11th January 2022
Neutral Citation Number: [2022] EWHC 57 (Comm)

IN THE HIGH COURT OF JUSTICE **Claim No. CL-2020-000544/594/725**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
BETWEEN

Hearing date: 15 – 16 December 2021

OCM SINGAPORE NJORD HOLDINGS HARDRADA PTE LTD
(1) TORM A/S **544 Claimants**

NOC SWISS LLC **594 Part 20 Claimant**

V8 POOL INC **725 Claimants**

-v-

GULF PETROCHEM FZC **Defendant**

BEFORE:
His Honour Judge Mark Pelling QC sitting as a Judge of the High Court

Richard Lord QC (instructed by Winter Scott LLP) for 544 Claimant.
Chirag Karia QC (instructed by HFW LLP) for 594 Part 20 Claimant.
Oliver Caplin (instructed by Ince Gordon Dadds LLP) for 725 Claimant.
Gideon Shirazi (instructed by Stephenson Harwood LLP) for the Defendant.

JUDGMENT
(Approved)

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JUDGE PELLING:

Introduction

1. This is the hearing of six applications being (a) applications by each of the claimants for summary judgment and (b) the defendant's applications for permission to amend its defences in each claim. At paragraph 17 of his skeleton submissions, Mr Shirazi, who appears on behalf of the defendant, accepted that subject to the amendments that the defendant sought permission to make that the defendant had not " ... *advanced a defence on liability* ... ". Subject to the application to amend, Mr Shirazi confines his submissions on the summary judgment application to two generic points, being (a) as against V8 and OCM that judgment should not be given summarily on its claim for final injunctions by reference to the defendant's argument concerning financial impossibility which in turn depends upon two points being (i) alleged illegality to pay given the defendant's alleged financial position and (ii) an alleged absence of funds necessary to enable payment to be made; and (b) as against NOC an assertion that the defendant has a realistically arguable defence to the money claims it makes.

2. The only basis on which liability can be disputed is by reference to a new assertion that the individuals who signed the letters of indemnity on which the claimants' claims depend lacked authority to execute those documents. That is the principal issue that the defendant seeks to advance by way of amendment. Since it is accepted that the claimants are entitled to judgment if the application to amend fails, all parties considered, and I agree, that the application to amend should be considered before the summary judgment applications.

Primary Facts

3. It is at this point that I would normally set out the factual background to the level necessary to understand the applications and this judgment. This is not necessary in this case however because I set out the background in my judgment in these proceedings delivered on 22 December 2020 bearing the neutral citation number [2020] EWHC 3689 (Comm) at paragraphs 13 to 15 in relation to the OCM claim and at paragraphs 21 to 23 in relation to the V8 claim. The facts relevant to the NOC claim are set out in my

judgment of 13 October 2020 bearing the neutral citation number [2020] EWHC 2820 (Comm) at paragraphs 3 to 8. Since those judgments were delivered there have been some changes to matters of detail but not in ways that affect materially the applications I have to determine at this hearing. In those circumstances, I incorporate by reference into this judgment the summary of primary facts set out in the earlier judgments to which I referred a moment ago.

4. As is apparent from each of these summaries, each claimant carrier agreed to release a hydrocarbon cargo without sight of the original bills of lading relevant to that cargo against a letter of indemnity ("LOI") provided by the defendant to each respective claimant. In each case the holders of the original bills made claims for wrongful delivery against the claimants and in turn the claimants intimated claims against the defendant under the respective LOIs. In each case, the defendant failed to comply with the terms of the LOI. Proceedings having been commenced by the claimants against defendants on the LOIs, the defendant filed defences in each claim. It did so when represented by experienced specialist maritime solicitors.

5. It is necessary that I set out what was initially pleaded by the defendant in relation to each of these cases because each claimant contends, and it is not in dispute, that the proposed amendment involves not merely asserting a positive case that has not before been pleaded but also involves the withdrawal of widespread admissions both express and implied by the defendant as to its liability to each of the claimants under the LOIs.

The Defendant's Currently Pleaded Cases

The OCM claim

6. Paragraphs 1 to 8 of the particulars of claim set out all the relevant primary facts. Paragraph 1 pleads the time charter by the first to the second claimant. Paragraph 2 pleads the voyage charter by the second claimant to the defendant. Paragraph 3 pleads the agreement contained within clause 15 of the voyage charterparty that the owners would discharge against the letter of indemnity in approved form where original bills of lading were not available. Paragraph 4 pleads various variations to the voyage charterparty. Paragraphs 5 to 6 plead the loading of the cargo and subsequent

instructions to the vessel. Paragraph 7 pleads that the defendant ordered the vessel to proceed and discharge at Fujairah and at paragraph 8 it is pleaded that:

> "On 9th June 2020, Defendants provided a Letter of Indemnity addressed to 'The owners of then MT Torm Hardrada c/o Torm AS' ('the 9th June LOI'). The 9th June LOI, to which Claimants will refer as may be necessary for its full terms and effect, contained the following express provisions:
>
> ' *... we, Gulf Petrochem FZC, hereby request you to deliver the said cargo to Vitol Bahrain EC, or to such party as you believe to be or represent Vitol Bahrain EC, or to be acting on behalf of Vitol Bahrain EC, at Fujairah, UAE without production of the original bill of lading.*
>
> *In consideration of your complying with our above request we hereby agree as follows:*
>
> *(1) To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.*
>
> *(2) In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.*
>
> *(3) If, in connection with the delivery of the cargo as aforesaid, the ship or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened [...] to provide on demand such bail or other security as may be required to prevent such arrest or detention [...] And to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention*

or threatened arrest of detention [...] whether or not such arrest or detention or threatened arrest or detention [...] may be justified.

