Neutral Citation Number: [2020] EWHC 2581 (Comm)

Case No: CL-2017-000458

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2020

Before :

MR JUSTICE FOXTON

- -

Between :

PALMALI SHIPPING SA — **Claimant**

- and –

LITASCO SA — **Defendant**

- -
- -

John Russell QC, Jessica Wells and Fiona Whiteside (instructed by **Lax & Co LLP**) for the **Claimant**
Charles Béar QC and Tom Bird (instructed by **Debevoise & Plimpton LLP**) for the **Defendant**
Hearing dates: **24** and **25 September 2020**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FOXTON

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"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed 10:00 AM on 01 October 2020."

Mr Justice Foxton :

INTRODUCTION

1. This judgment follows the hearing of a number of applications in an action in which the claimant ("Palmali") currently seeks damages of c.US$1.9 billion under what it contends was a long-term contract of affreightment ("the COA") with the defendant ("Litasco", a subsidiary of the Russian oil company Lukoil).

2. The applications which arose for determination were:

    i) Litasco's application for reverse summary judgment in relation to Palmali's claim for lost profits.

    ii) Palmali's application for permission to re-amend its Particulars of Claim.

    iii) Litasco's application for specific disclosure and

    iv) Litasco's application for further information.

3. I issued rulings on iii) and iv) above in the course of the hearing. This judgment sets out my decision on i) and ii).

BACKGROUND

4. The facts in this case are hotly disputed, and for present purposes it is sufficient to set out the principal contentions of the parties, and the history of the litigation.

5. In summary, Palmali contends that the COA gave it the exclusive right to carry oil products to be shipped by Litasco between various ports in the Caspian Sea/Black Sea/Mediterranean range up to a total monthly volume of 700,000 mt/month ("the Exclusivity Obligation"), and obliged Litasco to ship a minimum monthly quantity of 400,000 mt ("the Minimum Quantity Obligation"). Palmali contends that the COA was originally for a period of 10 years, but that the parties agreed to extend it for a further 5 years.

6. Litasco denies that the COA was enforceable, pointing to what it says are a series of commercially implausible features of the arrangement. If it was ever binding, Litasco denies that it was extended. There are also issues as to the correct construction of the provisions of the COA, and as to whether the COA was varied or waived, or Palmali is estopped from contending otherwise.

7. Palmali commenced proceedings in July 2017, and a 5-7 week trial of both liability and quantum was listed for June 2020. That trial was adjourned by consent, and refixed for February 2021. Both sides accept that this date is no longer viable – an issue to which I return later in this judgment.

8. Following supplemental disclosure by Palmali, issues arose as to the basis on which Palmali had pleaded its claim for damages which led to Litasco's reverse summary judgment application which is dealt with below. In addition, an issue emerged between the parties as to whether Palmali had in fact pleaded a claim for damages of the Minimum Quantity Obligation. That issue was determined against Palmali by HHJ

Pelling QC at a reconvened CMC on 5 June 2020, and is presently subject to an application for permission to appeal.

9. Palmali's ultimate owner and principal witness, Mr Mansimov, was arrested and imprisoned in Turkey, and it now appears unlikely that he will be able to give evidence at the trial. At a hearing on 15 July 2020, HHJ Pelling QC held that the trial should proceed as scheduled.

PALMALI'S PLEADED CLAIM

10. In its current form, Palmali's Particulars of Claim pleads:

    i) The existence of the Exclusivity and Minimum Quantity Obligations.

    ii) The 10-year duration and alleged 5-year extension of the COA.

    iii) That Litasco breached the Minimum Quantity Obligation, although the pleaded breach conflates the two obligations (referring to an obligation "to provide minimum monthly quantities of the Cargo of between 400,000 and 700,000 mt").

    iv) That Litasco breached the Exclusivity Obligation.

    v) A claim for loss and damage in the amount of the loss of the profit which Palmali "would have achieved if Litasco had provided up to 700,000 mt of Cargo per month".

    vi) Quantification of the damages claimed on the basis of the following calculation:

        a) taking the "actual quantity of Cargo shipped";

        b) using "actual revenue earned" to calculate "the gross revenue per ton of the Cargo actually shipped";

        c) taking the volume of Cargo if 700,000 mt/month had been shipped (i.e. assuming that there was in fact 700,000mt being shipped by Litasco per month which would have been shipped under the COA if the Exclusivity Obligation had been complied with);

        d) calculating the difference between the quantities in a) and c);

        e) using the "gross revenue" figure in b) to calculate an alleged loss of revenue on the figure in d);

        f) calculating what is said to be "the average percentage profitability for each year after deduction of expenses incurred in earning the actual revenue" (a percentage of just over 70%); and

        g) applying the "average percentage profitability" in f) to the alleged loss of revenue in e) to arrive at the loss of profit claim.

11. So far as the figure in f) is concerned, a distinction is drawn between "third party vessels" and so-called "own fleet" vessels:

    i) for the former, the expenses deducted include the costs which Palmali says it would have incurred in chartering vessels from third parties to carry the additional volumes of Cargos and any demurrage payable to those third parties (in addition to bunkers and port charges); and

    ii) for the latter, only port expenses and bunkers are deducted (i.e. it is assumed that Palmali would not itself have to pay any freight or hire in respect of the vessels which would have been used to carry the additional quantities of Cargo or pay demurrage for those vessels).

    For the purposes of the discussion which follows, I am going to focus on the issue of freight rather than demurrage, which is the more significant source of revenue deriving from the employment of vessels under the COA.

