Neutral Citation Number: [2023] EWHC 880 (Comm)

Case No: CL-2022-000334

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
KINGS BENCH DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 25 April 2023

Before :

MRS JUSTICE DIAS DBE

- -

Between :

Emirates Shipping Line DMCEST

Claimant

- and -

Gold Star Line Ltd

Defendant

- -
- -

Ms Lydia Myers (instructed by MFB Solicitors) for the Claimant
Ms Rebecca Jacobs (instructed by Mills & Co. Solicitors Ltd) for the Defendant

Hearing date: 22 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 25th April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....
MRS JUSTICE DIAS DBE

Mrs Justice Dias DBE:

1. I have before me an Arbitration Claim Form dated 27 June 2022 bringing an application under section 67 of the Arbitration Act 1996. The application is to set aside an Award of Mr Duncan Quinan and Mr Christopher Moss dated 30 May 2022 in which the Tribunal declared that it had no jurisdiction to resolve the dispute between the parties.

2. The application raises a deceptively short point. In purely legal terms it is whether there was a binding arbitration agreement between the parties. In factual terms, this resolves into the question of whether the Claimant ("ESL") became a party (as it alleges) to a Memorandum of Understanding dated 24 April 2018 (the "2018 MOU") between the Defendant (GSL) and various other ship-owning companies. The 2018 MOU was an agreement governing the operation of a container shipping line between India and the Far East. It contained an LMAA arbitration clause, and it is that clause on which ESL relies to found jurisdiction.

3. In its Award, the Tribunal held that ESL had not sufficiently established that it was party to the 2018 MOU and that accordingly it was not party to the arbitration agreement contained therein.

4. It is common ground that an application under s. 67 proceeds by way of a rehearing de novo rather than being limited to a review of the Tribunal's decision. The award therefore has no presumptive validity although obviously the reasoning of an experienced Tribunal such as this must be accorded the utmost respect. In the instant case, however, as the Tribunal itself made clear, it was considerably hampered by a lack of evidence as to the relationship between the parties. That lacuna has, at least partially, been filled before me. In particular, I had the benefit of a witness statement dated 6 October 2022 from Mr Leung of GSL which exhibited considerably more contemporaneous correspondence than was made available to the Tribunal.

The Underlying Facts

5. The following is a brief summary of the underlying facts as they appear from the documents before me, although I should emphasise that this was by no means a complete record. For example, it appears that there were various WhatsApp messages exchanged between the parties which were not in evidence.

6. GSL, was part of a consortium together with three other ship-owning companies (KMTC, Evergreen Marine Corporation (Taiwan) Ltd and Pendulum Express Lines Ltd), which operated a container liner service pursuant to the terms of the 2018 MOU. In broad terms, each company contributed one or more vessels to the service and in return was entitled to an agreed basic slot allocation ("BSA") of space on other vessels. Members of the consortium could release their slots to other members, or to third parties, albeit in the latter case only with the consent of the other members.

7. Originally, the consortium was operated with six vessels: three provided by GSL and one each by the other members. In about September 2018, GSL agreed to provide a fourth vessel for Cycle 9. By May 2019, however, due to challenging commercial circumstances, it had decided to withdraw the additional vessel with effect from Cycle 10. In recompense, it would purchase 100 teu slots on all other vessels at the

consortium slottage rate. Since the other partners wished to maintain seven vessels in the line, GSL also began to look for other potential partners to join the consortium.

8. ESL was one of the companies approached and exchanges took place between Mr Leung of GSL and ESL's Tom Peterson (CEO) and Willem Bekooy (Head of Operations) in which ESL expressed interest in providing a vessel. On 30 September 2019, Mr Leung proposed 25 November 2019 as an available position for ESL's vessel to be phased in stating, "It means Emirates will start taking 1 vessel's BSA from the said vessel and onwards if your side confirmed to join NIX". (NIX was the shorthand abbreviation used for "New India Service".)

9. This timescale was too short for ESL and on 10 October 2019 it put forward a counter proposal as follows:

> "ESL: (1) purchases 250 slots at 14 tons at cost as from Cycle 9 commencing on 28/10/2019 ex TAO (2) Becomes a vessel provider as from Cycle 10 commencing 16/12/2019 ext TAO (3) Confirms that they have a VSA compliant vessel available with a capacity of 4,200 teus @ 14 Tons which will then be deployed in the 6/1/2020 position in Cycle 10.
>
> The slot purchase commencing as from Cycle 9 is conditional on ESL receiving confirmation of its vessel provision as from Cycle 10."

10. Meanwhile, discussions were taking place in parallel within the consortium. On 14 October 2019, Mr Leung informed the other members that GSL had basically reached agreement with ESL that ESL could take additional slots from GSL in Cycle 12 provided the consortium released a vessel position in Cycle 13. He pointed out that this would assist the consortium in maintaining seven ships in operation and also in solving an issue which appears to have arisen concerning an additional 300 teus in Cycle 12. Mr Leung made clear that ESL was the only realistic candidate to join the consortium and asked for approval from the other partners.

