Neutral Citation Number: [2021] EWCA Civ 1829

Case No: A4/2021/0059

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Charles Hollander QC (sitting as a Deputy High Court Judge)
CL-2019-000645

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2021

Before :

LORD JUSTICE NEWEY
LORD JUSTICE DINGEMANS
(Vice-President of the Queen's Bench Division)
and
LADY JUSTICE WHIPPLE

- -

Between:

NORD NAPHTHA LIMITED	**Claimant/ Respondent**
- and -	
NEW STREAM TRADING AG	**Defendant/ Appellant**

- -
- -

Yash Kulkarni QC (instructed by **Fladgate LLP**) for the **Appellant**
Edward Levey QC (instructed by **Dentons UK** and **Middle East LLP**) for the **Respondent**

Hearing date : 17 November 2021

- -

Approved Judgment

Lady Justice Whipple:

Introduction

1. This is an appeal brought by New Stream Trading AG (the Appellant, "New Stream") against the decision of Mr Charles Hollander QC sitting as a deputy judge of the High Court (Business and Property Courts, Commercial Court) on 20 November 2020, when he granted summary judgment on a claim brought by Nord Naphtha Ltd (the Respondent, "Nord Naphtha") in relation to repayment of an advance paid by Nord Naphtha to New Stream under a contract dated 21 February 2019 (the "Contract")

2. The Contract was for 30,000 metric tonnes of 10PPM ultra-low sulphur diesel (the "Product"). The Contract provided for payment of an advance, calculated in the amount of US$16,059,600 representing 90% of the provisional value of the Product (the "Advance"). Nord Naphtha paid the Advance to New Stream on 22 February 2019.

3. New Stream intended to source the Product from the JSC Antipinsky Refinery (the "Refinery"). New Stream describes itself as the Refinery's marketing and sales agent. The Refinery issued a Comfort Letter dated 21 February 2019 to Nord Naphtha, referring to the Contract and offering certain guarantees and confirmations.

4. In the event, Nord Naphtha terminated the Contract for non-delivery. Nord Naphtha claimed repayment of the Advance from New Stream, who resisted repayment, contending that any liability to repay the Advance rested with the Refinery under the terms of the Comfort Letter.

5. Nord Naphtha issued proceedings and the matter came before the Court. Nord Naphtha's application for summary judgment succeeded and is the subject of this appeal. Permission to appeal was granted on the papers by Birss LJ, in relation to one only of the three grounds of appeal, namely that:

> "The Learned Judge erred in his approach to construction and in his construction of the Contract. This led to the Learned Judge failing properly to analyse the questions of construction and implication."

6. The two grounds of appeal on which permission was refused related to the Comfort Letter and to New Stream's assertion that it had in fact paid the bulk of the Advance to the Refinery. Although permission to argue those two grounds was refused, the points raised in them have some connection with the single ground on which permission was granted, at least on New Stream's case, so that aspects of those other two grounds were canvassed during the course of argument before this Court.

The Contract

7. The Contract is for the Product to be sourced from Russia. The delivery period is specified as 5 April 2019 to 25 April 2019, time being of the essence. The price was set by Clause 9, which required payment in US dollars by reference to a formula. Clause 9.3 provided for an advance payment "in accordance with clause 10.1 of this Contract".

8. Clause 10 is headed "Payment Terms". It provided, so far as relevant, that:

> "10.1 The Buyer or the Buyer's bank, acting on behalf of the Buyer, shall make advance payment in US Dollars, free of all charges via swift bank transfer to the Seller's nominated bank account, strictly not later than on 22.02.2019 against presentation by the Seller to the Buyer of the following documents (email copies acceptable):
>
> - Seller's advance invoice
>
> - Comfort Letter issued by the producing refinery in a format acceptable to the refiner
>
> - Draft of Commercial contract
>
> The advance invoice shall cover 90% of provisional value of the Product to be delivered under this Contract and shall be based on the Price calculated in accordance with clause 9.3 of this Contract."

9. It is to be noted that the second indent to this clause contains the only reference in the Contract to the Refinery.

10. It is further to be noted that clause 10 provided for the payment of interest by New Stream if there were delays, but interest was not to accrue if there were delays in deliveries for no fault reasons including force majeure events.

11. Clause 14 is headed Force Majeure. Clause 14.1 provided that neither party should be deemed to be in breach of contract or liable to the other "except for obligations to make payments under the Contract when due", to the extent that any failure, omission, delay or hindrance arose from any Force Majeure Event resulting from circumstances reasonably beyond the control of either party. Force Majeure Events were defined by reference to a non-exclusive list. Item (6) in the list related to hindrances or delays in delivery, and item (7) related to interference with supplies from any of New Stream's sources which interference was not reasonably within the control of the parties. By Clause 14.2 the party who became affected by a Force Majeure Event was required to give written notice of that to the other party. By clause 14.3, the time for delivery could be extended for a period, but either party was permitted to terminate the Contract on notice if delivery was delayed or prevented for more than thirty (30) consecutive days:

> "…In such case neither Party shall be responsible for further performance nor liable in any way for damages, penalties and other contractual and non-contractual remedies to each other, except in relation to obligations to make payments due under this Contract."