THE SUMMARY JUDGMENT APPLICATION

The nature of the summary judgment application

12. Litasco does not seek summary judgment on the issue of whether any and if so what obligations were owed under the COA, nor as to whether the Minimum Quantity and Exclusivity Obligations were breached. Nor does it seek summary judgment on the basis that Palmali has suffered no recoverable loss (indeed Litasco accepts the possibility that a very much smaller loss might, if other elements of the claim are established, be recoverable). Instead it seeks summary judgment on the current quantification of Palmali's loss of profit claim.

13. CPR 24.2 allows summary judgment "on the whole of a claim or on a particular issue". I see no reason why the particular means of quantifying a damages claim cannot constitute "a particular issue". In any event, if that formulation of the case is hopeless, the Court clearly has power to strike it out rather than allow costs to be incurred in addressing it (under CPR 1.4(2)(c) and 3.4 if necessary) and Litasco seeks such relief in the alternative. The effect of striking out (or summarily determining) the pleaded quantification of a claim for damages for breach of contract is not, however, to determine the claim for damages altogether. Rather, it will put the claimant in the position where it will need to amend its Statements of Case to advance a viable claim, and to satisfy the requirements for obtaining permission to amend in order to do so. The precise form of any order necessary to give effect to any determinations I make is best addressed in the course of consequential submissions.

The matters giving rise to the summary judgment application

14. I can set out the matters giving rise to the summary judgment application shortly, because there was little dispute as to the overall position:

    i) As noted above, Palmali's loss of profit claim in respect of voyages which would have been performed using "own fleet" vessels (in contrast to "third party" vessels) assumes that Palmali would not have incurred any expenses in

chartering in the vessels which would have been used to carry the additional cargos.

ii) As a result of enquiries made and rightly pressed by Litasco after reading annual reports relating to the Palmali group, Palmali eventually disclosed a series of Ship Management Agreements ("SMAs") on a BIMCO standard form between it and various ship-owning companies which were in the same beneficial ownership as Palmali. I will refer to the one-ship companies which were in related ownership to Palmali as "the owning companies".

iii) Each SMA states that Palmali will "provide the commercial operation of the vessel" including "providing chartering services in accordance with Owners' instructions". Those services include "the conclusion (including the execution thereof) of charter parties or other contracts relating to the employment of the vessel".

iv) Under the SMA, the owning company authorised Palmali "to draw up, to issue and to sign … COAs" and "to collect and remit to their accounts freights, demurrages, dispatches and all other due payments".

v) The SMA provided that "subject to the terms and conditions herein provided, during the period of this Agreement, the Managers shall carry out Management Services in respect of the Vessels as agents for and on behalf of Owners".

vi) The SMA provided that Palmali was responsible for:

> "arranging the proper payment to Owners or their nominees of all hire and/or freight revenues or other moneys of whatsoever nature to which Owners may be entitled arising out of the employment of or otherwise in connection with the Vessel".

vii) The SMA provided that "all moneys collected by the Managers under the terms of this Agreement (other than moneys payable by the Owners to the Managers) and any interest thereon shall be held to the credit of the Owners in a separate bank account" and that "all expenses incurred by the Managers under the terms of this Agreement on behalf of the Owners … may be debited against the Owners in the account referred to … but shall in any event remain payable by the Owners to the Managers on demand".

viii) Finally, the SMA provided that "Owners shall pay Managers for their services as managers under this agreement a management fee of 2.5 percent of the freights/dead-freights/demurrages or whatsoever for each fixture/voyage to be deducted therefrom at source".

15. Mr Béar QC submits that these documents make it clear that the distinction between "own fleet" and "third party" vessels assumed in Palmali's calculation of its loss of profits claim, and in particular the assumption that no expenses would have been incurred by Palmali in obtaining vessels in the former category for use under the COA, is misconceived. Once the amounts payable by Palmali to the ship owning companies are factored into the equation, he submits that Palmali has, at best, suffered a loss of the 2.5% of any earnings it would have been entitled to retain, something

which would clearly have a very dramatic impact on the size of Palmali's loss of profits claim.

16. Palmali accepts that this would be the position if the terms of the SMAs were reflected in the practical operation of all vessels used to lift cargo under the COA (which it says was not the case), and it also accepts that the quantification of loss in its Particulars of Claim has proceeded on a fundamental misapprehension which requires correction. The ultimate effect of Palmali's evidence (which involved a later correction of the evidence initially served in response to the summary judgment application and in respect of which investigations are still ongoing) is as follows:

    i) The SMAs did not reflect the basis on which the vessels were actually operated, but were probably generated in response to a query by an auditor or lender.

    ii) Palmali did not itself own the "own fleet" vessels which were and would have been used to lift cargos under the COA. Those vessels fall into two groups.

    iii) The first group comprises vessels owned by companies in the Palmali group which are flagged in Malta ("the Malta Fleet") and the second group vessels owned by companies in the Palmali group which are flagged in Russia ("the Rostov Fleet"). The Malta Fleet vessels are owned by one-ship Malta companies ultimately owned by Palmali Holding Co Ltd and the Rostov Fleet vessels by Palmali LLC ("Palmali Rostov").

    iv) There were SMAs with most of the Maltese one-ship companies. However, no payments were made under the SMAs, and the practical position which prevailed was that Palmali was able to use the vessels as it sought fit.

    v) The vessels in the Rostov Fleet were chartered by Palmali Rostov to a company called Dolphin Overseas Shipping SA ("Dolphin") which in turn chartered them to Palmali. The cash-flows under these arrangements are not entirely clear, but appear to have involved Palmali paying freight to Dolphin which would therefore have constituted an expense of using vessels from the Rostov Fleet under the COA.