...

(7) This indemnity shall be governed by and construed in accordance with English Law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England ...'"

By paragraph 1 of its defence, the defendant pleaded that: "*The defendant admits paragraphs 1 to 8 of the particulars of claim."* At paragraph 11 of the particulars of claim, the claimant pleads that it discharged in accordance with the defendant's instruction in reliance upon the LOI. The defendant admits that to be so in paragraph 4 of the defence.

7. In fact the original bills of lading were held by a trade finance house called Natixis France and at paragraph 12 of the particulars of claim the claimant pleads:

"**E. The Natixis claim**.

12. By an email dated 11th August 2020 from Natixis (France) ('Natixis') to the Claimants:

(1) Natixis, as consignee and alleged holders of the original Bills, demanded delivery up of the Cargo from the Claimants, alternatively damages for conversion based on the value of the Cargo at US$11,099,611 ('the Natixis claim'); and

(2) Natixis threatened to arrest and detain the Vessel in the event that the Claimants fail to pay the foregoing demand."

That allegation too is admitted at paragraph 4 of the original defence.

8. At paragraph 13 of the particulars of claim the claimant pleads:

"**F. The Defendant's Obligations**.

13. In the premises:

(1) Any liability which the Claimants or either of them may bear to Natixis in respect of or in connection with the Natixis Claim is a liability sustained by reason of the Claimants' delivery of the Cargo in accordance with the Defendant's request for the purposes of clause 1 of 9th June LOI and/or clause (i) of the Deemed LOI, and accordingly the Defendant is obliged to indemnify and hold harmless the Claimants and each of them against the said liability pursuant to the 9th June LOI, and/or the Deemed LOI;

(2) In the event of any proceedings being commenced by Natixis in connection with the Natixis Claim against the Claimants or either of them, the Defendant is obliged to provide the Claimants and each of them on demand with sufficient funds to defend the same pursuant to the 9th June LOI, and/or the Deemed LOI; and/or

(3) The Defendant is obliged pursuant to the 9th June LOI and/or the Deemed LOI to provide to Natixis such bail or other security for the Natixis Claim as may be required to prevent the arrest or detention of the Vessel or other ship or property in the same or associated ownership, management or control, and to indemnify the Claimants and each of them against any liability, loss, damage or expense caused by the arrest or detention or threatened arrest or detention ..."

At paragraph 5 of the defence, the defendant (a) denies the express LOI was addressed to the second claimant and further denies the existence of the deemed LOI but neither of these points arise on the present application since it is accepted for present purposes that the LOI on which this claim is brought applies to the first claimant; (b) asserts that no injunction should be granted because it was and is impossible for the defendant to comply with such an order; but (c) otherwise admits paragraph 13 of the particulars of claim.

9. On 22 July 2020 the defendant amended the defence to add a counterclaim relating to some proceedings commenced in India. Those proceedings are principally brought against the directors and shareholders of the defendant but name the defendant as a party as well. The claimants contend that the defendant was added as a requirement of Indian procedural law, India being the jurisdiction where the claim to which the counterclaim relates has been commenced, and that no relief is claimed as against the defendant in the Indian proceedings. Nonetheless it is alleged by the defendant in the counterclaim that the Indian proceedings have been commenced in breach of a London arbitration agreement contained in the voyage charterparty. This dispute is immaterial for present purposes other than to note that the voyage charterparty contained a London arbitration provision and is governed by agreement between the parties by English law.

10. Both the original defence and the defence and counterclaim contain statements of truth. The statement of truth on the original defence was signed by a partner in Mills & Co, the specialist maritime law firm then acting for the defendant.

11. The defendant changed solicitors on 22 March 2021 and its counsel on 11 April 2021. The statement of truth in respect of the counterclaim was signed by a senior associate employed by the defendant's replacement solicitors, Messrs Stephenson Harwood. The first mention of an amendment to the defence came in a letter from Stephenson Harwood to the claimants' solicitors dated 7 May 2021, where it was said that:

> "22. Further still, our Client denies that the Letter of Indemnity was or is legally binding because its signatory, Avanish Sharma, did not have the authority of our Client to enter into contracts of this kind in the absence of a specific mandate to do so.
>
> 23 In this regard, our Client seeks to amend its defence to address the points in paragraphs 21 and 22 above. Please find attached a draft Defence & Counterclaim with our Client's proposed amendments. The amendments have arisen in the following circumstances:
>
> 23.1 As you are aware, the Defence in the English Proceedings was settled by another firm.

23.2 Our Client has recently changed its legal representation, both solicitors and counsel ..."

The letter added at paragraph 30 that:

"Following the change of solicitors and counsel, we have now received instructions from our Client as to a number of points that were missing from our Client's Defence."

In part C of its application for permission to amend it was stated on behalf of the defendant by a partner in the defendant's replacement solicitors that:

" ... the Defendant changed its solicitors on 22 March 2021 and its counsel on or around 11 April 2021 for these proceedings. The Defendant's new legal team identified a number of points that were missing from its Defence as filed on 22 December 2020.

These missing points are crucial to the Defendant's factual and legal position in these proceedings ...

The amendments to the Defendant's Defence have a real prospect of success because they are primarily factual amendments.

