Neutral Citation Number: [2023] EWHC 2866 (Comm)

Case No: CL-2022-000148

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

Date: 15/11/2023

Before :

MR JUSTICE FOXTON

- -

Between :

LITASCO SA	**Claimant**
- and -	
(1) DER MOND OIL AND GAS AFRICA SA	
(2) LOCAFRIQUE HOLDING SA	**Defendants**

- -
- -

Frederick Alliott (instructed by **MFB Solicitors**) for **the Claimant**
Yash Kulkarni KC and **Gaurav Sharma** (instructed by **Withers LLP**) for **the Defendants**

Hearing date: 2 November 2023
Draft Judgment Circulated: 7 November 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 15 November 2023 at 11:00am.

The Honourable Mr Justice Foxton:

1. This is the Claimant's (**"Litasco"**'s) application for summary judgment of sums said to be due under an agreement reached by the parties on 4/5 November 2022 and entered into with effect "as of" 7 November 2022 (**"the Addendum"**), rescheduling the Defendants' existing indebtedness.

2. The application is opposed by the Defendants who contend:

   i) that they have a realistic prospect of defending the claim; and

   ii) even if they do not, there is a compelling reason for a trial in any event.

The Background

3. Litasco is an oil marketing and trading company incorporated in Switzerland, and wholly-owned by Lukoil PJSC **("Lukoil"**), a Russian oil company. The First Defendant (**"Der Mond"**) is a Senegalese company involved in oil trading, particularly in the West African market, and the Second Defendant (**"Locafrique"**) is Der Mond's parent company.

4. On 29 April 2021, Litasco entered into a contract to sell Der Mond 950,000 barrels of ERHA (Nigerian) crude oil, CFR Dakar, Senegal (**"the Contract")**. The cargo was delivered and Der Mond made partial payments in respect of the price in November 2021 and January 2022 in the amounts of €13,284,917.19 and €4,425,562.05 respectively.

5. Clauses 14 and 15 of the Contract provided as follows:

   "***14 FORCE MAJEURE***

   14.1 *If by reason of 'force majeure', which for the purpose of this Agreement shall mean any cause beyond the reasonable control of the affected Party including, but not limited to, any act of God, war, terrorism, riots, acts of a public enemy, fires, strikes, labour disputes, accidents, or any act in consequence of compliance with any order of any government or governmental or executive authority, either Party is delayed or hindered or prevented from complying with its obligations under this Agreement, the affected Party will immediately give notice to the other Party stating:*

   14.1.1 *the nature of the force majeure event;*

   14.1.2 *its effect on the obligations under this Agreement of the Party giving the notice;*

   and

   14.1.3 *the estimated date the contingency is expected to be removed.*

14.2 *To the extent that the affected Party is or has been delayed or hindered or prevented by a 'force majeure' event from complying with its obligations under this Agreement, the affected Party may suspend the performance of its obligations until the contingency is removed.*

14.3 *If:*

14.3.1 *the force majeure event cannot be permanently removed; or*

14.3.2 *a force majeure event results in a delay extending beyond ten (10) days;*

14.3.3 *either Party may terminate the Agreement upon notice and both the Parties will be relieved of their further contractual obligations, except for their accrued rights and obligations which shall survive the termination of the Agreement in accordance with this provision.*

14.4 *Neither Party shall be responsible for any loss or damage caused by any failure or delay in the fulfilment of its obligations under the Agreement if such failure or delay arises out of or is caused by force majeure events as described in these provisions."*

15 TRADE SANCTIONS

15.1 *Each Party acknowledges and understands that the performance of the Parties' respective obligations arising out of the Agreement shall be in compliance with any United Nations Resolutions or any Regulations which have the force of law in Switzerland, the EU, the United States of America, the United Kingdom and/or the country or countries in which the Oil may be loaded, delivered, discharged stored or transit during the performance of the Agreement and/or the counter of origin of the Oil, and which:*

15.1.1 *are directly or indirectly applicable to one or both of the Parties or to the transaction contemplated under this Agreement;*

15.1.2 *relate to foreign trade controls, export controls, embargoes or internal boycotts of any type (applying, without limitation, to the financing, payment, insurance, transportation, delivery or storage of the Oil); and*

15.1.3*are imposed against:*

(a) any natural or legal persons, entities or bodies from a particular designated country; or

(b) any natural or legal persons, entities or bodies controlled by such persons, entities or bodies, any other natural or legal persons, entities or bodies that are, in any way, subject to such controls, embargoes or boycotts,

hereinafter referred to as the "Trade Sanctions".

15.2 *If, at any time during the validity of the Agreement, there is an effective amendment to any existing Trade Sanctions or new Trade Sanctions have become or are due to become effective, which in the reasonable belief of the Seller may:*

15.2.1 *result in or risk the Seller breaching Trade Sanctions by performing any one or more of its obligations under the Agreement; and/or*

15.2.2 *result in or risk the imposition of any penalty, prohibition or impediment in any way of the payment obligations between the Parties,*

hereinafter referred to as "Sanctions Changes"

then at any time following such occurrence, may, at its sole and absolute discretion (with no obligation), suspend performance of any one or more of its obligations under the Agreement (including without limitation those which are affected by the Trade Sanctions), without any liability to the other Party whatsoever. Any such suspension of performance shall be notified by the Seller to the other Party.

15.3 *Where such suspension subsists for a period extending beyond ten (10) days, the Seller may terminate the Agreement upon written notice and both Parties will be relieved of their further contractual obligations, except for their accrued rights and obligations which shall survive the termination of the Agreement in accordance with this provision.*

15.4 *Where delivery of the Oil has taken place prior to the suspension of performance but payment in relation thereto remains outstanding, the Seller's payment obligation shall continue to be suspended after termination of the Agreement until the effect of the Sanctions Changes cease to exist, following which the Seller shall make payment within a reasonable period of written demand for payment by the other Party.*

15.4.1 *Where payment for Oil has already been made prior to the suspension of performance but delivery in relation thereto has not been effected the termination of the Agreement shall be without prejudice to any applicable Force Majeure Clause.*"

6. Der Mond failed to pay the balance of the purchase price. Following negotiations, Litasco and Der Mond entered into a Deed of Payment dated 17 January 2022 (**"the Deed of Payment"**) which provided for five payments over as many months. The Deed of Payment included terms relating to interest (Clause 1), acceleration of the whole debt in the event of default (Clause 3), and a continuing guarantee given by Locafrique in respect of Der Mond's obligations (Clause 5). Clause 7.7 of the Deed of Payment incorporated "all rights and remedies" arising under the Contract.

7. Payment of the first instalment under the Deed of Payment was made in two tranches: €2m on 1 February 2022 (1 day late), and €1m on 17 February 2022 (16 days late). The second instalment was due on 17 February 2022 but was postponed at the Defendants' request. When payment was not forthcoming, Litasco accelerated the debt and

demanded the outstanding balance by a notice dated 18 March 2022, which at that stage stood at €44,445,987.51 principal and €822,166.65 interest.

