enter the VTS Khambat area and to anchor where the Master considered appropriate. Alternatively, the requirements of the second paragraph of clause 2(a) applied, and there was a deemed substituted Delivery Location.
63. In relation to the first part of the argument, I have no hesitation in finding that 'outer anchorage Alang' was intended, and would have been understood by a reasonable person with the parties' knowledge at the time of the conclusion of the MOA, to mean the Inspection Anchorage or 'PQRST' area described by Captain Chadha. Certainly, the area where the Vessel actually anchored, outside VTS Khambat limits, was not the 'outer anchorage Alang'. In brief, my reasons for this conclusion are as follows:

(1) The words 'outer anchorage Alang' themselves denote an anchorage near to Alang. Further an outer anchorage is typically one where vessels regularly arrive to await formalities, port clearance, customs, free pratique and so on. Those words do not properly or naturally describe or apply to an area up to 100 nautical miles from Alang, where the Vessel anchored outside the VTS area.

(2) Captain Chadha's evidence, which I accept, is that there was only one area which was routinely regarded as the anchorage for Alang, namely his 'PQRST'. Vessels anchored there to be inspected and, if all formalities were satisfactorily completed, vessels would proceed to a customary waiting area, prior to beaching, which Captain Chadha called 'B1CDE' (with coordinates B1: 21°22.5'N/72°13.5'E; C: 21°22.5'N/72°18'E; D: 21°39'N/72°21'E; E: 21°30'N/72°17'E). Outside the VTS Khambat area would not be described as Alang anchorage, outer or inner.

(3) In the *Guide to Port Entry*, for Alang, the following is stated:

*'ANCHORAGES: Bhavnagar/Alang Outer Anchorage is approx. 4.5 n.m. NNE of Piram Light. Inner Anchorage (Alang Roads) is approx. 6.0 n.m. south of Piram Light'.*

These areas correspond with Captain Chadha's PQRST and B1CDE respectively. What this indicates is that if anyone were to talk of there being both an 'outer' and an 'inner' anchorage at Alang (contrary to Captain Chadha's view), they would typically be referring to the Inspection Anchorage as being the 'outer anchorage Alang' and the waiting area for beaching as being the 'inner anchorage Alang'.

- (4) It appears clear that when the Vessel left Singapore on about 9 March 2020, she was ordered to proceed to Bhavnagar, as confirmed by the ETAs which the Vessel gave. Bhavnagar is north of Alang, and, as Captain Chadha said, 'PQRST' is used as an anchorage for Bhavnagar. Indeed, it appears to be the only customary deep-water anchorage for Bhavnagar. That the Vessel was ordered to Bhavnagar is thus consistent with an understanding of 'outer anchorage Alang' as being 'PQRST'.
- (5) Mr Agrawal's evidence as to what constituted 'outer anchorage Alang' was not convincing, and in the end appeared to amount to a contention that the 'outer anchorage Alang' was any point within the Indian Exclusive Economic Zone, at least if it was on the West Coast of India, which was not 'PQRST' (which he called the 'inner anchorage Alang'). That cannot be right, as much of that large area could not possibly be described as an Alang anchorage at all.
64. The second part of this question is whether the second paragraph of clause 2(a) of the MOA was applicable and there was a substituted Delivery Location.
65. In relation to the second part of this question, a number of issues arose. NKD raised, as a first objection to the application of the second paragraph, that it was only applicable if '*on the Vessel's arrival*' the Delivery Location was inaccessible. Thus the further provisions of the paragraph were not engaged unless the Vessel had 'arrived'. In the present case, NKD contended, the Vessel had not arrived. NKD accepted that it was not necessary for the Vessel to have arrived at the Delivery Location specified in the first paragraph, but contended that she must have reached a position which could fairly be described as having 'arrived' at Alang.
66. What constitutes 'arrival' for the purposes of the second paragraph of clause 2(a) is not defined by the contract. It is clear that it cannot be arrival at the Delivery Location specified in the first paragraph, because the purpose of the second paragraph is to provide for the case where that location is inaccessible. Given that the purpose of the clause is to provide for a substituted Delivery Location in such a case, the basic function of the provision that the Vessel should have arrived is, in my judgment, to require that the Vessel should have got as near to the Delivery Location specified in the first paragraph as is possible given the matter which renders that Delivery Location inaccessible. I accept that there might theoretically be cases in which the matter which rendered that Delivery Location inaccessible meant that the Vessel, though as close as she could get, was nevertheless so far away that on no ordinary use of the term could she be said to have 'arrived'. In the present case, however, I consider that the requirement of 'arrival' in the second paragraph was met. The Vessel had got as close to Alang outer anchorage as she could, subject to the fact that she did not have permission to come within the VTS Khambat area, which rendered the Delivery Location inaccessible. Given that it was, and must be taken to have been known to be, the case that access to Alang was dependent on approval to enter the VTS Khambat area, a failure to obtain such approval must be taken to constitute one type of 'inaccessibility' of the Delivery Location for which the second paragraph of clause 2(a)