17. Palmali seeks permission to amend its Particulars of Claim to formulate its loss of profit claim on an alternative basis, but it is not yet in a position to put forward a fully-formulated alternative case. In addition to the continuing investigations as to how cash flows operated in respect of vessels in the Rostov Fleet, there is a further issue as to what assumptions should be made as to the source of the vessels which would have been used to carry the additional cargoes which Palmali says it would have lifted under the COA if Litasco had performed its obligations (i.e. what proportion of those cargoes would have been lifted by vessels from the Malta Fleet and/or vessels which were subject to SMAs and what proportion by vessels from the Rostov Fleet).

Palmali's adjournment application

18. Against that background, Palmali sought to adjourn the summary judgment application to allow it an opportunity (in effect), to get its tackle in order so far as

formulating the amendments to its case is concerned. However, I concluded that this was not the appropriate course, in circumstances in which the summary judgment application has been outstanding for some time, and when issues of principle are raised by the summary judgment application which I can resolve now.

The approach on a summary judgment application

19. The approach which the court should adopt on a summary judgment application is well-known. I was referred by Litasco to the summary of the relevant principles in The LCD Appeals [2018] 4 CMLR 23, [38]-[39]:

> "38. The court may strike out a statement of case if, amongst other things, it appears that it discloses no reasonable grounds for bringing the claim: CPR 3.4(2)a). It may grant reverse summary judgment where it considers that there is no real prospect of the claimant succeeding on the claim or issue and there is no other compelling reason why the case should be disposed of at trial: CPR 24.2(a)(i) and (b). In order to defeat an application for summary judgment it is only necessary to show that there is a real as opposed to a fanciful prospect of success. Although it is necessary to have a case which is better than merely arguable, a party is not required to show that they will probably succeed at trial. A case may have a real prospect of success even if it is improbable. Furthermore, an application for summary judgment is not appropriate to resolve a complex question of law and fact.
>
> 39 The relevant considerations were helpfully set out in passages from Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) per Lewison J (as he then was) and from the judgment of Lord Woolf MR in Swain v Hillmann [2001] 1 All ER 91 at [94]".

20. In Easyair Lewison J stated as follows (at [15]):

> "As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success …
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial".
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary

judgment, but also the evidence that can reasonably be expected to be available at trial.

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction".

No agency or trust issues arise

21. I should begin by clearing the legal ground of certain issues which have not featured in this application. The terms of the SMAs would suggest that Palmali acts as agent rather than principal when entering into contracts for the employment of the vessels. However, neither party has presented its case on that basis.

22. So far as the COA is concerned, it long pre-dated the various SMAs, and so cannot have been concluded by Palmali pursuant to any agencies the SMAs brought into being. In any event, one can see considerable difficulty in analysing the COA as a contract entered into on by Palmali on behalf of any owning company whose vessel might be used to lift cargo under the COA over the course of its 10-year term or any extension. Indeed I understand that many of the owning companies were only formed or acquired vessels after the COA was signed.

23. So far as individual carrying voyages are concerned, COAs frequently operate as "umbrella agreements", obliging the parties to perform a series of carrying voyages on commercial terms set in the COA, which individual voyages are then the subject of their own voyage charters (see e.g. Gunvor SA v Crugas Yemen Limited [2018] EWHC 2061 (Comm), [7]). The contractual position so far as individual voyages under this COA was concerned is opaque. The evidence of Mr Erdem was as follows:

> "Palmali was also named as the disponent owner of the vessels to perform voyages for Litasco under the COA as evidenced by the Annual Addenda entered into between Litasco and Palmali each year in the case of the voyages from Tatyanka and Nikolaevskiy and as owners in addenda for voyages from ports in the Black Sea.
>
> In the case of voyages from ports in the Black Sea, Palmali would also fix the vessels to Litasco under separate voyage charters under which Palmali was named as disponent owner. Copies of some of the Addenda and some of the voyage charterparties showing Palmali named as either the owner or disponent owner are attached …
>
> Because Palmali and the companies which legally owned the ships were under the same ultimate ownership, no formal charterparties were drawn up between Palmali and the ship owning companies as it was understood that the vessels were to be made available to Palmali to fix on whatever terms it negotiated with the charterer. In other words, Palmali's role in practice was as the de facto owner of the vessels".

24. It was Palmali's position that, to the extent that individual contracts were entered into with Litasco within the framework of the COA, these were concluded by Palmali as principal, and that those provisions of the SMAs which required Palmali to hold amounts paid in respect such voyages in separate accounts were not operated.

25. In those circumstances, it has not been necessary to consider the application, in an individual voyage context, of the common law exceptions to the inability of a contracting party to recover a third party's loss (namely claims by an agent to recover the losses of an undisclosed principal or by a contracting party who holds the benefit of a contract on trust to recover substantial damages even though it would have to account for all or some of any recovery to a third party). Nor was it necessary to consider what significance (if any), the position pertaining to contracts for individual carrying voyages may have had for claims under the COA, where no issues of agency or trust could arise.

Litasco's claim for summary judgment

26. It is not substantially in dispute that the current formulation of Palmali's claim for loss of profits under the COA is defective. It certainly does not reflect what Palmali now says is the underlying position, and to that extent it cannot go to trial in its current form, and will require an attempt at re-pleading. I deal with Palmali's application for permission to amend below.

27. However, Litasco's summary judgment application goes considerably further than this. It contends that Palmali's quantification of its loss has failed to reflect all of the expenses it would have incurred in carrying additional cargos under the COA, because it has failed to bring into account the amounts which it would have become liable to pay the owning companies for the use of their vessels. That issue would arise even after Palmali had amended its claim.