11. On the same day, KMTC asked GSL for clarification about ESL's deployment in the service. It is apparent from this email that ESL was independently purchasing 250 teu slot spaces from KTMC already and it may be this arrangement to which Mr Hui was referring in paragraph 6 of his witness statement when he stated that ESL first participated in the NIX service in July 2019. At all events, KMTC asked GSL to let it know:

> "whether ESL wants to have more space on top of current 250 teu, current their BSA [sic]. In addition, once ESL deployed, unless ESL use 250 teu continuously, KMTC has to cancel the slot purchase from PEL, otherwise KMTC slot will increase."

12. Mr Leung's response was that:

> "As far as we know, ESL's demand is not on top of their current 250 TEUs BSA. However, we are not sure if they will terminate their slot purchase from KMTC after joining our consortium as a vessel provider…

Since the slot purchase is between KMTC and Emirates, we would like to let KMTC partner to communicate with your slot charterer Emirates to see what is their future plan."

13. On 15 October 2019, Mr Leung replied to ESL acknowledging its proposal of 10 October and providing an update as to the latest developments. Commencement of the slot purchase arrangement and deployment of ESL's vessel in the consortium were dealt with under separate heads. As regards the former, due to various alterations in the scheduled sailings, GSL proposed that it would now start selling 250 teus of slot space to ESL on all vessels in Cycle 9 with effect from 4 November 2019. As to the latter, ESL would become a vessel provider in the consortium as from Cycle 10 (commencing 28 December 2019) with its vessel being phased in on 27 January 2020. Mr Leung also stated that the consortium partners had agreed to ESL joining the consortium and that if ESL was agreeable to the terms set out in the email, GSL would officially announce its participation.

14. ESL, however, was not happy about the proposed phase-in date of 27 January 2020, having lined up a vessel to phase in on 6 January. Emails were exchanged and a meeting apparently took place on 21 October 2019. Although there is no direct evidence before me as to what occurred at that meeting, Mr Peterson sent GSL an email the following day confirming the outcome of the discussions which was that ESL would phase in its vessel on 20 January 2020. He also asked GSL to "revert with the slot cost for the purchase of the 250 TEU."

15. Later the same day, Mr Leung emailed the other consortium partners to confirm that with effect from Cycle 12 (previously referred to as Cycle 9) commencing on 4 November 2019, GSL would sell 250 teu slots to ESL. He also set out his understanding that KMTC would be selling a further 250 teu slots to ESL. Mr Leung made clear that GSL's slot sale to ESL was valid only for one cycle, and that ESL would be deploying its ship in the service with effect from Cycle 13 (previously referred to as Cycle 10).

16. Shortly thereafter, Mr Leung emailed ESL, suggesting that the slot sale to ESL should be based on the final consortium slottage as determined between the participants. In his witness statement he said that he was concerned that ESL might pull out of the deal altogether if the price was any higher. ESL's response to this on 23 October 2019 was that any slot purchase should be at actual cost and not market rate, to which Mr Leung replied again proposing a sale based on the consortium slot cost.

17. On 29 October 2019, Mr Leung sent an email to the other consortium partners in which he stated that KMTC and GSL should invoice ESL for their respective slot sales separately. The email also set out the BSA adjustment between the partners (not including ESL) and noted that as from 16 December 2019, ESL would also have a BSA as vessel provider.

18. He followed this up with another email to ESL, confirming that ESL only needed to purchase 250 teu space from GSL on 5 rather than 6 voyages. This led to an exchange in which ESL insisted that they had agreed the slot purchase to be at cost, rather than at the consortium or VSA rate. Eventually on 31 October 2019, ESL emailed Mr Leung with a final compromise proposal that ESL would purchase 250 teus on the 4 November 2019 sailing but would thereafter purchase only 200 teus on

the remaining vessels. Mr Leung responded accepting the proposal and confirming that the slot purchase would be at the consortium slottage rate. If there was any response to this email, it has not been provided to me.

19. Cycle 12 commenced on 28 October 2019.

20. On 11 November 2019, Mr Leung sent an email to the other consortium partners and to ESL headed "Invitation to Emirates for participating NIX/FIVE/AIS3/CIX3". This read in material part:

"Per our earlier discussion, we would like to officially welcome Emirates to join NIX/FIVE/AIS3/CIX3 services as a vessel provider. Emirates will phase in their operated vessel in our service in Qingdao on 20 Jan, 2020.

Hereby we recap our existing terms of cooperation scheme with Emirates as followings for all partners' reference. Kindly comment if any."

Details of the services were then set out on the basis that seven vessels would be operated with a 49 day turnaround, i.e., including ESL's vessel.