8. These proceedings were commenced to enforce the claim arising under the Deed of Payment. The Defendants served a defence, relying upon the force majeure and trade sanctions provisions incorporated from the Contract into the Deed of Payment. Litasco served a request for clarification as to whether the Defendants were alleging that any sanctions regime other than the UK regime was relevant and whether it was the Defendants' case that payment would be illegal and a criminal offence under UK law. No response was received, possibly as a result of ongoing negotiations between the parties about the restructuring of the Defendants' debt.

9. During these negotiations, the proceedings were stayed. The negotiations encompassed discussions about the parties entering into a Memorandum of Understanding **("MOU**", although in act of wishful thinking, the Defendants used the definition "MOA") relating to possible joint business activities relating to the sale of Russian oil to West African customers.

10. Given the defences now put forward, it is necessary to say a little more about those negotiations:

    i) A meeting took place on 21 July 2022 between Litasco and the Defendants. The evidence of Mr Racine Sy for the Defendants is that, at that meeting, Mr Suleymanov for Litasco made it clear that Litasco wanted to do business with the Defendants in a joint venture, which could be used as means of resolving the outstanding payments. He also says that the Defendants were given a month to come up with a new payment plan and that "it was clear to me that these two issues were linked and that the joint venture was going to be used as a way to help with the outstanding payments".

    ii) On 7 August 2022, a PowerPoint presentation was prepared by Litasco which was described as "support material for discussion." The presentation outlined a proposed joint venture, which would involve establishing a joint venture company to be owned 50:50. The presentation was circulated under a covering email which stated:

        > "As usual, for all purposes, we specify that this email and all the communications between us are made without prejudice to the rights of Litasco (in particular under the Deed of Payment) as well as to the legal proceedings currently under way in the English courts."

    iii) On 9 August 2022, Litasco sent a revised version of the presentation to the Defendants, ahead of a discussion scheduled for the following week.

    iv) On 22 August 2022, Locafrique sent Litasco an email discussing "a new repayment schedule based on 2 mechanisms". The first was payment of €2 million a month for 9 months. The second was described as a "commercial component" and provided a mechanism for separate payments or credits every quarter. It is important to note that the Defendants' proposal did not contemplate that all

outstanding amounts would be paid from the proceeds of joint venture business done between Litasco and Der Mond. It was only the second aspect of the proposal – "the commercial component" – which envisaged such a link.

v) In particular, the proposed "commercial component" envisaged a revolving credit line for Der Mond which would be used to source cargo from Litasco to sell to West African customers. It was envisaged that payments made under letters of credit opened in favour of Litasco would reduce the debt (the assumption being that the West African customers would pay more for the cargo than the sale price as between Litasco and Der Mond, and that "margin" would be a credit against the outstanding debt). The credit would be reduced by 25% every quarter, or some €7.5m.

vi) Mr Roy for Litasco responded to the proposal by adding the following passage:

> "In case the Parties could not agree on commercial transaction(s), then the ¼ reduction of the trade line becomes due for settlement at the end of the quarter (respectively its balance between the amount amortized during the quarter through commercial transactions and the EUR 7.5 mln) with the first maturity on the 31.12.2022".

Mr Ba for the Defendants was asked to and did confirm that this was acceptable "as discussed previously."

vii) On 23 August 2022, Litasco replied asking Locafrique to confirm that the communication was "without prejudice to the rights of Litasco SA (in particular under the Deed of Payment) as well as to the ongoing legal proceedings", which confirmation Locafrique gave.

viii) On 26 August 2022, the Defendants' solicitors wrote to Litasco's solicitors putting forward a proposal which would involve Der Mond paying €2 million a month for 9 months, to be guaranteed by Locafrique, and Litasco providing a revolving line of credit for the remaining amount to be applied to allow Der Mond to order oil products from Litasco. The line of credit would be reduced by transactions with third parties purchasing Litasco product from the Defendants, and also by 25% in value every quarter (€7.5m). If Litasco and Der Mond could not agree on any commercial transactions in any given quarter, then €7.5m would be paid by Der Mond to Litasco every quarter in cash.

ix) On 14 September 2022, the Defendants' solicitors circulated an amended draft of the document which became the Addendum (which Litasco's solicitors had originally sent to them). Litasco's solicitors responded on 20 September 2022 stating that Litasco was willing to allow the Defendants more time to pay, but were not willing to surrender their accrued rights. Certain passages in the Defendants' draft were specifically objected to because they "appear to suggest that payment will only be made from 'the proceeds of sales of the cargo'. If that is what you intend, then we must advise you that it is not acceptable to our clients. Payment for the Cargo is not in any way to be dependent on on-sales by your clients." Litasco's solicitors also stated that unless the Defendants accepted that

there were no current sanctions preventing payment, "it is hard to see that the Addendum serves any purpose at all".

x) According to Mr Sy, on 20 September 2022 a draft of an MOU was produced by Litasco. Negotiations about a possible joint venture continued in September and October 2022. Those negotiations envisaged a joint venture company being established in the UAE with a branch office in Senegal. Mr Sy gives evidence of a call on 7 September 2022 in which the Defendants "specifically confirmed that the deals would be required to fund any repayment plan".

xi) On 28 September 2022, the Defendants' solicitors reverted on the Addendum. There was no challenge to the statements made by Litasco's solicitors on 14 September.

xii) On 30 September 2022, Litasco's solicitors stated that "the purpose of the Addendum is not to include additional obligations or protections, but rather to amend the terms of payments for the outstanding sums from Der Mond to Litasco under the Deed of Payment". There was no challenge to that statement.

xiii) On 5 October 2022, the version of the draft MOU before the court was circulated. This provides in Recital C that "the parties wish to enter into negotiations for considering a potential cooperation". Clause 2.2 envisaged that, once signed, either party could terminate the MOU automatically if it decided not to become involved or remain in the project. The MOU was expressly stated not to be binding and provided that "should for whatever reason the Parties fail to agree on the terms and conditions relating to the Project it is agreed by the Parties that neither Party shall have any recourse against the other Party whatsoever". The MOU anticipated the conclusion of a number of detailed written contracts if the joint venture negotiations succeeded. The draft MOU makes no mention of the repayment obligations which were the subject of parallel negotiations in relation to the draft Addendum.

11. The Addendum was concluded on 4/5 November 2022. It required Der Mond to pay (and Locafrique to guarantee payment of) the outstanding balance as follows:

i) Der Mond "irrevocably and unconditionally agree[d]" to pay €18m in nine €2m monthly instalments (from 10 November 2022 to 10 July 2023).

ii) Der Mond "irrevocably and unconditionally agree[d]" to pay the balance, described as the "Credit Amount", in four quarterly instalments (in January, April, July and October 2023, the last payment being due on 31 October 2023).

iii) Provision was made for the Credit Amount to be reduced or extinguished by any other cash or letters of credit procured in favour of Litasco.