28. For vessels which were subject to SMAs (and as I have indicated, the effect of Palmali's more recent evidence is that not all vessels which would have been used

were so subject, or were so subject at all relevant times), Palmali accepts that it would come under a liability to an owning company for using its vessel to lift cargo under the COA. Mr Aysan Erdem, the Senior Financial Controller for the Palmali group of companies, explained:

i) On completing a voyage under the COA, Palmali would invoice Litasco, and the owning company whose vessel was used would invoice Palmali, for the freight payable for that voyage.

ii) Palmali would book the invoices from the owning companies as operational expenses of the voyage, to distinguish it from the 2.5% commission.

iii) The amounts due from Palmali to the various owning companies pursuant to those invoices were recorded in Palmali's accounts as an inter-company debt or payable.

29. While Mr Russell QC referred at times during his submissions to the position set out in the preceding paragraph as one which prevailed "in the books" or "on paper", he confirmed that it was not Palmali's case that the SMAs and invoices were "sham" documents (using Diplock LJ's definition in Snook v London and West Riding Investments Ltd [1967] 2 QB 786, 802). Palmali accepts that the documents did create or record the legal rights and obligations which they purported to create or record. Rather he suggested that "in practice" Palmali was never required to pay the invoices, and was effectively able to treat the entire amounts received from Litasco as its own.

Has Palmali raised a triable issue in response to Litasco's argument?

30. Determining the loss which a claimant has suffered for the purposes of awarding damages involves a "net loss approach" which takes account of expenses caused or benefits lost by the breach, but also expenses saved and non-collateral benefits obtained as a result of the breach (*Chitty on Contracts* (33rd) para. 26-001). As Lightman J noted in National Employers' Mutual General Assurance Ltd v AGF Holdings (UK) Ltd [1997] 2 BCLC 191, 202:

> "The critical focus of attention must be the assets and liabilities, the rights and obligations, of the company".

31. In conducting this "net loss" calculation, the law of damages does not generally distinguish between a liability, and the discharge of that liability. It is well-established that an unpaid liability can constitute a loss for the purposes of awarding damages. The authorities on this issue were reviewed by the-then Peter Gross QC in Total Liban SA v Vitol Energy SA [2001] QB 643. He held at p.650 that there was "no general common law rule in English law that liability without payment does not constitute a recoverable loss"

32. Palmali's argument that the court should ignore the liabilities which it accepts would have come into existence if further cargos had been lifted under the COA when calculating its "net loss" involves a very significant departure from the conventional position. The argument suggests that the accounting which Palmali and the other companies performed did not reflect, or fully reflect, the economic reality of the position, although Mr Russell QC accepted that the inter-company debt was a "real"

asset of the owning company, in the sense that it was an asset available to its creditors in an insolvency or by way of execution.

33. Palmali points to a number of cases which have re-emphasised the overriding importance of "the compensatory principle" in the law of damages, which is concerned (within limits) with achieving restitutio in integrum *in fact*, rather than the simply applying rules or presumptions regardless of whether they achieve that goal: The Golden Victory [2007] 2 AC 353; Bunge v Nidera BV [2015] Bus LR 987 and Classic Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102.

34. I accept that there might well be circumstances in which, for the purposes of carrying out the "net loss" calculation, it will not be appropriate for the court's analysis to start and end with the identification of the relevant rights and liabilities. Mr Russell QC referred me to the decision of Nugee J in Stanford International Bank Limited v HSBC Bank Plc [2020] EWHC 2232 (Ch) in which an issue arose as to whether a company had suffered a loss when one of its assets had been used to discharge one of its liabilities without its authority. At [25] he stated:

> "It is easy to see that someone who needs, and whose solicitor is holding, cash to complete a purchase, for example, would be able to complain if instead of using the money to complete the purchase the solicitor used it to discharge some other debt, however much that other debt might be a liability of his, because the client might thereby be exposed to an action from the vendor for failing to complete the purchase and it is no comfort to say, "Oh, but, don't worry, your money, instead of being used in the way you wanted to use it, has been used for something else which you would have had to do sooner or later". So I do not dispute Mr Fenwick's suggestion that even in the case of a solvent person, wrongfully using his money to pay one of his debts can lead to consequential losses for which damages can be awarded, but where the loss that is claimed is simply the loss of the money paid out, in general I think Ms Robertson's proposition that you have to give credit for the fact that your liabilities have been diminished by a corresponding amount is probably in most, if not all, circumstances a good answer".

35. When considering whether an undischarged liability always constitutes a loss, the editors of *McGregor on Damages* (20th) observe at para. 10-30:

> "If a particular expense has already been incurred but not yet paid by the claimant, the amount thereof may be included in the damages where the claimant is under a legal liability to pay the third party … Should, however, it be clear and certain that the liability will never be discharged, and the expense never paid, by the claimant, recovery will be denied him so as to avoid his reaping a windfall; it was so held in Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH".

36. Biffa, reported at [2009] PNLR 5, is a decision of Ramsey J in which damages were sought for a liability which had not yet been paid, and which the judge found would never be paid. He held:

> "78. On that basis, it is evident that Biffa will not discharge the liability to MEH by making payment or incurring a loss for which they are entitled to be compensated. Indeed, in my judgment, Biffa will never pay MEH for

two reasons. First, Biffa's liability to MEH has, as pleaded and would, in any event be discharged by Biffa setting off its own claim for damages for that sum against its liability to MEH for that sum. No payment will occur and any sum recovered by Biffa would not be needed to compensate it for any loss that it has suffered. Secondly, given the fact that MEH is now insolvent, the prospect of Biffa's liability for the invoice being dealt with at all is, in any event, remote."