makes provision. Moreover, given the geography of the Gulf of Khambat and the unsurprising extent of its VTS area, I do not consider that it is unfair, or a misuse of language, to describe the Vessel as having ‘arrived’ for the purposes of the second paragraph, when she has got to the edge of the VTS area, and is prevented from proceeding within it.

67. On the basis that the Vessel can be said to have ‘arrived’, there arose three further issues as to the applicability of the second paragraph. The first is whether the ‘Delivery Location’ specified in the first paragraph was ‘inaccessible for any reason whatsoever’. In my view it clearly was. The evidence was that if a vessel proceeded into the VTS area without permission it would be in breach of regulations and subject to interception by the Indian Navy, Indian Coastguard or Indian Marine Police, and potentially to seizure or a fine.
68. The second of these further issues was whether the place where the Vessel actually anchored, outside the VTS limits, was such as could constitute a substituted Delivery Location. It not being in dispute that NKD had not designated an alternative berth or anchorage within 24 hours of the Vessel’s arrival outside the VTS limits, this depends on whether the position where the Vessel anchored was ‘the place at which it is customary for vessel to wait’.
69. Bart contended that where the Vessel actually anchored was to be regarded as being such a place because it was the convenient, and obvious, place for a vessel to wait if refused entry into the VTS area, and that it was not necessary to consider whether that place had previously been used for such a purpose. Alternatively Bart submitted that, if necessary to investigate whether it had previously been used, the evidence was that it had.
70. As to that alternative case, Captain Chadha’s evidence was that during the period in which he had been Port Officer at Jafrabad, Alang and Bhavnagar, which was 2010 to 2019, there had, to his recollection, been no case in which vessels had had to wait outside the VTS area because of an absence of permission to come within it. On the other hand Mr Agrawal’s evidence was that, from at least 2003, and in particular after the markets crashed, by which he meant in and after 2008, there had been cases in which there was congestion at the anchorage at Alang, or vessels were awaiting permissions to anchor at Alang, and where the vessels concerned had anchored off Jafrabad or Diu to wait (Day 4/pp. 129-135).
71. While it was not detailed, I do not consider that Mr Agrawal’s evidence on this matter can be disregarded. It was not necessarily inconsistent with Captain Chadha’s, which was based on the period 2010-2019. I therefore find that there were previous occasions in which, for a number of reasons, ships had not had permission or been able to proceed to what I have held to be ‘Alang outer anchorage’, ie ‘PQRST’, and had anchored off Jafrabad or Diu to wait. Accordingly I find that the place where the Vessel actually anchored can be described as ‘the place where it is customary for vessel to wait’ in a case where the vessel did not have permissions to access Alang outer anchorage.
72. On that basis it does not matter whether, had there been no previous cases in which vessels had anchored off Jafrabad / Diu because Alang outer anchorage was inaccessible, that could still be regarded as qualifying as a ‘place where it is customary for vessel to wait’ on the basis that it was the obvious and sensible place for a vessel to

wait, if refused entry into VTS Khambat limits (as it was in fact used by the Vessel and other vessels which were similarly refused entry because of Covid-19). I will nevertheless address that point.