12. Clause 14.4 provided that in the event of a Force Majeure Event, New Stream was not required to purchase the Product from other suppliers to make good any shortfall in delivery.

13. Clause 14.5 is the provision in dispute in this appeal. It provided as follows:

> "Subject to any agreement between the parties in relation to deliveries after termination of Force Majeure Event or any variation of the Contract with regard to the delivery affected by Force Majeure Event, in case of termination of the Contract, nothing herein shall impair the obligations by

> the Seller to repay to the Buyer the amount of the advance payment or any Outstanding Advance Amount under this Contract in the event that the delivery of the Product is not made or only partially made due to Force Majeure Event."

14. Clause 18.1 provided that the Contract was governed by English law.

The Comfort Letter

15. The Refinery provided a "Comfort Letter" dated 21 February 2019 to Nord Naphtha. It is not clear precisely when Nord Naphtha saw that Comfort Letter but by the terms of Clause 10.1, recited above, that letter was required to be presented to the Buyer as a condition of the Advance falling due under the Contract.

16. Paragraph 1 of the Comfort Letter recorded that the Refinery had been informed that Nord Naphtha (defined in the Comfort Letter as the Buyer) and New Stream (defined in the Comfort Letter as Seller) had entered into the Contract, a copy of which had been provided to the Refinery, and that the delivery period for the Product was 5 April to 25 April 2019. Paragraph 2 recorded that the Buyer would prepay 90% of the provisional value of the Product not later than 22 February 2019, as an "Advance Amount".

17. By paragraph 4, the Refinery guaranteed that the Product would be shipped to the Seller for supply to the Buyer "according to the conditions of the Contract".

18. Paragraph 5 recorded this:

> "We hereby confirm, that in case the total value of the Product delivered during the Delivery Period is less than the Advance Amount received by the Seller, we shall arrange repayment to the Buyer of all outstanding advance/s payment (hereinafter "Outstanding Advance"), calculated as the difference between the amount of the Advance Amount/s received by the Seller for delivery of the Product specified in the clause 1 hereof, and the value of the Product actually shipped for further delivery to the Buyer minus the Advance Amount/s already returned to the Buyer."

19. By paragraph 7, the Refinery stated that its liability under that Comfort Letter was limited to the amount of the Outstanding Advance only and expired on 25 April 2019 or on delivery of the Product, whichever was earlier.

20. By paragraph 9, the Comfort Letter could be revoked by the Refinery "at our sole discretion with immediate effect" by giving notice to Nord Naphtha. That right of revocation existed in a number of specified circumstances including where delivery could not be effected due to "the circumstances which are beyond our or the Seller's control and without our or the Seller's fault".

21. By paragraph 12, the Comfort Letter was governed by the law of the Russian Federation.

22. By an amendment dated 18 April 2019, the period of validity of the Comfort Letter was extended to 15 May 2019 or delivery of the Product, whichever was earlier. The amendment recorded this at paragraph 2:

> "The letter expires at the close of our business day on 15.05.2019 or on delivery of the Product whatever occurs earlier (hereinafter "Expiry Date"). On the Expiry Date the Letter becomes accomplished, null and void and no claims arising out of or in connection herewith shall be accepted by us."

Facts

23. The Contract was concluded on 21 February 2019 and Nord Naphtha paid the Advance the next day.

24. On 17 April 2019, New Stream notified Nord Naphtha of a Force Majeure Event under the Contract, stating that the delivery of the Product was delayed due to 'operational and production issues' at the Refinery. At that stage it was envisaged that delivery would still take place but in a later delivery window said by New Stream to be "at the end of April or possibly beyond that". On 19 April, New Stream sent Nord Naphtha the amendment to the Comfort Letter extending its validity to 15 May 2019.

25. The Product was not delivered within the extended window. By letter dated 30 June 2020, Nord Naphtha terminated the Contract. Although Nord Naphtha did not initially accept that it had been properly notified of a Force Majeure Event pursuant to clause 14.2, it does now accept the notification. It is common ground that the termination was contractually valid pursuant to clause 14.3 of the Contract and in light of the Force Majeure Event.

26. Nord Naphtha sought repayment of the Advance from New Stream pursuant to the Contract, alternatively on grounds of unjust enrichment. New Stream denied that it was under any contractual obligation to repay the Advance, and further denied any unjust enrichment on its part because it had paid the Advance less a commission to the Refinery as advance payment for the Product.