79. Rather, if Biffa were to recover from OT the sum invoiced by MEH it is evident that Biffa would retain that sum and not pay that sum to MEH. It would, in a real sense, obtain a windfall instead of compensation for a loss that it has suffered.

80. In certain circumstances where a windfall might occur it is appropriate, as identified in Total Liban at 663 to 664, for the court to adjourn the decision on quantum or, for instance, to make a quantum award on condition that the money is paid to a third party or that it is held on trust for that purpose. The purpose of that type of order in this case would be to prevent Biffa from obtaining a windfall and to ensure that the liability of Biffa to MEH on which the award of quantum would be premised was properly discharged. For the reasons set out above, this is not a case where such an order is appropriate because on the facts it is evident that any sum paid by OT would give rise to a windfall rather than compensate Biffa for a loss in relation to any liability to MEH."

37. Similarly, if it could be established to the requisite standard of arguability that any liability on the part of the claimant which had been avoided as a result of the breach is one which would have been waived or forgiven in any event, that might well be a reason why that liability should not be brought into account, or at least not accounted for in full, for the purposes of the "net loss" analysis.

38. However, Palmali does not seek to claim the loss of use of the amounts due, but it is said not paid, to the owning companies. Instead, it contends that damages should be assessed on the basis that no liabilities to the owning companies need be brought into account because the owning companies will never be paid. That case is not supported by Palmali's evidence. Mr Erdem's evidence as to the treatment of the inter-company balances in favour of the owning companies was as follows:

> "Palmali then used the freight it collected to (i) defray the OPEX of the vessel direct; (ii) it would pay the instalments of the loans on the ships to the relevant bank either directly or it would pay the balance of the freight including the profit element to its parent company … which would use the money partly to pay the loans on the ships and partly to fund its business activities".

39. Two of these uses involved expenditure for the benefit of the owning company (expenses on the voyage which under the SMA the owning company was obliged to meet, and Palmali was entitled to discharge on its behalf, or the repayment of loans made to the owning companies for the acquisition of their ships). These amounts were, therefore, remitted to the owning companies, there being no difference for this purpose between payments made to an owning company and those made to a third party on its behalf (Glory Wealth Shipping Pte Ltd v Flame SA [2016] EWHC 293

(Comm), [19]). So far as amounts paid to the parent company are concerned, no doubt these were treated as a short-circuited form of dividend to the common owners of both Palmali and the owning companies, which could have been "papered-up" if necessary.

40. There was no evidence from Palmali, the only party in a position to adduce such evidence, as to the effect such payments had on the inter-company balances in favour of the owning companies from time to time. One would expect that the balances would be reduced by any such payments, which were treated as payments on the owning company's behalf, albeit with the informality of authorisation commonly found in dealings between companies forming part of the same economic unit. But if that is wrong, then the liabilities remained, and therefore represent a debit to be brought into account in the "net loss" calculation. In summary, Palmali's evidence falls very far short of establishing an arguable case that, notwithstanding the liabilities solemnly recorded in its accounts, Palmali was entitled to apply the amounts which were the subject of those liabilities as it saw fit, and that the liabilities in question would never fall to be discharged.

41. For these reasons, I have concluded that Palmali has no realistic prospect at trial of establishing an entitlement to claim damages calculated on a basis which does not reflect the liabilities which the undertaking of additional voyages under the COA would have generated in favour of the owning companies. To the extent that Palmali would have come under a liability to pay freight or hire to Dolphin, the same issue is likely to arise. As I have stated, the terms in which the consequences of my determination should be recorded in an order can be considered with any other matters arising consequential on this judgment.

THE AMENDMENT APPLICATION

The applicable principles

42. Once again the applicable principles were not in dispute and are summarised by Carr J in Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm), [38]. A particular point on which Mr Béar QC laid emphasis was the requirement that a claim for damages be set out in sufficient detail for the other party to meet it, rather than simply asserted in the abstract. He relied in this connection on the judgment of Stuart-Smith J in Pedro Arroyo v Equion Energia Ltd [2013] EWHC 3150 (TCC), [14]-[15]:

> "14. … In my judgment, the level of precision that is required when pleading an issue or case, including a particular head of damages, should be determined by the need to provide a fair and sufficient indication to the Court and the opposing party of the case that is being brought and that the opposing party has to meet. Although I am not aware of specific authority on the point, modern pleading practice should not be and is not constrained by whether the label "general" or "special" damages is given to a particular item of claim. Take, for example, a claim for damages to compensate for physical damage to land. It is (correctly) common ground that the normal approach to assessment of such a claim is either by reference to diminution in value or by reference to costs of reinstatement. Describing such claims as claims for general damages should not and does not determine the level of particularisation that is required. If a claim for damage to land based on diminution in value were to be advanced, the opposing party needs certain information if it is to be able to meet the claim on an equal

footing: as a minimum it needs to know what sum is claimed and the nature of the case in support of that claimed sum. In some cases the diminution in value claim may be advanced by reference to comparables; alternatively it may be by reference to a reduction in the income stream which the land had generated but which can no longer be maintained; or it may be by reference to costs of reinstatement. If any of these are the nature of the case that is being advanced, they should be pleaded so that the opposing party can address the propositions on which the claim is based and either accept or refute them. If the claim is advanced on the basis of costs of reinstatement, the opposing party must be entitled to know what those costs are said to be and how they are computed calculated or otherwise made up. If that information is not provided, there can be no equality of arms and the opposing party is unfairly disadvantaged.