12. Once again the Addendum included provisions for the payment of standard and default interest on all outstanding money due (Clauses 1.5 and 1.6); an acceleration clause (Clause 3); a provision stating that Der Mond agreed to the reinstatement of these proceedings "in circumstances where they have defaulted on any of their payment

obligations under this Deed for any reason whatsoever" (Clause 3.1.4(b)); and a warranty by the Defendants that, as at the date of the Addendum, the performance of the Addendum "did not and will not contravene any law or regulation to which it is subject, including any relevant sanctions" (Clause 4.1.4).

13. On 5 November 2022, the Defendants referred to a "fruitful" meeting they had had with the Claimant on that date, and stating that they had signed the Addendum, and that an invoice for €2m should be sent to them. The email continued:

> "On the business side, as explained during our meetings we currently have a lot of opportunities in the West African region and we want to partner with Litasco to capture the market. We think that we need to move fast on the creation of the JV in Dubai so we can trade from there."

A meeting in Dubai in 10 days' time was proposed, and "in the meantime" two sales opportunities in West Africa were identified.

14. Mr Sy suggests that a further draft of the MOU was circulated on 9 November 2022, although I have not seen this document.

15. Two payments were made under the Addendum by Der Mond, the first on 8 November 2022 and the second on 9 December 2022:

    i) The first payment was made via EcoBank, a West and Central African bank.

    ii) The second payment was made via FBN Bank Senegal, a subsidiary of First Bank of Nigeria.

16. On 8 January 2023, Mr Ba for Der Mond wrote to Litasco acknowledging receipt of the invoice for the third instalment, which was due on 10 January 2023, and asking for time for payment to be extended to 20 January 2023. Litasco agreed, but the third instalment was not paid. On 24 January 2023, Mr Ba wrote to Litasco thanking them for the additional time allowed for payment of the latest monthly instalment under the Addendum, stating that payment had not been made because "there was serious difficulty for us finding currency to make the payment", but that it would be paid by 27 January 2023. It was not. The letter discussed upcoming payments under the Addendum, stating:

> "It was always our intention to fund a large portion of these payments from future deals we entered into with you and our customers. However, as you are aware, we have been working with your team in order to facilitate further deals with our regular customers but we have been finding it difficult in the current political climate to complete these deals. A number of our regular customers have shown some uncertainty about completing a deal for oil with origins in Russia. We are confident that we can identify other customers for these deals but would require a bit more time in order to complete these deals (which would obviously benefit Litasco as well).

> We would, therefore, respectfully request a three month pause in the payments under the [Addendum]. We can agree that interest continues to accrue on all unpaid amounts during this pause and if we can make payments sooner then we will try to do so."

17. Litasco accelerated the debt by a notice on 30 January 2023, the stay was lifted by consent on 10 March 2023 and on 13 March 2023 Litasco filed Amended Particulars of Claim advancing a claim under the Addendum. The Defendants served an Amended Defence and Counterclaim on 21 April 2023 which introduced a new defence as follows:

    i) The Addendum had formed part of a broad commercial arrangement between the parties under which "it was mutually anticipated that [Der Mond] would act as [Litasco's] regional partner in relation to sales of Litasco's cargoes to Der Mond's customers in West Africa over the period 2021-2024."

    ii) The Addendum was negotiated in tandem with the MOU, it being intended that the joint venture would provide the Defendants with the wherewithal to pay the amounts due under the Addendum and the Defendants would not have entered into the Addendum otherwise.

    iii) Litasco represented when the Addendum was concluded that it intended to enter into the MOU and enter into the joint venture.

    iv) Further, it was an implied term of the Addendum that "Litasco intended to execute" the MOU, alternatively there was a collateral warranty (sc. that "Litasco intended to execute" the MOU).

    v) That representation was false, Litasco not intending and/or not having a reasonable belief that it would enter into the MOU and the joint venture it was intended to establish. This appears to be a plea of fraudulent and negligent misrepresentation.

    vi) The implied term and collateral warranty were breached for the same reason.

    vii) The Defendants are entitled to rescind and have rescinded the Addendum and/or are entitled to damages "for misrepresentation", breach of the implied term or breach of the contract (the precise basis on which damages are claimed being unexplained).

18. The Amended Defence is signed by leading and junior counsel. The original force majeure and sanctions defences remain.

19. Litasco applied for summary judgment on 5 June 2023.

THE APPLICABLE PRINCIPLES

20. The principles to be applied when determining whether to grant summary judgment are clear and do not require recitation. The Court was taken to familiar (*Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch)) and less familiar (*Lex Foundation v Citibank* [2022] EWHC 1649 (Comm), [32]-[35]) summaries of those principles. I have kept them well in mind.

THE MISREPRESENTATION DEFENCE

Do the Defendants have a realistic prosect of establishing that a representation was made?

21. The Defendants do not plead any express representation as to Litasco's intention, and must therefore be relying upon an implied representation. The Defendants' skeleton states that "by its conduct, C represented that it intended to enter into the Joint Venture imminently following the conclusion of the Addendum." Mr Sy, the Defendants' only witness of fact, does not give evidence of any express statement by Litasco to that effect. Instead, he makes a series of essentially conclusory statements or statements concerned with Der Mond's motivations rather than what it was told:

    i) "Der Mond agreed to a repayment plan on the understanding that it had agreed to a joint venture arrangement with Litasco which would allow sufficient funds to be raised to make the outstanding payments and also to possibly overcome the obstacles to payment which had been put in place by those sanctions …. However to my surprise and disappointment, after Der Mond signed up to a revised payment plan Litasco failed to complete the joint venture agreement."

    ii) "Der Mond was induced to enter into a JV [sic – not the contract which the Defendants allege that they were induced to enter] on the basis of promises by Litasco that it would provide Der Mond with a rolling line of credit for it to sell Litasco's property into the West African market".

    iii) "From Litasco's words and conduct I was clear in my belief that Litasco was agreeing to enter into the JV alongside the Addendum to allow us to raise funds to make the payments under the Addendum."

22. Mr Kulkarni KC accepted that the obligations under the Addendum were not conditional on the conclusion of a joint venture. In the course of argument, he indicated that the Defendants' primary case was advanced not in misrepresentation but in breach of contract.