The amendments to the Defendant's Defence are not introduced at a late stage, given that they have been proposed before the Case Management Conference has been fixed for these proceedings, and well before the Hearing on the Claimants' summary judgment application, which has been fixed for 16 July 2021."

The NOC Swiss claim

12. The pattern of allegations made by the claimant and the response of the defendant was similar to that in the OCM claim. In particular at paragraph 4 of the defence the defendant pleaded:

> "It is admitted that the LOI is engaged, and it is admitted that the ... Defendant has not provided security. The ... Defendant is unable to provide the security demanded."

The application to amend in that case was issued on 15 July 2021 and the evidence set out in paragraph C of the application notice was in similar terms to that in the OCM claim. The draft amended defence seeks to qualify this unqualified admission by (a) denying that the signatory of the LOI had authority to sign the LOI on behalf of the defendant, and (b) withdrawing the admission that the LOI was engaged by reference to the alleged lack of authority of its signatory. The NOC Swiss LOI was purportedly signed on behalf of the defendant by Mr Avanish Sharma, who was the same person who had purportedly signed the OCM LOI on behalf of the defendant

The V8 claim

13. The primary facts alleged are all admitted in the original defence. The circumstances leading to the issue of the LOI are pleaded in paragraph 11 of the particulars of claim. The terms of the LOI and that it was signed and stamped on behalf of the defendant are pleaded at paragraph 12 of the particulars of claim and at paragraphs 13 to 15 of the particulars of claim the claimant pleads that it accepted the LOI by its conduct in effecting delivery of the relevant cargo in accordance with the defendant's instructions and the terms of the LOI and that by so delivering the defendant's obligations under the LOI were engaged. Each of these allegations is unequivocally admitted by the defendant in paragraph 5 of its original defence. The V8 LOI was apparently signed on behalf of the defendant and is stamped with the defendant's stamp. But the signatory is not identified by name by the signature and the signature itself is illegible.

14. The V8 application to amend the defence was issued on 30 July 2021 and the evidence in Part C of the form is materially similar to that in the application notices in the other claims. The draft amended defence seeks to withdraw the unqualified admissions made of paragraphs 10 to 15 of the particulars of claim by seeking to assert that the LOI concerned was entered into without authority - see paragraph 5BB of the draft amendment. On the basis of that assertion, paragraph 12 of the particulars of claim would be denied by amendment other than to the extent of admitting the document on which

the claimant relies was issued and paragraphs 14 to 15 of the particulars of claim again would be denied as would the allegation that the defendant was under an obligation to provide the security the subject of the claim.

Applicable Principles

15. In summary:

a. the applications to amend are all made under CPR Rule 17.1(2)(b) and thus require the permission of the court;

b. in deciding whether to give permission the court must apply the summary judgment test and give permission only where the proposed amendment has a realistic prospect of success - see SPI North Limited v Swiss Post International (UK) Limited [2019] EWHC 2004 (Ch) *per* Andrew Hochhauser QC at paragraph 5;

c. a defence with a real prospect of success is one which is more than merely fanciful; is one that carries some degree of conviction and is one that is more than merely arguable;

d. the applicable summary judgment principles are those approved by the Court of Appeal in TfL Management Services Ltd v Lloyds Bank Plc [2013] EWCA (Civ) 1415 and include:

i. in reaching a conclusion the court must not conduct a mini trial;

ii. the obligation not to conduct a mini trial does not mean that the court must accept at face value and without analysis everything that a defendant says;

iii. in arriving at a conclusion the court must take into account not only the evidence before it but the evidence that can reasonably be expected to be available at trial; and

iv. short points of law can and should be resolved but difficult points of law, particularly those in developing areas, should be left for trial so that they can be decided by reference to actual as opposed to assumed facts;

e. permission to amend will be refused where the defence sought to be raised is implausible or not supported by contemporaneous documentation - see Collier v P & MJ Wright (Holdings) Ltd [2008] 1 WLR 643 per Arden LJ (as she then was) at paragraph 21) - or which is speculative, surmise or invention - see Clarke v Marlborough Fine Art Ltd [2002] 1 WLR 1731;

f. since the defendant seeks to withdraw admissions, it requires the permission of the court to do so - see CPR Rule 14.1(5);

g. in deciding whether in the exercise of discretion a party should be permitted to withdraw an admission the court will consider all the circumstances of the case - see Sowerby v Charlton [2006] 1 WLR 568 at paragraph 35 - which circumstances include:

" ... (a) the reasons and justification for the application which must be made in good faith;

(b) the balance of prejudice to the parties;

(c) whether any party has been the author of any prejudice they may suffer;

(d) the prospects of success of any issue arising from the withdrawal of an admission;

(e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

… The nearer any application is to a final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing. … Above

all, the exercise of any discretion will always depend on the facts of the particular case before the court. The words 'will consider all the circumstances of the case have particular resonance in this context."