15. It follows from these observations that the mere fact that a party says that it claims damages because damage has been caused to land is not sufficient to alert the opposing party to the nature of the case that is being advanced, since claims arising out of damage to land may be many and varied."

43. Mindful of that guidance, I will now consider the amendments for which Palmali seeks permission.

The transferred loss amendment

44. If it is determined that Palmali's claim for loss of profits must give credit for the amounts which would have become payable to the owning companies in respect of cargos lifted with their vessels, Palmali seeks to amend its Particulars of Claim to recover the losses suffered by those companies under the transferred loss principle.

45. That principle, of uncertain scope, was first referred to in the House of Lords decision in Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd [1994] 1 AC 85, [114-115], a case in which the developer of residential property was held entitled to recover damages from the contractor for the defective performance of the building contract which had caused loss to the owners and occupiers of the properties. The principle has been formulated on both a narrow and broad basis:

i) The narrow basis (formulated by Lord Browne-Wilkinson at p.114) would confine the principle to cases where it was foreseeable that damage caused by breach of a contract relating to property would cause loss to a later owner of that property.

ii) The broader basis would apply when one contracting party (B) has promised another (A) that it will confer a benefit on a third party (C) but does not do so. If A has a "performance interest" in the performance of B's promise, A can recover damages in the amount of the cost of providing C with the promised benefit. This formulation of the principle was supported by Lord Griffiths in Linden Gardens (pp.96-97) and further explained by Lord Browne-Wilkinson in Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, 577.

46. Mr Russell QC accepts that the narrower formulation of the transferred loss principle cannot assist Palmali, but he suggests that the broader formulation can. I accept that it would not be appropriate in the context of an amendment application to seek to

resolve which analysis of the scope of the transferred loss principle is to be preferred or whether the two formulations co-exist, each with its own distinct requirements. The question is whether Palmali's claim is arguably capable of being brought within the scope of the broader ground.

47. The boundaries of the broader approach to the principle of transferred loss were considered by the Supreme Court in Swynson Ltd v Lowick Rose LLP [2017] UKSC 32. Lord Sumption JSC (at [16]) restricted its application to cases where recognition of the contracting party's right to recover the third party's loss was necessary "to give effect to the object of the transaction and to avoid a 'legal black hole'". He suggested that the rule would only apply where the "known object" of the transaction was to benefit a third party or class of persons to whom the third party belonged, and the anticipated effects of the breach of contract would be to cause loss to that third party ([14]). Lord Mance JSC referred to proponents of the broad principle as recognising that in some cases a contracting party may have a performance interest in the performance by its counterparty of an obligation to confer a benefit on or avoid a loss to a third party, but did not otherwise elaborate on the principle which he said could not conceivably be engaged on the facts of the case ([53-54]). Lord Neuberger PSC defined the principle of transferred loss as one applicable to transferred property ([102]). He referred to Lord Griffiths' wider formulation, which he said it was not necessary to address on the facts of the case ([106]).

48. In BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc [2019] EWCA Civ 596, the Court of Appeal considered the transferred loss principle again. Coulson LJ at [75] held that the broader ground was limited to "known object" cases:

> "I have no hesitation in concluding that, as a matter of law, for a successful claim for transferred loss that seeks to rely on the so-called broader ground, as explained in Linden Gardens and Panatown, the claimant must show that, at the time the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged".

49. Despite Mr Russell QC's valiant attempts to argue the contrary, I have concluded that Palmali cannot realistically argue that the common intention or "known object" of the COA was to benefit such of the owning companies as Palmali might contract with for the purposes of performing its obligation to lift cargos under the COA (any more than its known object was to benefit any owners of "third party vessels" in the same way). Mr Russell QC referred to the example given by Lord Griffiths in Linden Gardens at pp.164-165 of building works which a husband contracted for on his wife's house, or on a house which he later transferred to his wife, which he suggested illustrated the potential flexibility of the "known object" requirement. However, even if that example remains a valid illustration of the scope of the transferred loss principle some 26 years on, it involves a contract to do work on property, to the obvious benefit or detriment of its owner from time to time.

50. Here, the object of the contract was for Palmali to benefit from the financial obligations assumed by Litasco, it being a matter for Palmali how it went about putting itself in a position to perform its reciprocal obligations and thereby realise those benefits. Such benefit as other companies in the same ultimate ownership as Palmali might derive from voyages performed under the COA would not be conferred

upon them by Litasco through the performance of its obligations under the COA, but by the decision of Palmali to contract with them on whatever terms were decided upon to enable Palmali to perform its obligations under the COA. Whether any particular vessel would be used, when, for what voyage and at what freight rate would depend entirely on decisions taken by Palmali after the COA was signed, by reference to the prevailing circumstances and without reference to Litasco. The difficulties in identifying which third parties suffered the "transferred loss" and in what amounts, and what legal or economic connection with Palmali is necessary to bring them within the class of third party beneficiaries, all illustrate the inherent inapplicability of the principle of transferred loss to a case such as the present. Indeed it is far from clear that any of the owning companies have suffered any loss (which would involve determining whether they enjoyed no or less remunerative employment in the periods when they would otherwise have been engaged in lifting COA cargos).