23. I am satisfied that it is not arguable that any representation was made as to Litasco's present intention to enter into a joint venture for the purpose of inducing the Defendants to sign the Addendum.

    i) In its communications, Litasco had been careful throughout to reserve its freedom of action: see [10(ii), (vi), (vii), (ix) and (xiii)]. It is highly improbable, against that background, that it could reasonably have been understood as making a representation as to its present intention to contract for the purpose of inducing the Defendants to act on such a representation.

ii) The terms of the proposed joint venture were entirely "up in the air" when the Addendum was signed. The parties had not even signed the MOU, the terms of which would not have committed them in any meaningful way, and the terms of the draft MOU and the surrounding communications make it clear that there remained much to be discussed before any agreement was concluded: see [10(x) and (xiii)] above and [30] below. Against that background, it would have made little commercial sense for Litasco to represent that it intended to enter into a joint venture, when discussions relating to the possible terms and scope of such a venture were at such an early stage.

iii) Litasco's solicitors stated on 20 September 2022, without challenge, that the amounts payable under the Addendum would be due whether or not there were any sales of cargo. They also stated that unless the Defendants accepted that there were no current sanctions preventing payment, "it is hard to see that the Addendum serves any purpose at all". The Defendants' solicitors never challenged those assertions, nor did they suggest (as the Defendants now do) that the sole purpose of the Addendum was, together with the proposed joint venture, to provide a new mechanism for the Defendants to pay Litasco without the difficulties which had been experienced to date.

iv) The Defendants' email of 5 November 2022 is inconsistent with any understanding on its part that business to be done under a yet-to-be concluded joint venture was to provide the means of paying the amounts due under the Addendum.

v) On the Defendants' case, it must have been apparent by early January 2023 that a joint venture agreement was not going to be forthcoming. If, by its conduct, Litasco had "represented that it intended to enter into the Joint Venture imminently following the conclusion of the Addendum," it would soon have become apparent that this was not the case. However, there was no suggestion by the Defendants that they had been misled into signing up to the Addendum. Mr Ba's email of 24 January 2023, in the passage quoted at [16] above, did not suggest that there was any common understanding that payment under the Addendum would be made from a joint venture with Litasco, only that "it was always our intention to fund a large portion of these payments from future deals we entered into with you and our customers". Further, the email did not suggest any lack of commitment on Litasco's part to such a joint venture in the period after the Addendum was signed, but referred to the difficulties "in the current political climate" of completing these deals. There was no suggestion the Defendants had been misled. It is simply impossible to reconcile this email with the Defendants' current case theory, and with the "surprise" Mr Sy claims to have experienced when no joint venture materialised.

Do the Defendants have a realistic prospect of establishing that Litasco did not intend to enter the MOU when the Addendum was signed?

24. Beyond the fact that no MOU was signed, the Defendants point to no material from which it is said that it can be inferred that Litasco did not intend to enter into a joint

venture of some kind with the Defendants in relation to sales to West African customers when the Addendum was signed. Litasco had no incentive to misrepresent its intention, already having the benefit of the Deed of Payment, and clearly holding the "whip hand" in the discussions to reschedule the existing payment obligations.

25. The Defendants assert that Litasco "immediately [broke] off the Joint Venture negotiations once it had secured D1's execution of the Addendum". However, there is nothing supporting this assertion. Mr Sy's statement, the only evidence adduced by the Defendants, asserts that he followed up on joint venture discussions after signing the Addendum, but "Litasco began to withdraw from the JV and did not sign the MOU and/or any subsequent agreements" and that "we now understand that this was due to a shift in direction from those acting on behalf of Litasco, specifically Mr Gidado and his trader, with them wanting to focus on their own expansion rather than partnering with an outside entity (i.e. Der Mond) in order to do so."

26. As to this:

    i) No facts said to support the allegation that Litasco "began to withdraw from the JV" are put forward, beyond the statement that it did not sign the MOU.

    ii) No source is given for Mr Sy's alleged understanding, which is evidentially worthless.

    iii) The documents lend no support to the assertion that Litasco changed its attitude to a proposed joint venture in such a manner as to be capable of supporting an inference of fraud.

    iv) There was a "fruitful meeting" (as the Defendants described it on 5 November 2022) with a further meeting proposed for some 10 days' time.

    v) Mr Sy suggests that a further draft of the MOU was circulated on 9 November 2022.

    vi) I have been shown no documents in which the Defendants chased the finalisation of the MOU thereafter, or referred to any lack of engagement by Litasco.

    vii) There were abortive attempts to complete transactions in November and December 2022 which failed, in at least one instance because of the customer's concerns about the Russian origins of the oil.

    viii) As noted above, in January 2023 the Defendants attributed the lack of joint venture business with Litasco to the concern of their clients arising from the current political situation, rather than any lack of willingness on Litasco's part. There was a further attempt at a transaction of the kind the proposed joint venture had envisaged in April 2023.

27. In short, this aspect of the Defendants' case has no realistic prospect of success, and is little more than an exercise in ungrounded speculation.

Inducement

28. As I have noted, Mr Sy does not allege that the Defendants were induced to enter the Addendum at all. He makes a bare assertion that the Defendants were induced by "a promise" by Litasco to enter into a joint venture agreement. However, there is nothing to suggest that any such promise was made, it being wholly inconsistent both with the terms of the Addendum and the draft MOU. Mr Ba's email of 24 January 2023 is fundamentally inconsistent with any suggestion that the Defendants understood that a representation in the terms alleged had been made to them and on which they had relied. Further, the premise of the alleged inducement is highly uncommercial. As Mr Roy of Litasco explains, the margin the Defendants might have expected to make by on-selling Litasco cargoes to its own West African customers could only have made a limited contribution to meeting the instalment obligations assumed under the Addendum within the contractual payment period. There is no attempt by Mr Sy to explain what volume of sales would have been required over what period for the entire debt of €44.446m plus accumulating interest to be satisfied by "margin" on sales.

29. In any event, one does not need to search hard for a reason why the Defendants entered into the Addendum. It gave them more time to pay their existing obligations.

Contract

30. The alleged implied term and contractual warranty defences are also completely hopeless and there was no real attempt to support or develop them. They are wholly inconsistent with the express terms of the Addendum, which contain an irrevocable and unconditional promise to pay and contain no reference to any MOU. These defences would give the *unsigned* MOA an effect which, on its express terms even if signed, it was clearly not intended to have:

    i) Far from being a document which would "formalise" the parties' joint venture (as Mr Sy claimed), even if it had been signed, the MOU was not binding and terminable at will, for any reason whatsoever, without any liability. Even if the MOU had been signed, it imposed no relevant obligations on Litasco. There is no basis for implying an obligation or contract which placed Litasco under an obligation to enter into a joint venture.

    ii) The terms of the parties' discussions and as contemplated by the unsigned MOU made it clear that there would be extensive and complex negotiations before any binding joint venture could come into effect. That state of affairs is wholly inconsistent with a promise to the Defendants on 4/5 November that Litasco would enter into a joint venture agreement which would provide the means of making the payments due under the Addendum.

Where do the misrepresentation and contractual defences take the Defendants?

31. If the Addendum is rescinded, or the Defendants put by an award of damages in the position they would have been in had it never been entered into, the obligations of both Defendants under the Deed of Payment would remain. All of the amounts payable under the Deed of Payment are long since overdue, and in any event were accelerated, and default interest payable. This makes it all the more difficult to understand why a wholly speculative and ungrounded fraud plea has been advanced in this case.

32. The Defendants made no attempt to outline the loss which they suffered from breach of the alleged implied term or contractual warranty, but the terms of Mr Ba's letter of 24 January 2023 would suggest none.

Conclusion

33. The misrepresentation / collateral warranty / implied term defences are wholly contrived and lack any conviction. They do not amount to an arguable defence.