21. On 16 November 2019, ESL asked GSL if it could "share the actual VSA agreement for us to review". The VSA was an agreement which had been intended to supersede the MOU although it is common ground that no VSA was ever drawn up for the 2018 MOU. Accordingly, Mr Leung sent ESL a copy of the 2018 MOU on 20 November 2019. Jumping ahead slightly, ESL replied to this email on 15 January 2020 stating "Thanks had appreciate to receive a signed copy of the current VSA as well. Regarding inclusion of ESL in the VSA, ESL would require this be covered either by a new MOU or an addendum to the VSA."

22. On 28 Feb 2020 a new MOU was indeed drawn up and signed by ESL and all the other consortium partners. This was on materially identical terms to the previous 2018 MOU.

23. Meanwhile, on 30 November 2019, ESL loaded cargo pursuant to its slot purchase from GSL on the vessel IAN H. GSL's invoice for the slot space dated 11 December 2019 was duly paid. On 6 December 2019, however, the vessel was hit by a typhoon and some of the cargo was damaged.

24. Some five months later, on 23 April 2020, Mr Dennis Hui (the Insurance and Claims Manager of ESL's liner service agent) wrote to GSL. He referred to the 2018 MOU, pursuant to which the Owner was to be responsible for proper and careful carriage, and stated that a claim had been received from the cargo receivers. He suggested that since ESL did not have any of the relevant documentation to defend the claim, it would be simpler and easier for GSL to settle the claim directly, as liability would ultimately rest with GSL in any event. If, however, GSL preferred ESL to settle the cargo claim and then claim an indemnity from GSL it would need various documents.

25. Mr Chan of GSL's claims handling department responded that the contractual relationship between ESL and cargo interests was governed by the bill of lading whereas the relationship between GSL and ESL was governed by the 2018 MOU and that it was therefore more appropriate for ESL to handle the claim directly. Moreover

GSL was not in a position to provide any documentation until its own investigations had been completed. No admissions were made and all rights under the 2018 MOU were reserved.

26. On 26 May 2020, ESL's P&I Club, Skuld, sent a further email to Mr Chan stating that cargo claims had been received by ESL which it was unable to defend properly without the provision of documentation. Skuld referred to the obligation on the parties under clause 7 of Appendix C of the 2018 MOU to assist each other in defending claims and making documents available. Request was made for specific documents and an indication given that an indemnity from GSL would be sought under the 2018 MOU in due course.

27. Some months later, on 26 November 2020, Mr Chan responded, noting that "with reference to the MOU dated 24.4.2018 ('the MOU') between you, other liner partners and Gold Star Line Ltd, we were the 'vessel operator' and you were the 'slot charterer' for the purposes of the voyage of "IAN H."" He referred to various clauses in the 2018 MOU on which GSL proposed to rely and reminded ESL of its obligation to handle all cargo claims in the first instance and to defend and/or settle them appropriately and reasonably. Mr Chan also attached the documentation which had been requested.

28. In due course, both ESL and Safewell (the shippers) were held jointly liable to cargo receivers in the Chinese courts. Safewell paid the claim in full and sought an indemnity from ESL. Advice received by ESL from its Chinese lawyers suggested that Safewell's claim was likely to succeed for the full amount claimed together with interest and costs. After unsuccessful negotiations with Safewell, Skuld wrote again to Mr Chan on 26 February 2021, seeking approval of a proposed settlement on the basis that ESL would claim an indemnity from GSL in due course.

29. It does not appear what, if any, response was received from GSL. However, ESL eventually succeeded in negotiating a settlement with Safewell, and on 30 September 2021 commenced arbitration proceedings against GSL, purportedly under the 2018 MOU, claiming an indemnity against its liability to Safewell.

30. Contrary to its previous position, however, GSL denied that ESL was a party to the 2018 MOU or, necessarily, to the arbitration clause and argued that the Tribunal accordingly had no jurisdiction to entertain the claim. The parties agreed that jurisdiction should be dealt with as a preliminary issue on the basis of the documents then available, leading to the award referred to above.

The Issues

31. Against this background, Ms Lydia Myers, who appeared for ESL argued that the Tribunal had erred in its award and that jurisdiction could in fact be established on any of three bases:

i) An express contract between ESL and GSL on the terms of the 2018 MOU;

ii) Alternatively, an implied contract on the terms of the 2018 MOU, such contract to be implied from the conduct of the parties;

iii) Alternatively, GSL was estopped by representation and/or convention and/or by breach of an equitable duty to speak from denying that the 2018 MOU bound both parties in relation to the slot purchase arrangement.

32. I have set out the gist of the relevant documents above. As also noted above, both Mr Leung and Mr Hui gave evidence before me by video link. I found both men to be honest and credible witnesses who were doing their best to assist the court as far as they could. I therefore have no hesitation in accepting their evidence. However, it has to be recognised that Mr Hui was not involved in any direct contractual negotiations with GSL, these being handled by ESL's Commercial team. His involvement essentially started after the casualty had occurred – unsurprisingly given his role as Insurance & Claims manager – and he handled the arbitration proceedings. His evidence was therefore of limited assistance. Moreover, it was common ground between counsel that the first two ways in which Ms Myers put her client's case required an objective approach to the evidence, to which the subjective views of the parties were irrelevant. The witness evidence, both written and oral, was therefore of real assistance only in relation to her estoppel case.