16. As will be apparent from what I have said so far, the amendment for which permission is sought that is material for present purposes is that relating to authority. As to that:

a. Whether the signatory of the LOIs had actual authority to do so is at least realistically arguably governed by the law of the UAE, being the law that, at least realistically arguably, governs the relationship between the defendant and Mr Sharma in the NOC and OCM claims or the unknown signatory in the V8 claim - see in this regard Bowstead & Reynolds on Agency 22nd Edition at paragraph 12-015;

b. The claimants contend, but the defendant disputes, that whether the signatories had apparent authority in the circumstances of the case is a question governed by English law as the law governing the LOI and for that matter the charterparties. I return to that issue in detail later in this judgment to the extent it is necessary to do so;

c. In relation to apparent authority, on the basis that English law applies to the determination of that issue, it is common ground that the question in each case is whether the defendant has as against the claimant cloaked the signor with apparent or ostensible authority by

> " ... a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract ... The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's

> business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into ...
>
> The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business"

- See Freeman & Lockyer v. Buckhurst Park Properties Ltd [1964] 2 QB 480 *per* Diplock LJ as he then was at 503-505;

d. Even if wrong in their cases concerning actual, apparent or ostensible authority, the claimants maintain that the defendant ratified the LOIs either before the commencement of proceedings by seeking or obtaining and accepting delivery of the cargos by tendering the LOIs. It is common ground that whether there has been ratification is a question governed by English law - see paragraph 47 of Mr Shirazi skeleton argument.

e. In relation to ratification, the claimants contend and I accept that in English law, ratification will be implied where a principal receives property with knowledge of the circumstance of a contract under which it has been received - see most pertinently for present purposes Cornwal v Wilson [1750] 27 ER 1173, where in essence a foreign based agent purchased hemp and shipped it to his principal in London having purchased it at a price in excess of his authority. The Lord Chancellor in that case held that the principal had been entitled to accept delivery only as agent for his agent by reason of the breach of mandate concerning price but in fact had chosen to accept the goods and deal with them as principal and therefore was bound by the arrangements between the principal and agent. Although the word "*ratification*" does not appear in the judgment, the underlying principle is clear enough from the judgment when read as

a whole. In this context, as long as the principal, here the defendant, knows what the agent, here the signor, has done, the principal is bound - see Ing Re (UK) Ltd v R & V Versicherung AG [2006] 2 All ER (Comm) 870 per Toulson J (as he then was) at paragraphs 153 to 155. It is not asserted in the evidence that the defendant or anyone required to know was not aware of all the material facts. The only asserted lack of knowledge is that of Mr Sutton. However his knowledge or lack of it is immaterial for these present purposes since he was not in office at the time the LOIs were presented and delivery obtained by the defendant on the basis of the LOIs.

The Authority Issues

17. Given the difference between the circumstances surrounding the signing of the V8 LOI and those surrounding the signatories of the NOC and OCM LOIs it is necessary to distinguish between them when considering the authority issues that arise.

Actual Authority

18. The defendant submits it has at least a realistically arguable case that the V8 LOI was signed by someone acting without actual authority. As I have said already, the document is signed but the signatory is not identified by name, nor is the signature sufficiently legible for the name of the signatory to be identified from it. The defendant has not identified who it alleges to be the signatory in its evidence or explained why it has not done so. The V8 LOI has been stamped with the defendant's stamp, as I said earlier. As I have also said already, it is for a party applying for permission to amend a pleading to show that it has a realistically arguable case as to the point it seeks to raise by way of amendment. Although it is necessary to distinguish between the NOC and OCM LOIs on the one hand and the V8 LOI on the other, I am satisfied that the defendant has failed to show it has a realistically arguable case that any of the LOIs was signed (or tendered to the claimants) by someone without actual authority to do so.

19. The defendant maintains that it has shown at least a realistically arguable case that the only persons with actual authority to sign the LOI were the defendant's directors at the time. In so doing, it relies on the terms of the defendant's Memorandum of Association.

I reject that submission because (i) it is based on a misunderstanding as to effect of the defendant's Memorandum, (ii) it ignores the defendant's Articles of Association and (iii) is inherently implausible in any event. It is inherently implausible because at the time when the LOIs were executed the defendant was a substantial trading company as is apparent not least from the transactions the subject of these claims. It is inherently implausible that the internal arrangements within such a company would require all contracts of whatever nature to be signed by one of its directors. There is no evidence that such were the arrangements at the time the LOIs were signed and tendered on behalf of the defendant. The directors of the defendant at the time (and at all material times) were Messrs. Sudhir, Manan and Prerit Goel (collectively "the Goels"). They continue to be the directors of the defendant notwithstanding Mr Sutton's appointment as Global Restructuring Officer. Mr Sutton's evidence has consistently been that the Goels continue in office to assist him in restructuring the defendant. There is no evidence that this is no longer so or that Mr Sutton is not in contact with them or that they were approached to give evidence but had refused to do so. In those circumstances, the absence of any evidence from any of the Goels (or indeed anyone who was employed by the defendant in a senior managerial role at the relevant time) to the effect that no one other than one of the directors had authority to sign the LOIs (or authorise delivery of them to the claimants) is a startling omission. If there was a structure within the company under which authority was conferred on specific employees for specific purposes, they or one of them were the persons or person to give that explanation in evidence. That has not been done either.

20. In the absence of such evidence, the assertion of an absence of actual authority cannot pass the summary judgment test unless it is at least realistically arguable the effect of the Memorandum or Articles of Association of the defendant is such that only the directors have authority to sign contracts on behalf of the company and, critically, that such powers could not be conferred on or delegated to others. In my judgment, that is not even realistically arguably the effect of the Memorandum or Articles of Association. My reasons for reaching that conclusion are as follows.

21. Insofar as is material, the Memorandum of Association identify the shareholders in the defendant at Article 7 The Memorandum then continues:

"**Article 8 - Directors**

The names of each person who are to serve as member of the board of directors of the company are as follows:

1. Sudhir Goel (appointed as chairman of the company)

2. Prerit Goel.

3. Manan Goel.

Mr Prerit Goel and Mr Manan Goel are designated as joint managing directors of the company and Mr Sudhir Goel in addition to chairman is also designated as secretary of the company ...