THE FORCE MAJEURE DEFENCE

34. The Defendants argue that the force majeure clause has been engaged because payment has to be made through the international banking system and, on the evidence, no European clearing bank will make payments to Litasco. It is suggested that the refusal of the banks approached to make the payments is an event "beyond the reasonable control" of the Defendants which has "delayed, hindered or prevented" them from complying with their obligations to pay Litasco, with the result that the payment obligation has been suspended.

Is it arguable that there has been a force majeure event for the purposes of clause 14?

35. As I explain below, I have real doubts as to whether clause 14 is applicable at all to the Defendants' payment obligations. However, Litasco contends that there is no viable clause 14 defence on the facts.

36. It is well-established that clauses triggered when a force majeure event "hinders" performance of an obligation have a wider field of operation than those limited to events which "prevent" performance. Thus in *Peter Dixon & Sons Ltd v Henderson Craig & Co Ltd* [1919] 2 KB 778, the court upheld the arbitrators' finding that dislocation of trade due to the effect of war such that all contracts to obtain tonnage could no longer be fulfilled amounted to a hindrance of performance, even if it did not prevent it. Bankes LJ, surveying the authorities, referred to judicial interpretations of the concept of hindrance which equated it with "affecting to an appreciable extent the ease of the usual way of supplying the article" and "interposing obstacles which it would be really difficult to overcome", while Bankes LJ himself contrasted prevention, which in his view meant "rendering delivery impossible", and hindering delivery, which meant "something less than that namely rendering delivery more or less difficult, but not impossible."

37. However, it is *performance* of the obligation which must be rendered "more or less difficult", not a particular method of performance where the contract does not require performance by that method. Further, in the present case, the Defendants rely on clause 14 to suspend their obligation to discharge an accrued payment obligation. Whereas the suspension of an obligation to deliver goods will ordinarily have the effect of relieving the other party of its concurrent obligation of payment, a seller who has an accrued right to payment has, by definition, already done what it is necessary to do on its part to be paid, such that suspension of the payment obligation will inevitably operate asymmetrically. Finally, a payee is rarely concerned with the particular means by which payment is effected (cf. *Toprak v Finagrain* [1979] 2 Lloyd's Rep 98). Against this background, an argument that a party owing an accrued debt obligation is relieved of performance because paying the debt has been made more difficult is one which must be approached with particular circumspection. Even in the context of force majeure clauses under which hindering performance is sufficient, before difficulty in making payment would suspend performance of an accrued obligation, a significant degree of difficulty would be required, perhaps one approaching, albeit falling short of, impossibility.

38. What is the effect of the evidence here? In my assessment, it falls far short of establishing a realistic prospect that payment of the accrued debt was hindered for the purpose of clause 14:

    i) The Defendants have adduced evidence of five African banks with whom they had established banking relations who were unwilling to make payments to Litasco because of sanctions concern when contacted between February and May 2022 and, in one case when contacted again in November 2023.

    ii) However, Litasco has adduced evidence showing payments it has made through to and received from a variety of international banks throughout 2022 and 2023: Credit EuropeBank; Natixis; Deutsche Bank, BCGE, Credit Agricole, BIC-BRED, Arab Bank Switzerland, BCP Geneve, Citibank, UBAF, Raiffeisen Meine Bank and CIM Banque.

    iii) Further, the whole premise of the joint venture arrangement which the parties began discussing in August 2022 was that West African customers would be able to open letters of credit directly in favour of Litasco, which would provide at least one of the means by which the Defendants could meet their payment obligations. Those plans did not materialise, but that was because of issues relating to the sale of oil of Russian origin (Litasco's claim here relating to the supply of West African crude), rather than because of issues about paying Litasco.

    iv) The Defendants were able to make payments to Litasco in both November and December 2022. It is no answer for the Defendants to say they were able to make the first of those payments because Der Mond had sufficient Euros deposited with EcoBank to do so, but the payment exhausted its balance. Lack of foreign currency is not a force majeure event, and no explanation is offered as to why funds could not have been transferred by the Defendants into the Eco Bank account from elsewhere. Nor would the fact (as Mr Sy suggests) that its inability

to trade Russian oil reduced its ability to earn foreign currency be capable of amounting to a force majeure event so far as its obligation to pay Litasco is concerned. While the Russian-Ukraine war and the sanctions imposed in response to it may have caused a downturn in Der Mond's trade, and reduced its inflows of foreign currency, those events cannot be said to have hindered or prevented performance of accrued payment obligations, because the causal effect of such events on the Defendants' ability to pay is too remote.

v) So far as the second payment via FBN Bank Senegal is concerned, the explanation offered for why no further payments were made is that FBN Bank did not have sufficient foreign currency to do so. However, no explanation is offered for why the Defendants could not themselves have transferred further foreign currency to FBN Bank Senegal beyond the suggestion by Mr Kulkarni KC that "the funds you would be injecting into the account would be foreign currency funds, and what is being said is because we are not able to trade with the sorts of people that would pay us in euros, we don't have euro reserves." However, for the reasons I have explained, lack of foreign currency because of difficulties in trading, even if resulting from sanctions on Russian oil, do not amount to a force majeure event.

39. The reality is that the Defendants simply do not have the foreign currency to make the payments, not that they have been hindered by difficulties in the international banking system in making payments they are otherwise able to make. Mr Ba stated this clearly in his letter of 8 January 2023, attributing difficulties in paying to "a scarcity of foreign currency in our country" and again in his letter of 24 January 2023, when he referred to "a serious difficulty for us in finding foreign currency to make the payment."

40. Writing in 1918 about debtors who had sought to avail themselves of statutory protections for those prevented from performing their obligations as a result of the ongoing war, Sir Thomas Scrutton ("The War and the Law" (1918) 34 LQR 116, 132) summarised the resultant disputes in the following terms:

> "Did the inability to pay arise from the war; or was it, like Mr Micawber's, a chronic inability, equally present in war or peace? Numbers of debtors, however, urged with great vehemence to an unsympathetic Court that only this unforeseen war had prevented them finding El Dorado".

It is equally important, in the context of a force majeure clause such as clause 14, to distinguish between those prevented from or hindered in complying with their obligations because of the effects of a force majeure event, and those, such as the Defendants, who simply lack the financial resources to meet their obligations.

Is clause 14 engaged at all?

41. A striking feature of this case is that the Contract was fully executed on Litasco's part before any alleged force majeure event occurred, and the Defendants' payment obligations under the Contract had accrued due, and were initially payable before that time. The subsequent amendments to the time of payment under the Deed of Payment and the Addendum were all terms intended to reschedule the payment of that existing debt.

42. In those circumstances, and without having heard argument to the point, it seems to me strongly arguable that clause 14.8 of the Contract is engaged:

> "Notwithstanding this clause, neither Party shall be relieved of making payment in full and in accordance with this Agreement of any sums that have accrued due under this Agreement prior to its suspension or termination including but not limited to price, demurrage and/or any other financial obligation whatsoever".