73. I would accept that the ordinary meaning of a ‘customary place’ in other contexts is a place which has been habitually or normally used. In the present case, however, I do not consider that it is a correct reading of clause 2(a) to say that a place cannot be ‘the place at which it is customary for vessel to wait’ only because it has not been used before. In particular, the second paragraph of clause 2(a) is intended to be applicable if the Delivery Location specified in the first paragraph is inaccessible ‘for any reason whatsoever’; and port congestion is mentioned as being one, but specifically not the only, reason which might apply. This means that a reason for the inaccessibility of the agreed Delivery Location, which was of rare occurrence, or even entirely novel, would still qualify as a relevant reason for the purposes of the first sentence of the second paragraph of clause 2(a). It would, in my view, be inconsistent with the breadth of application of the paragraph thus indicated by its first sentence, to read the second sentence as applying only where the vessel is in a place which is routinely used for waiting, because the reasons why the Delivery Location might be inaccessible might also mean that that ordinary waiting place was also inaccessible. Some further support for the argument that there is no necessary requirement that the waiting place should have been used before by other vessels may also be provided by the use of the singular rather than the plural (‘... customary for vessel to wait...’). While that might be a typographical error, I am not persuaded that it is. Instead, it tends to suggest that the question is not whether the place of anchorage is or has been used by multiple vessels in the past, but whether it is one which it is in keeping with normal or ‘customary’ standards of navigational safety and proper seamanship for a vessel faced with the relevant inaccessibility to use.
74. For those reasons, albeit that the point is not clear cut, I am in agreement with Bart’s primary case on this issue as well.
75. The third further issue was one which, at the hearing, was called the ‘seven-day point’. NKD called attention to the fact that by the last paragraph of clause 4(e) of the MOA, and consistently with the Indian Shipbreaking Code, the necessary details and information for the ‘desk review’ by the relevant authorities were to be provided seven days prior to the Vessel’s expected date of arrival at Alang. That had not been complied with. The details and information had only been sent to the relevant authorities on 18 March 2020, when the Vessel was expected to arrive at Alang on 21 March 2020. NKD also argued that, had the details and information been submitted seven days before expected arrival, she would have obtained permission to enter the VTS Khambat area when she actually arrived outside it early on 21 March 2020. The significance of this point in the present context was, as I understood it, that if it was due to fault on the part of Bart that the Delivery Location was inaccessible ‘upon arrival’, then it could not rely on the second paragraph of clause 2(a).
76. I do not accept that an answer to Bart’s reliance on the second paragraph of clause 2(a) has been made out on this basis. The communications at the time did not clearly indicate that permission to enter the VTS area was refused because of a lack of the clearances which, in the normal course, would have been forthcoming after desk review. As I have set out above, VTS Khambat was asked the reason why the Vessel was not permitted to proceed, and no answer was given. The Master of the Vessel

thought only that there may be ‘some condition, traffic or they [ie. VTS] have their own logistic’, not that it was due to an absence of the clearances which routinely had to be obtained from the authorities after desk review. Further, on 21 March 2020, Admiral informed EPS and the Vessel that other vessels were already waiting outside the VTS area which had not got clearance to go in ‘due to present corona virus issues’, identifying a list of three vessels which were waiting due to a ‘refusal to accept by immigration’, and said that the reason why the Vessel had not been allowed to proceed was that she was ‘waiting for immigration permission’. This tends to indicate that the refusal of VTS Khambat to allow the Vessel to proceed was due to matters connected with the emerging Covid-19 situation, rather than just to the ordinary process of desk review being incomplete.

77. Equally, there is no contemporary evidence which demonstrates that had the details and information been supplied on 14 March 2020 rather than 18 March 2020 all relevant permissions would have been in place or that it was the short notice which meant that she could not proceed. That was not said by any of the authorities. Furthermore, if it is right that the reason why the Vessel was not permitted to enter the VTS Khambat area was because not all of the clearances which would follow desk review had been given by the time she arrived there, then this itself indicates that the authorities were already, prior to the first lock down, being affected by the onset of Covid-19 and its consequences. This can be seen from the fact that Captain Chadha’s evidence was that in his time as Port Captain of Bhavnagar, Alang and Jafrabad, there had been no cases of vessels being refused entry to the VTS area because they had not got all permissions. It seems highly unlikely that there had, in that length of time, been no case in which the details and information necessary for a desk review had been submitted less than seven days prior to expected arrival. Accordingly, if the completion of desk review was a prerequisite of entry to the VTS Khambat area, this indicates that, in normal times, the conduct of a desk review would be conducted in less than the seven days. If the Vessel was not allowed to enter the VTS area because of the absence of some of these clearances, then this shows that, at the point at which she arrived, this normal state of affairs no longer applied. If that is right, there is no convincing reason to believe that, had the desk review been requested seven days prior to 21 March 2020 it would have been completed by then: the delays which were already affecting the authorities could well have meant that it would not have been.
78. For these reasons, I conclude that the second paragraph of clause 2(a) of the MOA was applicable, and that where the Vessel anchored outside the VTS area was deemed the Delivery Location. Her arrival at that point constituted ‘full performance of the Seller’s obligations’ in terms of the delivery of the Vessel. In those circumstances, no relevant performance was prevented by the force majeure events relied upon by NKD, and it was not entitled to invoke clause 10 of the MOA.