33. I therefore turn to each of the ways in which the case was put.

Express contract

34. It was not in dispute that ESL was not expressly named as a party to the 2018 MOU. The parties were nonetheless agreed that there was an agreement between them for the purchase of slots and also for ESL to join the consortium as a vessel provider. ESL's case was that this was a single deal with two phases, which was subject in its entirety to the terms of the 2018 MOU. GSL by contrast argued that there were two separate agreements, each with its own terms and conditions. The slot purchase contract was concluded on about 31 October 2019, whereas ESL's introduction into the consortium only took place with effect from the cycle in which its vessel was phased in (Cycle 13), being formalised in the 2020 MOU after Mr Leung had invited comment on the proposed terms on 11 November 2019 and following review by ESL of the 2018 MOU. Accordingly, ESL never became a party to the 2018 MOU. The slot purchase was therefore an entirely separate contract with its own terms relating to the number of slots to be purchased, duration and price. There was no agreement that it should be governed by the terms of the 2018 MOU, still less that the MOU arbitration clause should be incorporated. Indeed, there was no mention of the 2018 MOU at all.

35. I was not taxed with citation of the principles applicable to contractual interpretation, there being no dispute that such questions are to be approached on an objective basis by reference to the deemed intention of the parties at the date of the contract. It was also agreed that the court could and should look at the whole sequence of correspondence between the parties in order to determine whether there had been a coincidence of offer and acceptance and, if so, at what point and on what terms: See Chitty on Contracts (34th ed.) paras 4-032ff; Carver on Charterparties (2nd ed.) para. 2-027; Cartwright on the Formation and Variation of Contracts (3rd ed.) para. 3-05. Where the parties differed was as to the extent to which the court could look at subsequent conduct to establish or imply an agreement. In this case, the main conduct relied upon by ESL was the provision of documents by GSL in 2020, ostensibly pursuant to the 2018 MOU.

36. In this connection, Ms Myers referred me to para. 4-036 of Chitty (op. cit.) for the proposition that where an offer or acceptance or both are alleged to have been made by conduct, and there is some difficulty in ascertaining the terms of the agreement, the court can resolve any uncertainty and plug any gap by applying a standard of reasonableness or by reference to another contract. However, I had great difficulty in seeing how this proposition could apply in the context of this case. It seemed to me that Ms Rebecca Jacobs who appeared for GSL was correct in saying that there undoubtedly was a contract between the parties for the slot purchase and that the court's task was simply to identify its terms. In this connection, I think that Ms Myers may have misunderstood the reference in Chitty to a "standard of reasonableness". This is referring to the court's power to infer agreement to pay a reasonable price or to do something within a reasonable time. It does not give the court carte blanche to make terms for the parties merely on the basis that it would be reasonable to do so.

37. In my judgment, a concluded agreement for the slot purchase was reached on 31 October 2019 (or at the latest when GSL's invoice was paid) on the terms recorded in the email exchange of that date. I am satisfied that this was an entirely separate contract from the agreement that ESL would join the consortium, albeit the two were linked in the sense that agreement in principle on the latter was regarded as a precondition to ESL's agreement to the former.

38. There was no express agreement between the parties that the slot purchase contract should be on the terms of the 2018 MOU, which I find as a fact that ESL had not even seen at this stage. It was only on 16 November that it asked for a copy to review, strongly suggesting that it had not previously seen it, and it did not even acknowledge receipt until 15 January 2020. Nor can I find that the parties nonetheless objectively intended the terms of the 2018 MOU to apply to the slot purchase so as to found any implied agreement. As Ms Jacobs pointed out, and Ms Myers accepted, none of the terms of the 2018 MOU was apposite to a third party slot purchase. Indeed, the only mention of third party slot purchases was in clause 5 which prescribed, as between consortium members, the circumstances in which slots could be sold to third parties.

39. Moreover, the evidence of Mr Leung was that if ESL had been party to the MOU, it would have had a BSA for which it would not have had to pay. The only reason it was required to pay for the slot purchase was because it was not yet a vessel provider and so did not have any BSA that it could utilise. This evidence is entirely consistent with (a) the emails of 30 September and 29 October 2019 which show that ESL was only intended to acquire a BSA once it became a vessel provider; and (b) ESL's own request on 22 October 2019 to be provided with a price for the slot purchase.

40. In this connection, I have carefully considered ESL's email of 10 October 2019, the KMTC email of 14 October 2019 and Mr Leung's response which referred to ESL's "current 250 teu BSA". As to the first of these communications, I find that, read in context, it is a forward-looking proposal by ESL, not a statement of the existing position. It is not, therefore, purporting to confirm that ESL had a VSA-compliant vessel at that time (when it had not even seen the MOU). As to the exchange on 14 October 2019, I have concluded that it is not to be read as indicating that ESL was already party to the 2018 MOU. Indeed, at this stage agreement had not even been reached on important matters such as when ESL's vessel would be phased in. In construing the correspondence, I bear in mind that neither of the authors was a native

English speaker and that I cannot therefore assume they were using language with the precision of English commercial court lawyers.