The Judgment Below

27. In an *ex tempore* judgment of which the Court has been given an agreed note, no transcript being available due to a technical fault, the Deputy Judge set out the key provisions of the Contract. He observed that the "the contract was not well drafted and it is a mix of sophisticated commercial terms and other clauses which do not fit in".

28. The Deputy Judge noted New Stream's defence to the claim was based on the Comfort Letter. He noted that the Comfort Letter was referred to only once in the Contract at clause 10.1, that Nord Naphtha committed to paying the Advance before it saw the Comfort Letter, that Nord Naphtha had no say in the drafting of the Comfort Letter, that it appeared that any claim for repayment by Nord Naphtha would not have accrued before the expiry of the Refinery's obligations under the Comfort Letter, and that the Comfort Letter was revocable by its author in a number of circumstances. He held that:

> "The comfort letter was not drafted by the buyer, was not referred to in the main contract other than with regards to the advance payment, as a result the suggestion that rights and liabilities of the contract can be affected by the comfort letter is rejected."

29. The Deputy Judge went on to construe clause 14.5 of the Contract. He considered the judgment of Andrew Baker J in a different case, *Totsa Total Oil Trading SA v New Stream Trading AG* [2020] EWHC 855 (Comm), but concluded that Andrew Baker J had been dealing with "a different contract and a different question in a different context", so that *Totsa* did not assist him.

30. He concluded by saying:

> "The starting point is that it would be a very surprising result if a buyer has no ability to reclaim its prepayment from NST in any circumstances. One can only make sense of Clause 14.5 by reading into it an express obligation to repay. If that is wrong, a repayment obligation is so obvious that it fulfils the requirements for an implied term."

Approach

31. On this appeal, the principles of construction are not in dispute and can be summarised shortly. The Court must ascertain the objective meaning of the language chosen by the parties, looking to understand what a reasonable person would have understood the parties to mean, such person having the background knowledge which would reasonably have been available to the parties when they formed the Contract. The Court must consider the Contract as a whole. The approach is set out in this familiar passage from the judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

32. Interpretation is a unitary exercise, which involves an iterative process by which each suggested interpretation is checked against the provisions of the Contract and its commercial consequences are investigated. Once the language in dispute and the relevant parts of the Contract that provide its context have been read, it does not matter whether the more detailed analysis commences with the factual background and the implications of the rival constructions or a close examination of the relevant language in the contract, so long as the Court balances the indications given by each: see *Wood v Capita* at [12].

33. If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other. But in striking a balance between the indications given by the language and the implications of the competing constructions, the Court must consider the quality of the drafting of the clause, and it must also be alive to the possibility that one side may have agreed something which, with hindsight, did not serve his interest. Similarly, the Court must not lose sight of the possibility that a provision may be a negotiated compromise.

34. In this case which involves the sale and purchase of diesel, the parties can be assumed to have a level of commercial sophistication which matched their experience as traders operating in that market.

Submissions on appeal

35. However, the parties disagree on the outcome, applying that common approach. Mr Yash Kulkarni QC appeared for New Stream in this Court as he did below. He argued that the Judge adopted a 'back to front' approach to construing the Contract, starting from the premise that it would be surprising if the Contract did not contain a right to the return of the Advance in a force majeure situation and proceeding from that start point to construe the Contract to contain such a term, expressly or impliedly. This, he argues, was circular because it begged the very question to be answered, namely whether there was such a right under the Contract. He submits that the Judge should have started with a textual analysis of the language used in the Contract. Clause 14.5 did not set out any express right to repayment of the Advance (noting that the word "impair" in that clause suggests the preservation but not the creation of a right). In *Totsa*, Andrew Baker J had correctly held that a clause in identical terms did not create any right to repayment. There was no ambiguity in these words, and no scope for construing them to contain an express or an implied term, citing *Yoo Design Services Ltd v Iliv Realty Pte Ltd* [2021] EWCA Civ 560, per Carr LJ at [47]-[51]. To the extent that the Judge had sought to attribute meaning to the words "the obligations by the Seller to repay to the Buyer the amount of the advance payment…", the Judge was merely striving to avoid redundancy and thereby deploying the presumption against surplusage which presumption is recognised to be of little assistance when construing commercial contracts: see *Total Transport Corp v Arcadia Petroleum* [1998] 1 Lloyds Rep 351 and *Antigua Power Co Ltd v AG of Antigua and Barbuda* [2013] UKPC 23. There was a sound explanation for why the Contract did not contain an express right to return of the Advance, because the Comfort Letter catered for that eventuality and put the obligation on the Refinery if delivery failed because of force majeure event; this was the commercial bargain struck and the Court should not interfere.