Was there inability to perform by reason of restraint of governments?

79. I turn to consider the third question. This arises as a significant matter only if I am wrong at to the first two questions. This is because I regard it as clear that the restraint of governments relied on by NKD did not render Bart unable to transfer title to the Vessel in accordance with the MOA, if, as I have held to be the case in relation to the first question, that did not involve requirements as to delivery. Equally, if I am right as to the second question, then Bart’s delivery obligations were fulfilled, and so even if

transfer of title in accordance with the MOA required delivery, that was not prevented by any force majeure event.

80. This third question thus needs to be addressed on the basis that transfer of title in accordance with the MOA required delivery at outer anchorage Alang, and that there was no substituted location under the second paragraph of clause 2(a). Was Bart unable to effect such transfer of title as at 14 April 2020 by reason of the restraint of governments?
81. In considering this question the following points are of potential relevance:
- (1) Why had the Vessel not been delivered at outer anchorage Alang by 14 April 2020, and was there anything preventing her delivery there?
  - (2) When could the Vessel have been delivered at outer anchorage Alang had the MOA not been terminated?
82. In relation to these points, I have had regard to the terms of the Indian lock down measures. I have also considered the contemporary documentation. Expert evidence from Mr Asher and Mr Agrawal was also given in relation to these issues, but I considered that it did not greatly add, in a reliable fashion, to what could be seen from the terms of the various orders and governmental measures. There was also evidence from Mr Naresh Kumar, who was the sole director of Compass Shipping Agency, an agency in Bhavnagar, who acted for two other vessels at this period. Mr Kumar, though he had given witness statements, declined to attend to give evidence and his statements were put in under CEA notices. While this meant that his evidence had to be treated with circumspection it was of some assistance.
83. On the basis of all the material, my findings are as follows:
- (1) That as from 25 March 2020 shipbreaking itself was prohibited by reason of the terms of the Order of 24 March 2020 for a period of 21 days. The 24 March 2020 Order did not, however prohibit government and governmental officials from at least working from home.
  - (2) Consistently with this, the Order did not prohibit the relevant authorities from completing the desk review of the documents submitted by the Vessel, and the Vessel did obtain immigration permission on 26 March 2020, GMB permission on 27 March 2020 and Customs Permission on 30 March 2020 (see Statement of Facts – Demolition).
  - (3) By that point, what was preventing the Vessel from proceeding to Alang outer anchorage was that no permission had been received from GPCB. The reason for this was that all the GPCB staff had been directed to work, full time, on the collection and disposal of biomedical waste, in particular from hospitals. Apparently by order of the Member Secretary of GPCB Ghandinagar, GPCB staff were otherwise to ‘follow 100% lockdown’. This meant that the desk review was not completed by GPCB at this time. Equally, no boardings of vessels which were at Alang outer anchorage were being conducted by GPCB, with an apparently single exception made in the case of a dead vessel, the ‘Naashi’, after special permission had been given for this by the District Collector on or about 10 April 2020.