41. Likewise, I can find no express or implied agreement that the dispute resolution provisions of the 2018 MOU should apply to the slot purchase. Ms Myers relied on Lord Hoffman's well-known statement in Fiona Trust & Holding Corp. v Privalov, [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254 at [13] that it should be assumed that rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal unless there is a clear indication to the contrary. I accept the force of the general proposition, but it is nevertheless only a default presumption and not an invariable rule. As I have found, these were two separate contracts, albeit linked, each dealing with a completely different subject matter. In those circumstances it is neither conceptually impossible nor commercially improbable that the parties intended them to be governed by different terms and conditions, including as to dispute resolution. Unlike the agreement to join the service, the slot purchase was a short-term arrangement and I accept Ms Jacobs' submission that the parties are objectively unlikely to have intended the MOU arbitration clause alone to be incorporated when none of the other substantive provisions were applicable.

42. In this context, it should be noted that ESL was separately already a slot purchaser from KMTC. I do not know what terms applied to this slot purchase but there was no suggestion that it was on the terms of the 2018 MOU. There is accordingly no reason why ESL should not also have had a similar separate slot purchase arrangement with GSL. If nothing was expressly agreed regarding law or jurisdiction, then this would fall to be determined in the usual way by application of the conflicts rules of the relevant forum.

43. Ms Myers suggested that it was uncommercial and could not objectively have been intended that disputes relating to the slots on the IAN H should all be resolved under the 2018 MOU save for those relating to slots purchased by ESL. I see nothing uncommercial in this at all. Third party slot purchasers would necessarily have different arrangements to those which prevailed between the consortium members and it would have been pure happenstance that ESL was the only third party slot purchaser on that particular voyage. She also submitted that no rational businessman would have agreed to a slot purchase without having a regime in place to govern liability. Regrettably, however, businessmen are not always so meticulous. That is why most developed systems of law have specific provisions for determining governing law and jurisdiction in default of agreement.

44. Next, Ms Myers relied on the "invitation" email of 11 November 2019 as evidence of an agreement that ESL was already party to the 2018 MOU. In my judgment, however, this email cannot bear the weight she sought to put on it. Not only does it not refer to the slot purchase at all (unsurprisingly, since the cycle to which the slot purchase related was already under way), but it is in my view clearly looking towards the future. Thus, it records the agreement that ESL should join the consortium, but then recaps the existing consortium terms as they would look with the addition of ESL's vessel and invites comments from all parties on those terms. In those circumstances, I cannot read the email as an indication that ESL was already a member of the consortium. This conclusion is reinforced by the fact that ESL subsequently requested sight of the VSA which it had clearly not seen before, and the

fact that when ESL eventually reverted after reviewing the 2018 MOU, it stated that it would require either a new VSA or an amendment to the 2018 MOU. For the sake of completeness, I add that the subjective views of Mr Hui as to the meaning of this email are irrelevant and inadmissible.

45. As to the other matters relied on by Ms Myers in her skeleton argument as evidencing an express agreement that the 2018 MOU should apply, I deal with these briefly:

i) The email exchanges of 26 November 2020 cannot realistically be regarded as evidence of an agreement. Not only are they far too late in the chronology but they are also communications between (effectively) claims handlers rather than anyone who had direct knowledge of the negotiations. They are also dealing with an ancillary matter, namely document provision.

ii) The fact that emails in which ESL was included as a recipient were headed "Dear Partners", I regard as being neither here nor there. Whether or not this was simply an unthinking failure to discriminate between existing partners and a future partner, or an attempt at politeness in recognition that ESL soon would be a partner is unnecessary to resolve. On any view, it is insufficient as a basis for inferring agreement to the application of the 2018 MOU.

iii) Likewise, the fact that the other consortium partners were copied into exchanges with ESL relating to the slot purchase. This is unsurprising in circumstances where the 2018 MOU required the consent of all partners to the release of slots to third parties.

iv) It is also unremarkable that the other partners were copied into correspondence relating to the casualty. Indeed, it would have been astonishing if they had not been, given that the casualty occurred during the operation of their liner service and that the partners themselves had slots on board the vessel.

v) The reference in the 17 October 2019 email to ESL as a "new partner" is explicable by its context, which is that GSL (with some justification) perceived ESL to be trying to boss the consortium around as regards the date of the phase in, notwithstanding that it was the "new kid on the block". In no way can it be read as evidencing an agreement that ESL was already a party to the 2018 MOU.

vi) Finally, the statement in the 2020 MOU that the parties had agreed to "continue operating" the service is woefully inadequate as a basis for inferring agreement that ESL was bound by the 2018 MOU. The service was already in existence so would inevitably continue, even if a new partner was to be admitted.

46. In short, I find that there was no express agreement that the terms of the 2018 MOU should apply to the slot purchase arrangement.