43. The words "notwithstanding this clause" and "making payment …. in accordance with this Agreement" suggest that clause 14.2 does not permit Der Mond to suspend payment of its accrued payment obligations. That conclusion also derives support from clause 14.3.3, which would entitle Litasco to terminate the Agreement in the event a force majeure event continued for more than 10 days, in which eventuality the Defendants' accrued obligations would remain. There is no equivalent in clause 14 to clause 15.4 which provides for the suspension of any payment obligation to continue after termination. In circumstances in which the Contract was wholly executed but for performance of the Defendants' payment obligations, which obligations have accrued, had there been a viable force majeure argument applicable to the Defendants' obligations, it would have been necessary to consider whether Litasco could have terminated the relevant contract under clause 14.3 and enforced the accrued payment obligations under clause 14.3.3.

IS THERE AN ARGUABLE SANCTIONS DEFENCE?

44. The Defendants' sanctions case is advanced both under clause 15 of the Contract and as a matter of general law, relying in both instances on the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 ("**the 2019 Regulations"**). There are important differences in the way in which the arguments under the Contract and as a matter of general law operate:

    i) The Contract contains provisions that may restrict the circumstances in which the 2019 Regulations could be relied upon to excuse performance *as a matter of contract*, albeit that would not prevent the 2019 Regulations taking effect as part of the law of the United Kingdom.

    ii) The Contract gives effect to sanctions which "in the reasonable belief of the seller" have or risk certain consequences, permitting a party to suspend performance.

    iii) The application of the 2019 Regulations as a matter of general law will depend on the terms of those regulations properly construed on the basis of the actual facts, not the reasonable belief of a contracting party as to the position or the risks it may face.

    iv) It has been held that the 2019 Regulations do not prevent the court from entering a money judgment in favour of a sanctioned party: *Mints v PJSC National Bank Trust* [2023] EWCA Civ 1132. It necessarily follows that they do not provide a defence to a claim for such a judgment.

Does clause 15.2 apply?

45. Clause 15.1 of the Contract contains a mutual acknowledgement by the parties that performance of the Contract "shall be in compliance" with various sanctions regimes, including those of the United Kingdom, where they are "directly or indirectly applicable to one or both of the Parties or to the transaction contemplated under this Agreement" and certain other conditions are satisfied. These are referred to as "Trade Sanctions".

46. Clause 15.2 then addresses the position:

> "If, at any time during the validity of the Agreement, there is an effective amendment to any existing Trade Sanctions or new Trade Sanctions have become or are due to become effective".

Those changes are referred to as "Sanctions Changes".

47. Significantly, it is only Sanctions Changes, not Trade Sanctions per se, which permit a party to serve written notice suspending its performance. The scheme of the Contract is clearly that the parties are taken to have assessed the position at the date of the Contract and committed to performing the Contract, thereby assuming the risk, if and to the extent that any Trade Sanctions in force at the date of the Contract prevent them from performing.

48. At this point, it is important to note that clause 15 of the Contract is engaged because clause 7.7 of the Deed of Payment of 17 January 2022 provided "all rights and remedies under and in relation to [the Contract] continue in full force and effect and unaffected by the entry into this Deed and nothing shall be construed under this Deed as preventing the Parties from exercising any right or remedy conferred upon to them under the Purchase Agreement" (sic). The Addendum amends clause 1 of the Deed of Payment by varying the payment obligations but also provides in clause 4.1.4 that the Defendants represent and warrant "on the date of this Deed that":

> "as at the Effective Date [7 November 2022] the execution, delivery and performance of this Deed does not and will not contravene any law or regulation to which it is subject, including in relation to any relevant sanctions, or any provision of its memorandum and articles of association, and all governmental or other consents requisite for such execution, delivery and performance are in full force and effect."

49. Reading clause 15, the Deed of Payment and the Addendum together, I am satisfied that a "Sanctions Change" requires a change after the date when the relevant obligation has been assumed, which in the case of the Addendum means 7 November 2022. That reflects the structure of clause 15 which, as I have explained, requires a change after the date of contracting for clause 15.2 to have effect, and also gives full effect to the warranty given in clause 4.1.4 of the Addendum as to the absence of any "relevant sanctions" as at that date. It has been noted that the question of whether a force majeure clause applies to matters which are in existence or in contemplation at the date of contracting is ultimately a matter of construction (*Channel Island Ferries Ltd v Sealink*

UK Ltd [1988] 1 Lloyd's Rep 323, 328). A warranty by one party as to the position when the relevant obligation is assumed makes the position clear beyond argument.

50. The Defendants point to no Sanctions Change said to have occurred after 7 November 2022. For that reason alone, its contractual sanctions defence must fail.

If clause 15.2 applies, is it arguable that it is engaged?

51. For clause 15.2 to be engaged on the Defendants' case, the following conditions must be satisfied:

    i) The 2019 Regulation must be "directly or indirectly applicable" to one or both of the parties or the transaction.

    ii) The 2019 Regulations must relate to foreign trade controls, export controls, embargoes or internal boycotts of any type.

    iii) The 2019 Regulations must be "imposed against … any natural or legal persons, entities or bodies from a particular designated country" or "any natural or legal persons, entities or bodies" controlled by "such persons, entities or bodies" or "any other natural or legal persons, entities or bodies that are, in any way, subject to such controls, embargoes or boycotts."

Is it arguable that the 2019 Regulations are "directly or indirectly applicable to one or both of the parties or the transaction?

52. It will be noted that the definition of Trade Sanction has two distinct elements:

    i) The regulations must be "directly applicable to one or both of the Parties or to the transaction contemplated."

    ii) The regulations must be imposed against persons from a particular designated country, or those controlled by such persons.

53. In this case, the contract was entered into between a Swiss subsidiary of a Russian company, and two Senegalese companies, in relation to the sale of Nigerian crude which was delivered to Senegal. Regulation 3 of the 2019 Regulations provides:

> "Application of prohibitions and requirements outside the United Kingdom
>
> 3 (1) A United Kingdom person may contravene a relevant prohibition by conduct wholly or partly outside the United Kingdom.
>
> (2) Any person may contravene a relevant prohibition by conduct in the territorial sea.
>
> (3) In this regulation a "relevant prohibition" means any prohibition imposed— (a) by regulation 9(2) (confidential information), (b) by Part 3 (Finance), (c) by Part 5 (Trade), (d) under Part 6 (Ships), or (e) by a condition of a Treasury licence or a trade licence.

(4) A United Kingdom person may comply, or fail to comply, with a relevant requirement by conduct wholly or partly outside the United Kingdom.

(5) Any person may comply, or fail to comply, with a relevant requirement by conduct in the territorial sea.

(6) In this regulation a "relevant requirement" means any requirement imposed— (a) by or under Part 8 (Information and records), or by reason of a request made under a power conferred by that Part, or (b) by a condition of a Treasury licence or a trade licence.

(7) Nothing in this regulation is to be taken to prevent a relevant prohibition or a relevant requirement from applying to conduct (by any person) in the United Kingdom."