Article 10

1. Mr Sudhir Goel authorised singly while Mr Manan Goel and Mr Prerit Goel jointly authorised for opening and closing bank accounts on behalf of the company and designating the authorised signatories of such accounts from time to time.

2. Mr Sudhir Goel, Mr Manan Goel and Mr Prerit Goel will singly exercise the following powers and do all the below acts on behalf of the Company which are necessary for the management of the Company and the fulfilment of the Company's objects ...

(c) Signing (or certifying) of all papers and documents of the Company (including but not limited to, all contract, agreement, deeds, notices, undertaking, promissory notes, letters, and any other documents), whether before notaries, banks, official and non-official department or otherwise ..."

22. Turning to the Articles of Association, Article 13 provides as follows:

"**Article 13 - Contracts**.

(A) Any contract may be made by the company by writing (1) under its seal together with the signature of any director of the company or, (2), with the signature of any director and expressed in whatever form of words to be executed by the company. Any contract may be made by the company by writing on its behalf by any person acting under the authority of the company whether such authority be expressed or implied. [Emphasis supplied]

(B) Any contract which purports to be made by or on behalf of the company at a time when it has not been duly formed will have effect as one made with the person purporting to act for the company or its agent and he is personally liable on the contract accordingly ..."

23. The Memorandum of Association does not either expressly or impliedly state that only one of the directors can exercise the powers referred to in Article 10(c) to the exclusion of any other person. In my judgment, the purpose of Article 10 was to establish what could be done by one director acting alone and which directors were required to act together for particular purposes. The Memorandum cannot be read separately from the Articles and Article 13(a) expressly provides that any contract may be made by any person acting under the authority of the company. Reading Article 13(a) of the Articles of Association, together with the Memorandum of Association, renders the defendant's construction of Article 10(c) of the memorandum unarguable.

24. In any event, there is no reason why Article 13(a) of the Articles of Association should not take effect in accordance with its terms. Not merely is it obvious on the face of this material that it was open to the defendant to authorise any person to enter into contracts on behalf of the company but that is the evidence of the defendant's UAE expert Mr Al Zarouni. He accepts in paragraphs 27 and 41 of his opinion that it was open to the defendant to delegate or assign powers to employees to execute contracts on behalf of the defendant. This concession, coupled with the terms of the Memorandum and Articles of Association, mean the defendant's case concerning lack of actual authority cannot succeed in the absence of evidence stating that no authority was conferred on anyone for the purposes of executing the letters of indemnity in the case of V8 or on Mr Sharma in relation to the other letters of indemnity. As I have said, that evidence, if correct, could have been given by one or more of the directors or for that matter a senior

manager employed by the defendant at the time when the letters of indemnity were executed. There is no such evidence and no explanation as to why such evidence has not been provided.

25. In relation to V8, the defendant cannot succeed unless either it identifies the signatory of the V8 letter of indemnity and evidence is given by at least one of the Goels or a senior manager with the requisite knowledge that the signatory so identified did not have actual authority to sign the document or, if the signatory could not be identified, that no one other than the directors were authorised to sign letters of indemnity. There is no such evidence.

26. The only evidence in support of the applications comes from Mr Sutton. He was not in post when the letters of indemnity were issued. His evidence, at paragraphs 6 to 9, is in these terms:

> "6. I understand that the question of actual authority to enter into the respective Letters of Indemnity ('**LOI**') raised in the draft Amended Defences is a matter of UAE law. I refer the Court to the relevant paragraphs on this issue in the expert report of Mr Ismael Al Zarouni, which was submitted by the Defendant.
>
> 7. From a practical perspective, I can see from the LOI issued by the Defendant to (i) *'the Owners of MT Torm Hardrada*' and (ii) NOC Swiss LLC that Mr Avanish Sharma was *'The Requestor'* of the respective LOIs. I note that the LOI issued by the Defendant to V8 Pool Inc does not identify *'The Requestor'*.
>
> 8. I first became aware that Mr Sharma was the signatory of the OCM Torm and NOC Swiss LOIs, and of the unnamed signatory of the V8 LOI, when these were brought to my attention by Stephenson Harwood LLP (the Defendant's current solicitors in these claims) in or around March 2021. It was at that point in time when the Defendant and Stephenson Harwood properly investigated whether the signatories of these LOIs had authority to do so under UAE law.

> 9. Having seen the Defendant's Articles of Association, I note that Mr Sharma would not qualify as an authorised signatory of the Defendant. This is because he is not named as a person capable of 'Signing (or certifying) ... all contract (sic), agreements, deeds, notices, undertaking, promissory notes, letters, and other documents' on behalf of the Defendant under Article 10(2)(c) of the Defendant's Articles of Association. Article 10(2)(c) expressly states that only Mr Sudhir Goyel, Mr Manan Goel and Mr Prerit Goel are 'singly' authorised to exercise this power ..."

It is necessary to note that Mr Sutton is wrong when he refers to the relevant document as being the Articles of Association because he is quoting there from the Memorandum of Association but as I have said the Memorandum of Association cannot be read independently of the Articles of Association and Mr Sutton makes no mention of the Articles in his evidence.

27. Mr Sutton's evidence is unsatisfactory. It does not refer to the Articles of Association at all as I have said, notwithstanding the terms in which Article 13 is expressed. He does not suggest that the terms of the Articles were not known to him and it is inherently implausible that someone in the position of Mr Sutton would be aware of the memorandum of Association but not its Articles of Association. He does not explain how it is that he could only have become aware that Mr Sharma was the signatory of the OCM and NOC LOIs as he alleges in paragraph 8, when Mr Sharma's name appears in the clearest terms in typescript on these documents and those documents had formed the basis of the OCM and NOC claims from the outset.