Implied contract

47. In the alternative, Ms Myers argued that even if the conduct relied upon above did not constitute or evidence an express agreement that the 2018 MOU should apply to the slot purchase, it was nonetheless conduct from which such agreement could be implied.

48. This was never likely to be a promising argument if Ms Myers failed in her primary argument and for the same reasons as discussed above, the conduct relied upon is in my judgment no more capable of giving rise to an implied agreement than it is of constituting or evidencing an express agreement. Moreover, apart from the exchanges in 2020 which I have addressed above, the other conduct relied upon by Ms Myers as giving rise to an implied agreement (such as loading the cargo and paying GSL's invoice) was no more consistent with a contract on the terms of the 2018 MOU than with a separate slot purchase contract on the terms alleged by GSL. Indeed, it could be argued with some force that it was only consistent with a separate slot charter given the inapplicability of the 2018 MOU to a slot purchase and the fact that payment would not be required if ESL already had a BSA under the 2018 MOU.

49. In any event, having concluded, as I have, that the slot purchase contract was a separate agreement from the phase-in contract and was capable of standing independently on its own terms without any gap which required to be plugged, it follows that subsequent conduct is not only inadmissible in construing the terms of that contract but has no part to play at all and can be relevant only if it is alleged that it amounted to a variation (which was not a case advanced by Ms Myers) or gave rise to an estoppel (which was).

50. For these reasons, I also reject the case based on implied contract.

Estoppel

51. This leaves the question of estoppel, as to which Ms Myers relied on the three species of estoppel referred to in paragraph 31.iii) above, namely:

i) Estoppel by representation/promissory estoppel;

ii) Estoppel by convention;

iii) Breach of an equitable duty to speak (sometimes referred to as estoppel by silence or acquiescence).

52. The lynchpin of her case was the exchanges between the parties in April and November 2020 in which, in response to ESL's assertion that the 2018 MOU governed the parties' relationship, GSL did not contest that proposition but on the contrary expressly asserted its own rights under the MOU and exhorted ESL to abide by its terms, as well as providing documents in response to a request by ESL made expressly under the terms of the 2018 MOU.

53. In these circumstances, I do not see how any estoppel by representation can arise. Estoppel by representation requires a representation of existing fact: see Snell's Equity (34th ed.)(2020) para 12-005 whereas a representation as to the existence of a contract is at best a representation of law. I therefore treat Ms Myers' first basis as confined to promissory estoppel.

54. There was no substantial dispute between the parties as to the applicable principles of law. In short summary:

i) Promissory estoppel requires:

a) a clear and unequivocal promise or assurance by A that it will not enforce its strict legal rights;

b) which promise/assurance is intended to affect the legal relations between the parties;

c) coupled with reliance by B on the assurance such that it would be inequitable to permit A to withdraw the promise or act inconsistently with it.

ii) Estoppel by convention requires:

a) a common assumption which is expressly shared between the parties by means of conduct crossing the line between them;

b) an assumption by A of some element of responsibility in the sense that A conveyed an understanding that it expected B to rely on the common assumption;

c) reliance by B on the common assumption in subsequent mutual dealings with A, rather than on its own independent view of the matter;

d) some detriment to B or benefit to A sufficient to make it unjust or unconscionable for A to assert the true legal position.

55. As further elaborated by the Supreme Court, the underlying rationale of these requirements is that B must know that A shares the common assumption and be strengthened or influenced in its own reliance on the assumption by that knowledge. A must also intend or expect that this will be the effect of its conduct on B: see Tinkler v HMRC, [2021] UKSC 39; [2023] AC 886 at [45]-[51], approving and explaining the statement of principle expounded by Briggs J in HMRC v Benchdollar Ltd, [2009] EWHC 1310 (Ch.); [2010] 1 All ER 174 at [52].

56. As regards duty to speak, Ms Myers relied on the judgment of the Court of Appeal in Spiro v Lintern, [1973] 1 WLR 1002 that:

"… if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation."

Subsequent authorities have clarified that the duty arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights: see The Henrik Sif, [1982] 1 Lloyd's Rep. 456 at 465; Wilkins, The Law of Variation, Waiver and Estoppel (2nd ed.) paras 9.56-9.58.

Shield or sword

57. Before turning to each of the ways in which Ms Myers put her case, I must deal first with one overarching point which Ms Jacobs submitted was a complete answer to any case based on estoppel regardless of which way it was put, namely that ESL was relying on the alleged estoppel to create a cause of action.

58. It is well-established that an estoppel (a) cannot be used to create a new cause of action or new rights which would not otherwise exist but (b) can enable a party to succeed in a claim which would otherwise have failed by preventing the other party from relying on a defence: see Chitty (op.cit) paras 6-106 to 6-107. Ms Jacobs argued that this was a paradigm case falling within (a). This was a powerful argument persuasively presented but on closer analysis I find that I cannot accept it.