- (4) After the end of the first period of lock down, on 14 April 2020, the lock down measures were continued up to 3 May 2020, but with certain relaxations announced to come into effect on 20 April 2020. There was no relaxation of the prohibition on shipbreaking itself as of 15 April 2020.
- (5) In the period between 15 and 21 April 2020, the authorities (including GPCB) allowed two further dead vessels, the support vessel 'Aditya I' and the 'Sea Frost', to proceed to Alang outer anchorage and boarded her.
- (6) The relaxations to lock down from 20 April 2020 must have been the basis on which work on shipbreaking activities resumed, as reported by the *Deccan Herald* on 23 April 2020. I consider that this activity must have been considered to be permitted, as it was being openly performed with knowledge of the relevant authorities, and apparently with the enthusiastic backing of the Port Officer. Furthermore, and after lobbying by the local industry, the District Collector gave permission for GPCB to grant anchoring permissions, and to allow boardings.
- (7) This led, on 24 April 2020, to anchoring permission being given by the GPCB to the vessel 'Lan Wan' (which was a 'non-dead vessel', as it was put during the trial) and which had arrived outside VTS Khambat limits on 30 March 2020. She received her anchoring permission from GMB on 4 or 5 May 2020, and arrived at Alang outer anchorage on 5 May 2020, was boarded by the authorities thereafter, and beached on 9 May 2020.
- (8) In the meantime, the dead vessel 'Petrojarl' had arrived at Alang outer anchorage and been boarded for inspection, including by GPCB on 27/28 April 2020. The non-dead vessel 'Kweilin' was given permission to proceed from outside VTS limits to the Alang outer anchorage, arrived there on 1 May 2020, was boarded by Customs on 2 May and by GPCB on 4 May, and was beached on 7 May 2020. It appears that 'Kweilin' arrived outside VTS limits at a similar time to the Vessel, although probably after her. While Mr Kumar's evidence was that he believed she had arrived on 20 March 2020, she is not listed in the vessels ahead of the Vessel in the Port Line Up produced by Admiral on 21 March 2020.

84. Accordingly:

- (1) The reason why the Vessel had not, by 14 April 2020, been permitted to proceed to Alang outer anchorage was because the GPCB officials had been ordered to work on other matters and had not, as a result, completed the desk review. Further, even had she been permitted to proceed to Alang outer anchorage, she would not have been boarded by GPCB officials.
- (2) This position did not relevantly change in respect of non-dead vessels in the period up to 20 April 2020.
- (3) After 20 April 2020 there was some relaxation, and shipbreaking itself had recommenced at Alang by 23 April 2020. Certain permissions to proceed to anchor were given by the authorities, including GPCB, starting with a dead vessel.
- (4) Had the MOA not been terminated, the likelihood is that the Vessel would have been permitted to proceed to Alang outer anchorage, would have been boarded, and



would have been beached at much the same times as the 'Kweilin' in fact completed those steps.

85. To distil these points still further, I conclude that the reason why the Vessel had not obtained clearance to proceed to the Alang outer anchorage by 14 April 2020 was due to the direction given to GPCB officials not to process desk reviews, at least of non-dead vessels; and that she would not have been boarded and inspected by GPCB officials by that date, even if she had been able to proceed to Alang outer anchorage, again because GPCB officials had been directed not to conduct such inspections. As of 14 April 2020, it was not certain how long that would be the position of the GPCB. In fact, had the MOA not been terminated, GPCB would probably have given the relevant authorisation and the Vessel could have proceeded to Alang outer anchorage on or about 1 May 2020 and would have been boarded and inspected between about 2 and 4 May 2020.
86. Given those facts, was Bart 'unable to transfer title to the Vessel in accordance with the MOA ... due to restraint of governments? I accept that the reason why the Vessel had not by 14 April 2020 obtained permission to proceed to Alang outer anchorage, and could not have been boarded by GPCB officials even if she had been there, namely the position of the GPCB, can be described as a 'restraint of governments'. A key issue is then whether that position rendered Bart 'unable' to transfer title.
87. As to that issue, Bart submitted that 'inability' was a strong and demanding criterion. The criterion was not 'hindered' or 'delayed' or the like. While inability could undoubtedly have a temporal element, it could not be fixed by reference to the contractual cancelling date: cancelling dates are merely an agreed occasion for a contractual option and no more. The period of requisite inability under clause 10 must be for a frustrating period, namely a period which makes the contract something radically different from what was undertaken.
88. I accept Bart's submission that the provision that there should be 'inability' is significantly different from a provision that refers to hindrance or delay. I also accept that inability is not to be judged simply by reference to whether there was inability to perform by the contractual cancellation date. As Mr Young QC submitted, if 'inability' were to be judged simply by whether there could be performance by the cancelling date, this would mean that potentially very short-lived and transient hindrances to performance might trigger the operation of clause 10. Furthermore, such an interpretation of the force majeure clause would also fit ill with the right to cancel being a Buyer's option, for it would potentially give to the Seller a right to escape from a contract which it was unable to perform by the cancelling date, even though the Buyer would not have wished to exercise its option to cancel.
89. In my judgment, whether there is 'inability' to perform for the purposes of clause 10 by reason of a temporary restraint of governments (etc.) depends on whether the probable period of that restraint is such as materially to undermine the commercial adventure. In assessing this, similar considerations will be relevant as those which would be involved in the, admittedly analytically distinct, question of whether a contract is frustrated, and which are referred to in Edwinton Commercial Corporation v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The 'Sea Angel') [2007] EWCA 547, [2007] 2 Lloyd's Rep 517.