54. A "United Kingdom person" is defined in s.21 of the Sanctions and Anti-Money Laundering Act 2018, which defines the extra-territorial reach of that Act and of the prohibitions and regulations made under it, in the following terms:

"21 Extra-territorial application

(1) Prohibitions or requirements may be imposed by or under regulations under section 1 in relation to—

(a) conduct in the United Kingdom or in the territorial sea by any person;

(b) conduct elsewhere, but only if the conduct is by a United Kingdom person.

(2) In subsection (1) *"United Kingdom person"* means—

(a) a United Kingdom national, or

(b) a body incorporated or constituted under the law of any part of the United Kingdom.

(3) For this purpose a United Kingdom national is an individual who is—

(a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,

(b) a person who under the British Nationality Act 1981 is a British subject, or

(c) a British protected person within the meaning of that Act."

55. The Defendants did not identify on what basis it was said that the 2019 Regulations were applicable to them or to the transaction. Absent such an explanation, the clause 15 defence does not get off the ground.

Is it arguable that Trade Sanctions have been imposed against Litasco?

The 2019 Regulations

56. The key regulations relied upon by the Defendants in this context are Regulations 12 and 7.

57. Regulation 12 provides:

> "(1) A person ("P") must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.
>
> (2) Paragraph (1) is subject to Part 7 (Exceptions and licences).
>
> (3) A person who contravenes the prohibition in paragraph (1) commits an offence.
>
> (4) The reference in paragraph (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person."

58. Regulation 12 is one of a number of regulations which includes a provision extending the prohibition imposed by the regulation to "a person who is owned or controlled directly or indirectly (within the meaning of regulation 7) by the designated person." The other provisions following this structure include Regulation 11 ("dealing with funds or economic resources owned, held or controlled by a designated person") and Regulation 14 ("making economic resources available to a designated person"). In the case of Regulations 12 and 14, the reference to Regulation 7 is for the purpose of explaining the concept of "making [the relevant benefit] available indirectly to a designated person", making funds or resources available to such a person being seen as sufficiently proximate to the principal prohibition to merit the same treatment. In addition, Regulation 6 permits the designation of a person who is "owned or controlled directly or indirectly (within the meaning of regulation 7)" by a person who is or has been "involved in destabilising Ukraine or threatening its territorial integrity, sovereignty or independence". In that context, the reference to Regulation 7 signals a sufficient identification between the company and the person involved in destabilising Ukraine to justify designation of the company by reason of the individual's activities.

59. Regulation 7 provides:

> "(1) A person who is not an individual ("C") is "owned or controlled directly or indirectly" by another person ("P") if either of the following two conditions is met (or both are met).

> (2) The first condition is that P— (a) holds directly or indirectly more than 50% of the shares in C, (b) holds directly or indirectly more than 50% of the voting rights in C, or (c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C.
>
> (3) Schedule 1 contains provision applying for the purpose of interpreting paragraph (2).
>
> (4) The second condition is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes."

60. Regulation 7 only addresses companies – not, for example, individuals who it is reasonable to assume will act in accordance with the wishes of a designated person.

61. The language in Regulation 7(4) appears first to have entered the legislative lexicon in the context of Schedule 2 of the Broadcasting Act 1990, dealing with restrictions on holding broadcasting licences. Schedule 2 paragraph 1(3) to that Act had originally defined a person as having control of a company where "(a) he has a controlling interest in the body, or (b) although not having such an interest in the body, he is able, by virtue of the holding of shares or the possession of voting power in or in relation to the body or any other body corporate, to secure that the affairs of the body are conducted in accordance with his wishes …" That provision was amended by the Communications Act 2003 so that paragraph 1(3)(b) provided that a person has control of company where:

> "…although he does not have such an interest in the body, it is reasonable, having regard to all the circumstances, to expect that he would (if he chose to) be able in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of the body are conducted in accordance with his wishes."

The change appears to have been made because the government took the view that the previous definition was "insufficiently robust" and would "make it too easy for people to set up arrangements that, under the rules, would not be deemed to give them control, even though in practice it would be clear that they had control." OFCOM published *Guidance on the definition of control of media companies* on 27 April 2006, pursuant to its duty under s.357(2) of the Communications Act 2003. The Guidance discussed paragraph 1(3)(b) under the heading "de facto control", and makes it clear that, for its purposes, what matters are the company's interests "relating to its business as a broadcasting licensee or a newspaper proprietor" – a helpful reminder that it is always necessary to look at the context in which the issue of control arises when applying a definition of control.

62. More recently, the language which appears in Regulation 7(4) has become a staple of UK sanctions regulations.

Is it arguable that Litasco is controlled by Mr Alekperov for the purposes of Regulation 12?

63. In this case, the Defendants put Litasco to proof that they are not a person sanctioned by the 2019 Regulations, or controlled by a person who is so sanctioned, and in their submissions the Defendants suggest that Litasco may be controlled by Mr Alekperov, its founder and its president and chief executive until April 2022. However:

    i) Neither Litasco nor its parent Lukoil has been named as an entity sanctioned by the 2019 Regulations.

    ii) Mr Alekperov was sanctioned under the 2019 Regulations on 13 April 2022. The sanction was imposed because "through his directorship of Lukoil, ALEKPEROV continues to obtain a benefit from and/or continues to support the Government of Russia by working as a director (whether executive or non-executive), trustee, or equivalent, of entities carrying on business in sectors of strategic significance to the Government of Russia, namely the Russian energy sector."

    iii) Mr Alekperov stood down from the Litasco board in April 2022 after he had been sanctioned.

    iv) Such evidence as there is shows that Mr Alekperov's shareholding in Lukoil is 8.5%, which would not be sufficient to amount to a controlling stake in Litasco.

    v) I was provided with no evidence which suggested that Mr Alekperov continued to exercise control over Lukoil.

64. The evidence before me does not, therefore, establish a triable case that Mr Alekperov controls Litasco. The Defendants' contentions to the contrary are pure speculation, which may explain why their Defence was amended to replace what was once a positive case of such control with a non-admission.

Is it arguable that Litasco is controlled by President Putin for the purposes of Regulation 12?

65. By way of an alternative argument, advanced in writing but not orally, the Defendants contended that Litasco was controlled by President Putin, who has been sanctioned by the 2019 Regulations. In this context, the Defendants relied upon the discussion of this issue in *Mints v PJSC National Bank Trust & Anr* [2023] EWCA Civ 1132. In that case, in her judgment at [2023] EWHC 118 (Comm), Mrs Justice Cockerill addressed an argument that the claimant, PJSC National Bank Trust (**"NBT"**), fell within Regulation 12 because it was controlled for Regulation 7(4) purposes by President Putin. Mrs Justice Cockerill dealt with the argument relatively briefly, because on her primary conclusions, the point did not arise. She held that where a designated person exercised "political control" over another entity, that did not satisfy the requirement for control in Regulation 7.