59. In my judgment, Ms Myers was right to say that ESL had a cause of action under the slot purchase contract and that she could rely on the alleged estoppel to establish that the terms of the 2018 MOU applied to that contract such that the arbitration clause also applied. This is therefore not a case where, absent estoppel, there was simply no substantive cause of action at all. It is not even a case where, absent the estoppel, the cause of action would necessarily be defeated – for example, because the claim would otherwise have been time barred.

60. Ms Jacobs relied heavily on the decision of Teare J in The Eleni P, [2014] EWHC 2402 (Comm); [2015] 1 Lloyd's Rep. 461 where it was held that the claimant could not rely on an estoppel to found the jurisdiction of an arbitration tribunal. In that case a bill of lading contract contained two inconsistent arbitration clauses and the court had to determine which one applied. The importance of the point lay in the fact that if clause X applied, then the claim was time barred. The case therefore has undoubted similarities to the present where the issue is likewise as to the terms which governed the slot purchase contract. The learned judge held that as a matter of construction clause Y applied. He rejected the argument that the respondent was estopped from denying the application of clause X on the grounds that:

> "An estoppel operating between the parties cannot found the arbitrators' jurisdiction since an estoppel cannot create an agreement… Mr Macey-Dare did not accept that he was using an estoppel to create an agreement. He said it was common ground there was an arbitration agreement; the dispute was as to the terms of the agreement. I do not consider that this is a realistic or sensible distinction; an arbitration agreement without any terms is not an agreement. But the question of the arbitrators' jurisdiction is different from the question whether, on the facts of the case, Eleni/Deiulemar is estopped from contending that its claim is not time-barred. Whether such estoppel exists will be a matter for the tribunal to consider in the event that Transgrain alleges an estoppel when it pleads its case."

61. I find this a difficult question, not least because, as recognised in The Eleni P, an arbitration clause is for many purposes treated as a separate severable agreement from the substantive contract in which it is embedded. Moreover, there was a time bar issue in that case which does not arise in the present. With considerable diffidence, however, I have taken a different view from Mr Justice Teare. In my judgment, ESL is not here relying on an estoppel in order to found jurisdiction directly. Rather, it is using the estoppel to establish a particular contractual framework which happened to incorporate an arbitration clause. The arbitration agreement does not therefore need to be created from scratch but already exists, inchoate but nonetheless "oven ready". The only question is whether the set of terms in which it was contained was incorporated into the contract. However, in the same way that there can be no objection to contracting parties agreeing to incorporate a set of terms containing an arbitration clause which they have not specifically or expressly negotiated, I see no reason why one party cannot be estopped from denying the incorporation.

62. In my judgment, therefore, there is no reason in principle why GSL cannot be estopped from denying that it contracted on the terms of the 2018 MOU and I accordingly reject Ms Jacobs' overarching point.

Promissory estoppel

63. Taking promissory estoppel first, I have grave doubts as to how any promise or assurance that GSL would not rely on its strict legal rights can be spelled out of the 2020 email exchanges relied upon. It seems to me that there is a fundamental difference between a representation by GSL that it will not rely on its contractual rights, and a representation that a contract exists when in truth it does not. Promissory estoppel is directed at the former situation not the latter, and despite Ms Myers' valiant attempts to argue the contrary, I do not accept that GSL had a "legal right" to argue that there was no contract, which it represented that it would not exercise. Whether a contract exists or does not exist is primarily a question of construction, which has nothing to do with the exercise or non-exercise of any legal or contractual right.

64. Both parties referred me to The Henrik Sif, [1982] 1 Lloyd's Rep. 456 where there was a dispute as to whether the contractual carriers under bills of lading were the vessel owners or the time charterers. The time charterers were held by Webster J to be estopped from denying that they were the carriers on the basis that:

> "… the representation on their behalf that [the time charterers] were the proper party to be sued on the bills of lading, constituted a representation that they would not enforce their strict rights against the other; they were saying, for practical purposes, "We will not take against you a point of fact and law upon which we would otherwise be entitled to rely in this legal dispute between us".

65. There is, however, one important difference between The Henrik Sif and the present case. In the former there was no relationship between the claimant and the time charterers at all absent the estoppel. Here, by contrast, there is no dispute that ESL and GSL are parties to a slot purchase contract. The only question is whether the terms of the 2018 MOU apply to it. In representing that they did, GSL was not to my mind giving up any substantive rights at all, particularly since the substantive terms of the 2018 MOU are inapposite to a slot purchase contract. The only right which it could conceivably be said to have been giving up was the right to argue that it was not bound by the arbitration clause. However, I am completely unable to find any clear and unequivocal representation to this effect in the mere acceptance by GSL of ESL's assertion that the 2018 MOU applied.

66. Ms Myers also relied on GSL's conduct in loading the cargo and paying the slottage rate as constituting the necessary representation. However, as I have found at paragraph 48 above, this is entirely equivocal and thus incapable for that reason of founding an estoppel.