90. In this regard, the following considerations appear to me to be of significance:
- (1) The contract was one aimed at allowing the demolition of the Vessel. It was not one to permit the trading of the Vessel.
  - (2) Under Shree Ram's Ship Recycling Plan for the Vessel, produced on 19 March 2020, it was anticipated that recycling would start on 25 April 2020 and would last for a year, being completed on 25 April 2021, and with the completion of the sale and disposal of all components being completed by 30 April 2021. On any view, therefore, the process would be a lengthy one. Further, as Mr Dheir himself said, the price which would be paid for the Vessel would be assessed by reference to a projection as to what would happen to steel / component prices over the length of the year-long recycling process, which it was known would fluctuate.
  - (3) Some delays in the commencement of the recycling were to be anticipated. This was in part because a vessel of the size of the 'Shagang Giant' could only be beached on tides which occurred twice a month. So if one of those tides was missed, it would be about half a month before the next possible beaching could occur. More generally, I consider that the terms of clause 16 of the sub-MOA indicate that delays of up to about 60 days after arrival were within the contemplation of parties seeking to have vessels scrapped at Alang.
  - (4) The further delay as a result of actions of the Indian government which would reasonably have been regarded as probable as at 14 April 2020 did not extend beyond 3 May 2020. That was the date on which the further lock down would end. I have not been persuaded that it would have been seen as probable that that lock down would be extended beyond 3 May 2020 in such a way as further to delay the Vessel. On the contrary, it seems clear that by 14 April 2020 there were already pressures on the government to introduce relaxations within the period of the extended lock down. These, in fact, bore fruit on 15 April 2020 with the announcement of certain exceptions to take effect from 20 April 2020. There was also, by 14 April 2020, clearly pressure at Alang from industry participants, and indeed it seems from the GMB, for the GPCB to proceed with desk reviews and carry out or dispense with inspections. That this was the stance of the GMB is shown by its communication to the GPCB on 27 March 2020 about the Vessel; and also by its encouragement to the GPCB to allow the dead vessel 'Naashi' to be beached, as referred to in paragraph 25 of Mr Kumar's witness statement. It is also borne out by the enthusiasm with which the Port Officer welcomed the reopening of shipbreaking activities, as reported by the *Deccan Herald*. Given these matters I do not consider that it can be said to have been reasonably probable as at 14 April 2020 that there would be a further relevant restraint of governments beyond 3 May 2020, and indeed it might reasonably have been hoped that there would be progress in getting permission for the Vessel to proceed to Alang outer anchorage before then.
91. In light of the nature of the MOA and the other considerations referred to in the preceding paragraph, I do not consider that the delay that there had been by 14 April 2020, together with that which could then reasonably be anticipated as probable, constituted an 'inability' on the part of Bart to perform the MOA for the purposes of clause 10. Nor, to the extent it is relevant, did the delay which would actually have

occurred had the contract not been terminated. These delays did not materially undermine the commercial adventure.

### Failure to cooperate

92. A case was pleaded by Bart that the failure of the Vessel to obtain all relevant permissions prior to the first lockdown was due to NKD's failure to cooperate to obtain them, and that thereafter NKD took steps to prevent the Vessel from arriving at what I have held to be outer anchorage Alang.
93. This case was only weakly put forward at the hearing. In light of my findings on other questions, it does not matter. I should record, however, that I considered that this case was not made out. It had two particular aspects. One was that NKD should have enlisted, but failed to enlist, the aid of Shree Ram in obtaining the relevant permissions. Mr Dheir's evidence, however, was that the authorities have few dealings with the recyclers, and the recyclers do not have significant influence with them. No case was put to Mr Patel of Shree Ram as to what Shree Ram might have done. Moreover, Captain Chadha gave clear answers, which I accept, that as Port Officer he would have had nothing to do with recyclers; and that if a shipowner had come, with a recycler, to the authorities seeking the grant of permissions, he would 'smell a rat, because they're hand-in-glove'; and that he would 'never allow such a vessel to come'. Accordingly I find that the case that involving Shree Ram would have had a beneficial effect in obtaining permissions has not been made out; and, indeed, that any such involvement might have made matters worse.
94. The other aspect of this case was the suggestion that the offer on behalf of NKD on 13 April 2020 to pay the additional costs of provisioning at the Vessel's then current location was part of an effort to ensure that the Vessel did not come within the VTS Khambat area, in order not to weaken NKD's case that there had not been and could not be delivery under the MOA. While I find, on the basis of the email from Mr Kothari of 13 April 2020, that such an offer was made, and while I am prepared to accept that NKD desired, if possible, to take advantage of the circumstances relating to the Vessel to bring the MOA to an end and to seek to capitalise on falling market rates, I am not persuaded that the offer to pay the additional costs was motivated by this desire or was a step taken to facilitate the termination of the contract. I accept that it was a practical suggestion made in the prevailing circumstances.