51. Mr Russell QC rightly did not argue that Palmali could recover any "transferred losses" suffered by third party owners whose vessels might otherwise have been used to lift COA cargos. However, there is no material difference between the position of those vessel owners and those of the owning companies. To the extent that Palmali relies on the fact that the owning companies were in the same ultimate beneficial ownership as Palmali, the following comments by Coulson LJ's judgment in Rembrandt are apposite:

> "76. During the course of his oral submissions, Mr Morpuss suggested that it was a relevant factor that both NIVE and Henningsen were companies within the same group and were owned by the same family. In support of this contention, he referred to Lord Clyde's speech in Panatown [2001] 1AC 518, when he said, at p 535H–536A, that the problem that arose in that case 'is most likely to arise in the context of the domestic affairs of a family group or the commercial affairs of a group of companies'.
>
> 77. But, certainly on the facts of this case, I do not consider that it makes any difference that NIVE and Henningsen are owned by members of the same family. First, as Mr Kealey pointed out, the evidence was that, not only were these companies separate legal entities, but they traded with each other on commercial terms. Secondly, it was obviously in the interests of the family members who owned these companies to use their separate legal entities for their own purposes. They cannot rely on the separate nature of those companies when it suits them, and then seek to break down the barriers when it creates difficulties. That comes uncomfortably close to what Mr Hunt was trying to do in Swynson [2018] AC 313".

52. On Coulson LJ's statement of the law in Rembrandt, therefore, (which is binding on me), Palmali's "transferred loss" case cannot succeed. However, even if there is a "wider still and wider" formulation of the transferred loss principle, which protects the performance interest of a contracting party in the conferring of a benefit on or avoidance of loss to a third party even where that was not the known object or common purpose of the contract, I do not see how Palmali can bring itself within such a principle.

53. Palmali was contracting for its own benefit, as the sole recipient of payments under the COA. Palmali is able to sue for the loss of those benefits, but must give credit for

any expenses it would have incurred in realising them. By contrast, any benefits which the owning companies obtained would be derived from the contracts which Palmali entered into with them, and they would be received by way of amounts due from Palmali under those contracts (or perhaps under a contract with an intermediate entity such as Dolphin which in turn contracted with Palmali). If Palmali assumed such obligations to them, then on the hypothesis under consideration, it would be liable to its owning company counterparties for any failure to perform those obligations, whether Litasco had performed its obligations under the COA or not. Indeed to the extent that a contract was concluded between Palmali and an owning company, that would itself preclude any claim by Palmali for the owning company's transferred loss in respect of that voyage because of the existence of an alternative remedy (Alfred McAlpine Construction Ltd v Panatown Ltd, 547-548, 577-578, 582-583). In the absence of such contracts, it is not meaningful to speak of Palmali suffering a loss equivalent to the cost to it of conferring on the owning companies the factual benefits which they would have enjoyed if Litasco had fully performed the COA and their vessels had been used to fulfil Palmali's side of the bargain (compare Lord Browne-Wilkinson's discussion of the performance interest in Panatown, pp.919-920).

54. The fact that the transferred loss in question is the loss of profits which the owning companies would have made under contracts which they would have entered into with Palmali further militates against the claim which Palmali seeks to advance. This is not a case in which the loss transferred arises from interference with or diminution in the value of a legally protected interest on the part of the third party such as a right of property or to possession (such as the owner of a home in Lenesta or cargo in The Albazero) or even a contractual right (an interest at best precariously protected in private law against interference by anyone other than the contractual counterparty), but at best from the loss of the opportunity to conclude a contract. There is no case which suggests that the principle of transferred loss is capable of extending so far.

55. Finally, Mr Russell QC submitted that, as the transferred loss principle was a developing area of law, the appropriate course is to give permission to amend, thereby offering Palmali the opportunity to take the issue of law to the Supreme Court, if necessary, on the basis of the facts as found at trial.

56. I do not accept that, in the light of the very clear statement of law in the Rembrandt case, that would be a legitimate approach. That is particularly the case in circumstances in which:

   i) I have been unable to identify any viable basis on which some form of transferred loss principle might be invoked in this case; and

   ii) the recent trend of authority in this area of law offers no encouragement for the wholesale restatement of the principle which Palmali would need, which principle, as Lord Sumption JSC emphasises in Swynson, is an limited exception to what is otherwise the general rule.

The amendment to plead a claim in damages for breach of the Minimum Quantity Obligation

57. As I have stated, HHJ Pelling QC concluded that although Palmali had pleaded a claim for breach of the Minimum Quantity Obligation, it had not pleaded a claim for damages for that breach. That ruling is under appeal, but it represents "the law of the case" before me.

58. In those circumstances, Palmali seek permission to amend to bring such a claim now. The application is made in circumstances in which Litasco has long understood that Palmali intended to seek such damages. For example, Litasco (in Mr Lloyd's first witness statement of 21 December 2017) stated:

> "Palmali claims damages of US$1.9 billion (plus interest and costs) for alleged breaches by Litasco of its obligations since 2010:
>
> i. To provide minimum quantities of cargo to Palmali;
>
> ii. To do so exclusively; and
>
> iii. To provide cargo for transhipment..."

59. Later in the same witness statement, Mr Lloyd explained the issue of construction which arose as to the operation of clause 2 (the Minimum Cargo Obligation) which, if decided in Litasco's favour, "has the practical effect of nearly halving Palmali's claim for damages".