66. Mrs Justice Cockerill's decision on the principal issues was upheld by the Court of Appeal. The Chancellor dealt with the control issue in what was, therefore, an obiter passage at [225] to [234]. His conclusions, supported by Popplewell and Newey LJJ, were as follows:

i) By excluding control arising from a political office, the Judge had put "an impermissible gloss on the language of the Regulation because of a concern on her part that, if the appellants were correct about the construction of the Regulation, the consequence might well be that every company in Russia was 'controlled' by Mr Putin and hence subject to sanctions."

ii) "If, as may well be the case, that is a consequence of giving Regulation 7 its correct meaning, then the remedy is not for the judge to put a gloss on the language to avoid that consequence, but for the executive and Parliament to amend the wording of the Regulations to avoid such a consequence."

iii) The relevant language "is not concerned with ownership, but with influence or control" and "is apt to cover the case of a designated person who, for whatever reason, is able to exercise control over another company irrespective of whether the designated person has an ownership interest in the other company, economic or otherwise."

iv) "The provision does not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control, that the affairs of the company are conducted in accordance with his wishes".

67. *Mints* was a case in which NBT was 97.9% (or 99.9%) owned and controlled by a Russian public body, the Central Bank of Russia. The governor of the Central Bank of Russia is appointed by the Duma on the recommendation of the President of Russia, and board members are appointed on the basis of a proposal to the Duma with the agreement of the President of Russia. It was the Mints parties' evidence that the Central Bank of Rusia "is an organ of the Russian state" over which President Putin exercised de facto control, and that "in practice it serves as an arm of the executive". Against that background, it is perhaps not surprising that it was conceded in that case that NBT was subject to the control of President Putin.

68. The Defendants in this case did not point to any similar evidence said to show (or arguably show) that Litasco was presently under the de facto control of President Putin. Lukoil is not a state-owned body and there is no suggestion that it functions as an organ of the Russian state. Further, the issue of control arises here in the context of Regulation 12, the relevant "affair" for Regulation 7(4) purposes being the availability of funds, and the question being whether making funds available to Litasco amounts to "making funds indirectly available to" President Putin. As a result, the issue of control has, as its central focus, the ability of the designated person to control the use of the funds made available. I was shown no material which provided an arguable basis for contending that funds received by Litasco on payment of this debt would be used in accordance with President Putin's wishes, and I regard the suggestion as wholly improbable.

69. I would be prepared to assume that it is strongly arguable that President Putin has the means of placing all of Litasco and/or its assets under his de facto control, should he decide to do so. Many executive or legislative sovereign bodies have the power to bring an entity incorporated under the laws of their state under their control or to take control of their assets. The practical and legal inhibitions on the exercise of such powers will

vary greatly between different countries, and I am willing to assume that they are wholly absent in Russia.

70. However, I believe the better interpretation of Regulation 7(4) is that it is concerned with an existing influence of a designated person over a relevant affair of the company (just as its legislative parent in the Broadcasting Act 1990 was so concerned), not a state of affairs which a designated person is in a position to bring about. Were matters otherwise, it would follow that President Putin was arguably in control, for Regulation 7(4) purposes, of companies of whose existence he was wholly ignorant, and whose affairs were conducted on a routine basis without any thought of him. Further, I note that the Chancellor endorsed part of Mr Rabinowitz KC's summary of the effect of Regulation 7(4), namely that it applies "when the designated person 'calls the shots'" ([229], [232]), not the wider formulation at [114] ("if the designated person calls the shots, or can call the shots"). While I accept that the Chancellor at [233] lends some limited support to a view that being "at the apex of a command economy" might be sufficient for Regulation 7(4) purposes, and that "Mr Putin could be deemed to control everything in Russia", these observations were couched in tentative terms, and, in my view, necessarily reflected the particular context in which they were made (see [67]).

71. It follows that there is no arguable case on the material before me that President Putin controls Litasco for Regulation 12 purposes.

72. Finally, the Defendants relied upon Regulation 44(2):

> "A person must not directly or indirectly make funds available to a person connected with Russia in pursuance of or in connection with an arrangement mentioned in (1)."

73. Regulation 44(1) provides:

> "(1) A person must not directly or indirectly provide, to a person connected with Russia, financial services in pursuance of or in connection with an arrangement whose object or effect is— (a) the export of energy-related goods, (b) the direct or indirect supply or delivery of energy-related goods, (c) directly or indirectly making energy-related goods available to a person, or (d) the direct or indirect provision of technical assistance relating to energy-related good."

74. The Defendants contended that paying Litasco would or might amount to making funds available to a person connected with Russia in pursuance of or in connection with an arrangement for the export of energy related goods.

75. In my assessment, it is not arguable that Regulation 44(1) is engaged by payment for a sale of West African oil for redelivery to West Africa:

    i) Regulation 40(1) prohibits "the export of energy-related goods for use in Russia", Regulation 41(1) the "supply or delivery of energy-related goods for use in Russia", Regulation 42(1) making "energy-related goods available for use in

Russia" and Regulation 43(1) providing "technical assistance relating to energy-related goods for use in Russia".

ii) Regulation 44(1) refers back to the activities in Regulations 40(1), 41(1), 42(1) and 43(1) and provides that a person must not "directly or indirectly provide, to a person connected with Russia, financial services in pursuance of or in connection with an arrangement" whose object or effect is one of those prohibited activities.

iii) Regulation 44(2) deals with making funds available in pursuance of or in connection with such an activity.

76. These is no export of energy-related goods for use in Russia in this case, with the result that Regulation 44 is not engaged.

77. In any event, the arrangement in question was concluded and, with the exception of payment, executed before the sanctions were imposed. I am not persuaded that the Regulations apply in these circumstances.

THE ILLEGALITY DEFENCE

78. I have concluded that there is no arguable case that Litasco is controlled by a person who has been sanctioned under the 2019 Regulations and in any event, the 2019 Regulations do not prevent a money judgment being entered in Litasco's favour. Accordingly this defence is unarguable.

IS IT ARGUABLE THAT THE CONTRACTUAL OBLIGATION WAS DISCHARGED BY FRUSTRATION?

79. Finally, the Defendants contended in writing that the payment obligation was frustrated because (i) the Defendants cannot compel banks to make payments and/or (ii) the payment would be illegal under the 2019 Regulations. I find it difficult to see how an accrued payment obligation for a wholly executed contract could be frustrated by events occurring after the payment obligation had accrued. In any event, I have found that neither of the factual bases for the frustration plea are arguable. This avoids having to engage with the wholly unpalatable argument that the effect of frustration would have been to render the price "undue" under s.1(2) of the Law Reform (Frustrated Contracts) Act 1943, so as to require Litasco to persuade the court to apply s.2(4) (a state of affairs criticised by Professor Robert Stevens in characteristically trenchant terms in *The Laws of Unjust Enrichment* (2023), 140-141).

SOME OTHER REASON FOR A TRIAL?

80. Finally, it is suggested that the present case should proceed to trial "as it would effectively be a test case for the issue of 'control' under the [2019] Regulations". However, there is no arguable evidential basis for such a debate, nor should Litasco be deprived of the judgment which the 2019 Regulations do not prohibit it from entering simply to provide the occasion for it. There is unlikely to be any shortage of disputes providing the courts with the opportunity to examine the 2019 Regulations over the coming months.