### Conclusion on the fundamental Issue

95. For the reasons I have given, I find that NKD was not entitled to terminate the MOA on 14 April 2020. Its Notice of Termination itself constituted a default for the purposes of clause 8 of the MOA and a repudiation of the contract. Bart is, accordingly, in principle, entitled to succeed on its counterclaim.

### Bart's Counterclaim

96. Bart is entitled, under clause 8, to retain the Initial Payment, and also to claim further compensation to the extent to which the Initial Payment does not cover any losses which it had sustained as a result of NKD's non-fulfilment of the contract.

97. Bart claimed that it had suffered losses amounting to a total of US\$4,937,696.04 as a result of NKD's non-fulfilment of the MOA. That total was made up as follows:
- (1) MOA resale loss: US\$3,456,833.87 (this being the difference between the MOA price and the lower resale price under the Best Oasis MOA);
  - (2) Bunker Costs: US\$152,536;
  - (3) Luboil Costs: US\$10,713;
  - (4) Crew Wages: US\$108,082.93;
  - (5) Provisions: US\$2,937.76;
  - (6) Port and Agency Costs: US\$14,023.96;
  - (7) EPS Management Fees: US\$28,443.07;
  - (8) Interest at 14% per annum: US\$1,164,125.45.
98. There was agreement between the parties as to the figures in items (1), (2), (3), (5) and (6).
99. The parties had agreed daily rates for items (4) and (7) in the sums of US\$2,338.71 and US\$466.28 respectively. The parties were however at odds as to the number of days relevant. Bart contended that it should be 61: namely from 15 April 2020 until the date of Bart's delivery of the Vessel to Best Oasis. NKD contended, by contrast, that if Bart wished to establish that it had incurred more in respect of Crew Wages and Management Fees than it would have done had the contract been performed, it would have needed to show what it would have been liable to pay had there been such performance. This it had not done in the case of the crew because it had not shown what its contractual obligations to the crew were. Further in the case of both crew and management fees, there could be no claim relating to the amount of time during which such expenses would have been incurred even had NKD performed.
100. As to this, I accept that in the case of the crew, Bart has not made out its case, because it has not shown what its contractual responsibilities to the crew were, and thus has not shown that NKD's breach led to its incurring any additional expenses in this regard.
101. I did not understand NKD to make the same point in relation to management fees, but only that the relevant period of claim would depend on when the Vessel would have been transferred to NKD and Bart would have stopped having to pay the managers had there been performance. I find that Bart would have stopped having to pay the managers at latest by 7 May 2020, and that the relevant period is accordingly one of 23 days.
102. The main issue, however, is as to Bart's claim for interest. It is this which produces an amount overtopping the Initial Payment. It is Bart's contention that interest is payable at a contractual rate of 14% on the amount of its loss on the resale and associated expenses, notwithstanding that these amounts are more than covered by the Initial Payment which had been paid to it, and which it retained throughout. Given prevailing interest rates at the relevant time, a provision for a 14% rate of interest might have been

of doubtful enforceability by reason of the rules as to penalties. Be that as it may, in my judgment, the correct reading of clause 8 is that contractual interest was only payable if and to the extent that Bart was actually out of pocket. I regard that as implicit in the use in clause 8 of the term 'interest' itself. Bart was not actually out of pocket because its losses were more than covered by the Initial Payment.

103. On that basis, the amount of Bart's claimable loss did not exceed the amount of the Initial Payment, and it is not entitled to any further amount on its counterclaim.

**Overall Conclusion**

104. NKD's claim fails. Bart is entitled to retain the Initial Payment, but is not entitled to recover any further amount.