28. More particularly, in paragraph 9 he accords to Article 10 the meaning that only one of the Goels could sign a contract on behalf of the company where that is not the effect of the Memorandum. Aside from the fact that Mr Sutton's opinion as to the meaning of the document is irrelevant, what the evidence shows is that an assertion that the signatory does not have actual authority is a legal theory based on the documents Mr Sutton refers to, namely the Memorandum of Association alone. For the reasons I have explained, that is a legal theory that is mistaken and in my judgment unarguable. Further it was this point in Mr Sutton's evidence that an explanation of why no evidence could be offered from the Goels or a senior manager with the requisite knowledge concerning the

authority of the signatories of the LOIs. No such explanation has been provided either there or anywhere else. The evidence does not even state that the V8 LOI has not been signed by one of the Goels.

29. In relation specifically to the V8 LOI, the defendants collectively adduced evidence from a UAE lawyer, Mr Heloo, who is a partner in a Dubai based law firm. Mr Al Zarouni was instructed on behalf of the defendant to respond to Mr Heloo's opinion - see paragraph 4 of Mr Al Zarouni's opinion. As I have said, the signatory has not been identified but in addition to the signature there appears also the stamp of the defendant. The impact of the presence of the stamp was considered by Mr Heloo at paragraph 4.20 to 4.25 of his opinion, where he states:

> "4.20. The Dubai Court of Cassation in Case No. 169 of 2011 and Case No. 653 of 2016 confirms the concept of implied authority of the company employees when the counterparty is acting in good faith.
>
> 4.21. In 2014, the Dubai Court of Cassation in Case No. 547 of 2014 held that: *'it is well established under the judgments of the present court that in case that a specific company name is stated in the letterhead and the introduction of a specific contract where someone affixes a signature at the footer or at the end thereto, it shall constitute a sufficient legal proof of evidence based on the fact the signatory thereon was acting on behalf - and to account of - the company. It is then, the effects of that contract, being rights or liabilities, shall be binding to the company as the delegated party - in that case - the representative on behalf of the delegator'*.
>
> 4.22. This case establishes a test whereby when a document that is sent on a company's letterhead and the signature is included a court will find that, the person signing had authority. This is also supported by Dubai Court of Cassation Case No. 653 of 2016.
>
> 4.23 It should be noted, however, that this case is specifically in relation to the signing of an arbitration agreement, which as mentioned above in paragraph 3.1 has a higher threshold than authority to act in general. This case is mentioned to highlight the distinction for what is required to specifically enter into an arbitration

agreement versus implied actual authority under the UAE law in general. However, even if this more stringent test were to be applied, the fact that the LOI was issued on the Defendant's letterhead would cause the UAE Courts to determine that the signatory was *'acting on behalf - and to the account of - the company'*.

4.24.The Dubai Court of Cassation in Case No. 386 of 2015 stated:

'it should be stated that affixing the company seal to the agreement shall constitute an evidence that the signatory thereon had the sufficient power and authority to perform such act ... based on the above mentioned legal rules, that signatory shall be deemed of the capacity to make the arbitration agreement, accordingly, the arbitration clause shall be rendered valid as provided in that contract with its due legal effects against both litigants.'

4.25 This case is mentioned because despite the reference to a representative holding a specific authority to arbitrate in Article 4.1 of the Arbitration Law, this has not affected the UAE courts' interpretation of how authority is recognised under UAE law.

4.26 Initially UAE courts upheld the doctrine of implied authority on the basis of general principles of law such as good faith ... The courts have now gone a step further from Article 198 and have upheld that a party cannot challenge the validity of the arbitration agreement if alleged defect to the validity was attributable to the parties' own action.

4.27 It can therefore be said generally that, more recently, the UAE Courts have continued to adopt and expand their recognition of implied authority under UAE law."

30. This point is not addressed by Mr Al Zarouni in his opinion. He mentions only NOC and OCM LOIs in paragraph 53 of his opinion. Even in relation to Mr Sharma his opinion assumes as true the absence of any delegation of authority to any employee, for, as he puts it in paragraph 48 of his report:

" ... in the absence of any document confirming the authority of the signatory of the subject letters, it appears that the Letters of Indemnity were not signed by a manager or any authorised signatory ..."

However, as I have explained, the defendant has not adduced any evidence to the effect that either Mr Sharma or the unidentified signatory of the V8 LOI did not have such authority.

31. I remind myself that in deciding whether a realistic case has been made out I must take account not only of the evidence available at a hearing such as this but the evidence that can reasonably be expected to be available for trial. However, the points I have made concerning the absence of evidence are fundamental and the absence is absolute and unexplained. There is no evidence that suggests these omissions can or will be corrected at trial nor any evidence as to why the evidence could not be adduced now as opposed to some later stage.

32. In those circumstances, I conclude that the defendant has not shown that it has a realistically arguable case that (a) Mr Sharma did not have actual authority to sign the OCM and NOC LOIs or (b) that whoever signed the V8 LOI did not have actual authority to do so.