60. Mr Béar QC very fairly accepted before me that the List of Issues includes issues which suggest that the damages issues in play include those arising from the breach of the Minimum Quantity Obligation. However, Litasco resists the amendment because it says Palmali is not in a position to plead a coherent, complete and adequate methodology for quantifying such a claim at this time. There is something in this complaint, but not as much as Litasco has suggested:

    i) The calculation pleaded at paragraph 19 of the Points of Claim does provide a comprehensible methodology for calculating loss, which is capable of applying to a claim for breach of the Minimum Quantity Obligation.

    ii) In particular, it calculates what is alleged to be an average gross revenue per ton and average profitability on cargo actually shipped, which is applied to cargo which it is said Litasco was contractually obliged to ship, but did not.

    iii) For the purposes of the Minimum Quantity Obligation, the shortfall to which that lost profit would fall to be applied will be the difference (in any month in which the figure in the "Quantity of Cargo Provided" column in Annex A is below 400,000 mt) between the "Quantity of Cargo Provided" and 400,000 mt.

61. However that is subject to two caveats.

62. First, the issues raised in relation to Litasco's summary judgment application impact on this claim. In short, the figure for expenses which is used to calculate Palmali's average profitability per mt carried suffers from the deficiencies which Palmali acknowledges in relation to the claim for damages for breach of the Exclusivity

Obligation, together with the further issues which arise from my determination of the summary judgment application. However, that of itself is not a reason for refusing Palmali permission to plead the claim for damages for breach of the Minimum Quantity Obligation which both parties have long been aware Palmali intended to assert, any more than it is a reason for striking out the damages claim for breach of the Exclusivity Obligation which is already on the pleading.

63. Second, an additional issue might arise in relation to the Minimum Quantity Obligation which may not arise (or arise in the same way) in relation to the Exclusivity Obligation. In particular, for the purposes of its claim relating to the Exclusivity Obligation, Palmali can point to those shipments actually made by Litasco using vessels not sourced under the COA, and claim damages by reference to the freight rate applicable to those voyages. For the breach of the Minimum Quantity Obligation, however, an issue arises as to what assumptions should be made as to the ports between which such shipments would have taken place. I anticipate that Litasco will argue that damages would fall to be assessed on the basis that it would have chosen to ship the cargo using the route which would have involved the lowest payment to Palmali (applying the minimum performance doctrine) and that Palmali will contend that this principle does not apply or is limited to reasonable choices on Litasco's part.

64. If the minimum performance doctrine does not apply, there are a number of ways in which it might be possible to determine the freight rates applicable. The approach which Mr Russell QC has confirmed Palmali is adopting – and the draft pleading should expressly record this in its final iteration – is to assume that there would be the same distribution of voyages as those which did take place under the COA, and that this distribution is sufficiently captured in the average revenue calculation which Palmali has pleaded. That proxy might be capable of being attacked at trial, but it cannot be said to be incoherent or to leave Litasco in the dark as to how Palmali intends to approach this issue.

65. In these circumstances, I concluded that it is appropriate to give Palmali permission to amend to bring a claim for damages for breach of the Minimum Quantity Obligation on the basis set out in paragraph 19 of the draft pleading. It follows that permission is given to effect the amendment to the penultimate sentence of paragraph 18, and the opening sentence of paragraph 19.

66. However, it will be necessary for Palmali to make a further application for permission to amend, and to substitute a new Annex A, both to reflect my ruling on the summary judgment application and any changes necessary to reflect the position of vessels in the Rostov Fleet. That application will fall to be determined on conventional permission to amend principles, including as to whether the additional matters pleaded are sufficiently arguable and adequately pleaded, and as to whether there is time to address that case having regard to such issues as it might raise. It seems unlikely that this last factor will loom large, in circumstances in which the February 2021 trial date is to be vacated.

The amendments relating to the Exclusivity Obligation

67. The amendments which Palmali seeks permission to effect in relation to the Exclusivity Obligation compromise:

i) The statement in the second and third sentences of paragraph 18 that:

> "Now that Litasco has provided Further Information as to the volume of Cargo shipped on third party vessels, it is possible and necessary for Palmali to recalculate the Particulars of Loss and Damage. Palmali will provide the recalculated Particulars as soon as possible".

ii) The statement in the last sentence of the same paragraph:

> "In relation to the loss and damage caused by Litasco's breach of the Exclusivity Obligation, Palmali is considering whether an alternative methodology is feasible and/or appropriate".

68. I agree with Mr Béar QC that these are not helpful amendments, and I do not give permission to make them. What is required is for Palmali, as soon as it can, to do the following:

i) to plead its methodology for calculating the damages claimed for breach of the Exclusivity Obligation. This will have to address not only the consequences of my ruling on the summary judgment application and any revised case from Palmali in relation to the Rostov Fleet, but also its position in relation to the following issues:

a) The treatment of cargos carried on large third party vessels, which it would have required a combination of the vessels available to Palmali to lift; and

b) The approach to be taken to months in which the total cargo shipped by Litasco exceeded 700,000 mt;

and

ii) To serve its revised Annex A setting out the monthly calculations on the basis of that methodology.

69. It might be possible for these two requirements to be met sequentially. In each case, an amendment will be required on the basis set out in paragraph 66 above.

THE TRIAL

70. As I have noted, both parties agree that the trial date in February 2021 is no longer viable, and in those circumstances I will order that that fixture is vacated. At that point, the common ground ends. Litasco has reserved its right to argue that the court should refuse to re-list the case on the basis that a fair trial is no longer possible, in reliance on the principles referred to in cases such as Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167.

71. In these circumstances, a further hearing should be fixed on this case (with a provisional estimate of one day), before the end of this term, to consider the future progress of the action. It would clearly be desirable, if possible, for there to be clarity in relation to the further disclosure to be provided by Palmali (whether in relation to the position of the Rostov Fleet or pursuant to the orders I made at this hearing), and

for Palmali's draft amendments to its pleading to have been finalised, before that hearing takes place. I will seek to give directions to this end when dealing with the arguments consequential on this judgment.