67. In any event, I find that promissory estoppel fails for lack of reliance and unconscionability.

68. The evidence of Mr Hui as to reliance in his witness statement was simply that:

"If the parties had not been bound by the terms of the 2018 MOU, the Claimant would not have entered into the settlement with Safewell nor would the Claimant have commenced the arbitration proceedings the subject of this challenge."

In his oral evidence, however, he said that Safewell's claim had been settled on the advice of Chinese counsel that there was almost no chance of a successful defence under Chinese maritime law and that it therefore was better to settle rather than incur any legal costs. ESL accepted that advice. He also stated that he had not been involved in the original contractual negotiations with GSL and that his understanding that the contract was on the terms of the 2018 MOU derived only from the fact that this was what he was told by ESL's Operations Team when he asked for a copy of the governing contract after the casualty. Arbitration was commenced against GSL under the 2018 MOU because he thought that was the applicable contract.

69. As Ms Jacobs pointed out, nowhere in his evidence does Mr Hui say that either he or ESL relied on any representation by GSL when it settled with Safewell or commenced arbitration. I agree with her that this is an insufficient basis to establish reliance. It is clear to me that ESL settled with Safewell for reasons of overwhelming commercial expediency and that the contractual relationship with GSL played no part in that decision whatsoever. In relation to the commencement of arbitration, I find that ESL had formed its own independent view that the 2018 MOU governed the relationship between the parties irrespective of anything said or done by GSL. Mr Hui believed this because it was what he had been told by ESL's Operations Team. He had no reason to question that position. Certainly GSL said nothing to disabuse him; quite the opposite. However, in my judgment he was nonetheless relying on his own and ESL's independent view of the matter in commencing arbitration rather than on any representation by GSL.

70. Even if I were wrong in my conclusions so far, I have formed the clear view in any event that it would not be unconscionable to permit GSL to resile from its previous position. There is no evidence that GSL intended ESL to rely on anything it said by commencing arbitration proceedings against it. Nor was it submitted that there was any operative time bar or other irreversible detriment that ESL would suffer if the arbitration proceedings were ineffective. On the contrary, although the matter was not explored in depth before me, it seems that the only relevant time bar was contained in the 2018 MOU such that ESL may well benefit from a longer limitation period if it does not apply. The fact of the matter is therefore that, in the light of my findings above as to the true contract between the parties, ESL has brought proceedings in the wrong forum. In circumstances where there is apparently nothing to stop ESL from now bringing suit in the correct forum, I see nothing inherently unconscionable in GSL requiring it to do so.

71. For all these reasons, I conclude that the case based on promissory estoppel must fail.

Estoppel by convention

72. I accept that the correspondence on which Ms Myers relies is sufficient to establish a common assumption for the purposes of an estoppel by convention. However, I cannot see that GSL assumed responsibility in the sense of conveying to ESL an understanding that it expected ESL to rely on that common assumption. On the contrary, it was ESL's own categoric assertion that the 2018 MOU applied. ESL was

not seeking any assurance to that effect from GSL; it was making a positive statement which Mr Chan simply accepted with demur. Even if it could be said that ESL was strengthened in its own reliance on the common assumption by its knowledge that the assumption was shared by GSL, it is difficult to see how GSL either intended or expected that this would be the effect of its conduct, given that ESL's view as to the applicability of the 2018 MOU had already been formed independently.

73. Furthermore, what I have said above about reliance and unconscionability applies equally here.

74. I therefore reject ESL's case on estoppel by convention.

Duty to speak

75. I also see grave difficulties in this way of putting the case.

76. First, the statement of principle set out in paragraph 56 above requires that GSL should see ESL acting in the mistaken belief that GSL is under some binding obligation to it and in a manner consistent only with the existence of that obligation. But what obligations did ESL believe GSL to be under which would not have been imposed in any event under the slot purchase contract? If it was the duty to provide documents (which I accept only arises under the 2018 MOU), then these were provided.

77. Secondly, there was no evidence that Mr Chan was aware that the 2018 GSL MOU did or might not apply. Accordingly he was labouring under as much of a misapprehension as to its applicability as ESL. It cannot therefore be said that GSL knew that ESL was mistaken as to their respective rights: see Wilken (op. cit.) para. 9.58. In my judgment, the overwhelming likelihood is that both parties were mistaken and in those circumstances GSL's failure to bring the true facts to ESL's attention is not a failure to act honestly and responsibly.

78. Finally, as Wilken points out at para. 9.59, parties to legal proceedings are not generally required or expected to "nurse maid" their opponents. Indeed I would require some convincing that a prospective defendant was under any sort of duty to prevent his opponent from suing him in the wrong forum. Ultimately, each case must turn on its own facts and the present case is very different from The Henrik Sif given that there was undoubtedly a contract between the parties here on which ESL can still sue if it so chooses.

79. I do not therefore accept that GSL was under any duty to speak in the circumstances of this case.

Conclusion

80. For all these reasons, I hold that ESL's application fails and that the Tribunal's conclusion that it has no jurisdiction to resolve the claims raised by ESL should be upheld.