Ratificiation

33. In the light of these conclusions strictly speaking it is not necessary to consider apparent authority other than to the extent that I have done so by reference to the absence of any challenge to the legal opinion advanced on behalf of the claimants. There is no need to consider ratification either. However, Mr Karia QC argued very strongly that there was simply no answer to the defendant's case that the defendant had ratified the LOIs even if, contrary to the claimants' case, the signatories of the LOIs had neither actual or apparent authority sign them. Mr Karia argued that in those circumstances ratification should be considered ahead of his case on apparent authority because the ratification issue was so strongly one to be resolved in the claimants' favour. In those circumstances I have considered whether or not I should deal with the ratification issue even though I have reached the conclusions I have concerning actual authority. In light of the

supposed strength of these arguments I propose to address, albeit briefly, the ratification issues even though strictly speaking it is unnecessary to do so. It necessarily follows that I do so on the counterfactual basis that the defendant has demonstrated a realistically arguable case that the signatories lacked both actual and ostensible or apparent authority to sign the LOIs. As I have said earlier, it is common ground that English law applies to the ratification issues.

34. The claimants' primary case on ratification is that the defendant ratified by seeking and obtaining delivery on the basis of the LOIs. I accept Mr Karia's submission on this issue. The only basis on which it might be suggested that the defendant had a realistically arguable answer to this would be if there was evidence that the defendant sought and obtained delivery without full knowledge of all the material facts at the time when delivery was sought and obtained either directly to the defendant or to its order to a third party. However, that is not alleged. The only alleged lack of knowledge is by Mr Sutton and the only facts that he alleges he was unaware of was that (a) the OCM and NOC LOIs had been signed by Mr Sharma and (b) Mr Sharma did not allegedly have authority sign the LOIs. However, that is entirely immaterial to the issue I am now considering since Mr Sutton had not been appointed as the defendant's global restructuring officer at the time when the LOIs were executed and delivery of the goods obtained.

35. This issue is not addressed at all in Mr Shirazi's skeleton argument as far as I can see. As I recall it he did not address it either in his initial oral arguments. In his reply submissions Mr Shirazi suggested that the principal authority relied on by Mr Karia, Cornwal v Wilson (*ibid*.) was distinguishable on its facts. In my judgment, that is not to the point. It is the principle that is relevant and, as Mr Karia submits, the defendant cannot rely upon the LOIs for the purpose of obtaining delivery or delivery to its order but then be permitted to disavow the LOI (and the defendants obligations thereunder) on the basis that it was signed by someone without authority to do so. Such an outcome would be at best commercially absurd. Further, as Steyn LJ observed in First Energy UK Ltd v Hungarian International Bank Ltd [1993] 2 Lloyd's Rep 194 at 196:

> "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding

> force of our law of contract. It affords no license to a Judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness."

To permit the defendant to take the benefit of delivery of the cargos and then to avoid the effects of the LOI on the basis that they were signed by someone without authority to do so runs counter to the reasonable expectations of honest people. It also undermines the basis on which world shipping and in particular hydrocarbon shipping operates.

36. In light of these conclusions it is not necessary that I consider whether Mr Sutton ratified the letters of indemnity in the various ways identified by the claimants. However, in summary, I reject as unarguable the suggestion that Mr Sutton could not ratify the LOI because he was not in post at the time when the LOIs were signed. Mr Sutton is not the principal. The principal is the defendant and Mr Sutton is its agent. The defendant had capacity to enter into the LOIs at the time they were signed and tendered to the claimants. In those circumstances, that Mr Sutton was not in post at that time is entirely irrelevant if otherwise he ratified the LOIs. Equally, Mr Sutton's lack of knowledge of Mr Sharma's alleged lack of authority at the time he allegedly ratified the LOIs is immaterial as well - see Ing Re UK Ltd v R and V Versichung AG (*ibid.*) per Toulson J at paragraphs 153 and 155, relying in the latter to the dictum of Steyn LJ cited earlier; Brown v Innovatorone Plc [2012] EWHC 1312 (Comm) per Hamblen J (as he then was) at paragraph 858 and Bowstead on Agency, (*ibid.*) at paragraph 2-068. That said, I consider it realistically arguable that referring to a letter of indemnity in a litigation context without qualification, without also relying on the letters of indemnity to found a claim, is not ratification. However, it is not necessary that I comment further on this point in light of the conclusions I have so far reached. In summary, the defendant has failed to show a realistically arguable defence based on lack of authority or a realistically arguable basis for contending that the defendant did not ratify the LOI's by relying on them to obtain delivery of the cargoes from the claimants and on that basis I refuse permission to amend so to allege. It would be entirely wrong to permit the defendant to withdraw his admissions irrelevant to these issues in those circumstances.

Article 1002 of the UAE Federal Civil Code

37. Turning now to the application to amend the defences so as to rely on Article 1002 of the UAE Federal Civil Code, the essence of this point is that if payment was to be made to the claimants of any part of the sums they claim in these proceedings that would be a breach of Article 1002 and expose Mr Sutton to criminal liability under Article 404 of UAE Federal Penal Code for misuse of funds held on trust. This application is not supported by expert evidence and I agree with Mr Caplin that that is of itself fatal to the application since it was for the defendant to show that it had a realistic defence based on this proposition, particularly having regard to the fact that a similar argument failed comprehensively for the reasons set out in my 22 December 2020 judgment, from which there has been no appeal. Expert evidence was required in order to show why none of the reasons identified in that judgment apply to the reliance placed on Article 1002. The onus rests on the defendant to address this since it is it as the party applying for permission to amend to show that it has a realistically arguable case on the issue I am now considering. One issue that would have to be addressed is why, on the one hand, the claimant can apparently continue to trade and pay its current creditors whilst allegedly being insolvent whilst at the same time being prevented from paying the claimants on pain of prosecution and how and why in those circumstances paying current creditors is not as much of a breach of the provisions on which reliance is apparently placed as paying the claimants. No attempt has been made to address these issues. Applying the principles set out above, it would be wrong to permit the defendant to amend its defences by pleading reliance on Article 1002 in those circumstances.

The Summary Judgment Applications.

38. As I explained earlier, Mr Shirazi accepts that if the applications to amend failed then in principle all the claimants were entitled to judgment. I agree.

39. Two issues remain. Firstly whether NOC is entitled to recover the damages it claims at the hearing and whether OCM and V8 claims for a final injunction should be refused on the financial impossibility ground that failed when the application for interim orders was determined.

The NOC Money Claims

40. NOC made clear by its applications and evidence in support that it was seeking payment of sums US$6,062,431.80. NOC's evidence in support of the application is set out comprehensively in the fifth statement of Mr Strub. This evidence has not been challenged evidentially. Mr Shirazi addresses the issue at paragraph 69 and following of his skeleton submissions. He submits that there *"... is a real prospect that a court might conclude ..."* that the settlement that forms the basis of the money claims was not a reasonable settlement. It is clear that the onus of proving unreasonableness rests on the defendant - see OBS (Nominees) v Lend Lease Construction (Europe) Ltd [2017] EWHC 25 (TCC) per Stuart-Smith J (as he then was) at paragraph 1875. The judgment in that case was given following a trial and this of course is an application for summary judgment. That being so, it is for the defendant to show a realistically arguable basis for challenging NOC's entitlement to the sums claimed. In my judgment, the defendant has not come close to satisfying that requirement in the circumstances, particularly having regard to the two points Stuart-Smith J made at paragraph 187(i) and (ii) of his judgment in OBS. In principle, I am satisfied NOC is entitled to recover the sums claimed in respect of its settlement. In relation to any claim in respect of costs that have yet to be assessed, I consider provisionally that there should be judgment for the sum found due following an assessment but will hear counsel further on that point since it has not been the subject of argument at the hearing.

Final Mandatory Orders

41. The defendant relies on the same financial impossibility defence that it relied on when resisting the application for interim mandatory orders but with a further explanation contained in Mr Sutton's seventh witness statement. The general principles that apply are those identified in my judgments leading to the interim mandatory orders.

42. Mr Shirazi submits that the test that arises on this issue is different from that which applied to the interim applications and that for present purposes the defendant has only to show a realistically arguable case that it would be financially impossible for the defendant to pay the sums sought for it to be entitled to a trial on that issue. All relevant

claimants maintain that this is no more than an impermissible attempt to rerun the impossibility defence that failed on the interim application.

43. I accept Mr Shirazi's submission that for present purposes the defendant has only to show a realistically arguable case on the issue. However, applying the principles set out earlier, that does not mean that I should accept at face value and without analysis what Mr Sutton says on this issue either in his seventh or earlier witness statements. Whilst that is so in relation to all issues that arise on the summary judgment application, it is particularly the case in relation to an issue such as financial impossibility. I reiterate the principles that apply as summarised in paragraph 24, (a) to (c) and (e) to (f) of my 22 December 2020 judgment and in particular the principle summarised at (e)(iii) applies as much on an application for summary judgment as it did on an the applications for interim orders.

44. In my 22 December 2020 judgment, I set out at paragraphs 26 to 48 why the evidence filed down to the date of that judgment did not support the conclusion that the defendant had made out to the level required at the financial impossibility defence. The standout point is that the defendant continues to trade with the support of the limited group of "Lenders" as defined in Mr Sutton's letter of appointment and the restructuring which he is carrying out is being carried out for the benefit of those limited group of Lenders. Mr Sutton has never been able to explain how it can be appropriate for an ostensibly insolvent company to continue to trade while insolvent paying some creditors but not others as Mr Sutton apparently chooses, perhaps with the support, encouragement or sanction of the "Lenders" concerned.

45. Mr Sutton's most recent evidence on the financial position of the defendant is contained in his seventh statement. It is apparent from that, for example, that at least some of the defendant's assets are being sold to meet some creditors' claims - see paragraph 10.1. It is clear from paragraph 11, as it has been in the earlier evidence, that the defendant continues to incur and meet its current operating expenses. At paragraph 23, Mr Sutton implies that the defendant continues to meet the operating expenses of its oil storage terminal at the rate of about US$500,000 to US$600,000 per month while the maintaining that the defendant had no funds available to comply with the court orders made in these proceedings even on an instalment basis. The documents attached to

Mr Sutton's seventh statement do not disclose a realistically arguable basis for asserting financial impossibility because they are not a comprehensive statement of the defendant's assets, are not profit and loss accounts and appear to be at best a partial balance sheet statement based on cash holdings alone and outgoings for particular and limited snapshot periods. In these circumstances, I am not able to accept at face value the assertions made. Further, to the extent necessary, I do not accept that Mr Sutton has met the point concerning third party financing for the reasons set out in the fifth statement of Mr Houghton at paragraph 13(d) to (g).

The V8 Strike Out Application

46. Given the conclusions I have reached on the summary judgment application, the V8 strike-out application does not arise. Had it done so, I would have made the order sought for the same reasons that I made a similar order in Aramco Trading Fujairah FZE v Gulf Petrochem FZC [2021] EWHC 2650 (Comm).

Disposal

47. In the result, he applications for permission to amend the defences fail and the applications for summary judgment succeed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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