36. Mr Edward Levey QC appeared in this Court, as below, for Nord Naphtha. He submitted that the case raises a short point of contractual interpretation, namely whether upon non-delivery of the Product and termination of the Contract due to force majeure, New Stream was entitled to keep the Advance. Clause 14.5 recognises the existence of a right to repayment of the Advance in force majeure circumstances. That is not to make a presumption against surplusage, but to give effect to the agreement (as per *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2008] 1 All ER (Comm) 451 at [26] and *Bindra v Chopra* [2008] EWHC 1715 (Ch) at [28]). The Judge was not in any sense adopting a 'back to front' approach by starting with common sense, noting the "unitary exercise" of construction described in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at [11]-[12]. The term is express, but alternatively, must be implied as both obvious and necessary. *Totsa* was irrelevant; anyway, it was not binding on the Judge or on this Court. The Comfort Letter did not provide any comfort at all, because it was revocable at will by the Refinery in the event of force majeure, and because in any event it had expired on 15 May 2019 which predated Nord Naphtha's termination of the Contract. In short, the Deputy Judge reached the right conclusion for the right reasons.

Totsa

37. Mr Kulkarni places some weight on the decision of Andrew Baker J in *Totsa* and it is appropriate to address *Totsa* at the outset. In that case, Totsa had purchased diesel from New Stream, that diesel was also intended to be sourced from the Refinery. Delivery

failed and Totsa sued New Stream for the return of its advance on the basis (amongst other things) that the contract had been terminated for force majeure. Force Majeure was addressed at clause 16 of Totsa's contract; clause 16.6 was in materially identical terms to clause 14.5 of the Contract in this appeal. But Totsa's contract also included clause 10.18, which does not find any equivalent in the present Contract. Clause 10.18 commenced with the words "Save for clause 16.6" and then provided a right to repayment of the advance in the event that delivery of the product did not take place "for any reason whatsoever". New Stream resisted the claim for repayment, arguing that clause 10.18 did not apply if there was a force majeure event within clause 16. Andrew Baker J rejected that argument, holding that clause 16.6 said explicitly that nothing in that clause was to impair the obligations of the seller to repay the buyer the amount of the advance payment in the event that delivery had not taken place as a result of a force majeure event, and that:

> "23. … that use of language does not itself create the obligation to repay in those circumstances, but begs the question of the source of that obligation. However, contractually, the source of that obligation is obvious, namely clause 10.18 of the contract, and I regard it as quite unrealistic to propose, as the argument effectively did, that whereas the parties had agreed by clause 10.18 their terms as to the obligation to repay the advance payment, that would be the one such obligation they did not have in mind by saying in clause 16.6 that clause 16.6 was not to impair such obligations."

38. Mr Kulkarni relies on *Totsa* in two ways. First, as a matter of construction, he says that Andrew Baker J's analysis of clause 16.6 is persuasive, and that we too should conclude that "that use of language" – ie, the identical wording we find in clause 14.5 of the Contract in this case - does not create the obligation to repay. He says that in *Totsa* the judge identified clause 10.18 as the obvious source of the obligation to repay, but in this case there is no clause 10.18 or equivalent, there is no source in the Contract for the repayment obligation, and in consequence, there is no such obligation in existence at all, whether in a force majeure situation or any other non-delivery situation.

39. Secondly, Mr Kulkarni seeks to draw a comparison between the contracts in the two cases and to suggest that the key difference between the two contracts, namely the omission from this Contract of an express repayment clause equivalent to clause 10.18, must have been the product of negotiation between the parties and thus deliberate; it is not a gap to be filled by any process of construction by this Court. This is in essence to make a point on the facts, to suggest a reason why the Contract in this case is different from the Totsa contract.

40. Mr Levey says that *Totsa* is irrelevant in both ways. The construction point is misguided because the Totsa contract was different, it did contain clause 10.18 but there is no analogue of that clause in this Contract. He notes that the two contracts are materially different and argues that in consequence the construction issue raises a materially different question. Further, he says that Andrew Baker J was not asked to consider the possibility that clause 16.6 might *itself* contain the obligation to repay, without need of a counterpart clause such as 10.18, so any conclusion he reached on the meaning of clause 16.6 cannot for that further reason have any possible application to this case. The factual point is simply speculation, says Mr Levey. We have no evidence about why there are differences between the two contracts, specifically why clause 10.18 was included in the Totsa contract but not included in this Contract; we

do not know what occurred during negotiations and whether clause 10.18 or an equivalent was deliberately omitted from the Contract, or if so, why that occurred.

41. In my judgment, Mr Levey plainly gives the right answer to both arguments based on *Totsa*. In relation to the first: the Deputy Judge was right to conclude that Andrew Baker J was construing a materially different contract, in order to answer a different question, set in a different context. He did not consider the same contract or the same arguments as have been advanced here; he did not address his mind to whether clause 16.6 in the Totsa contract itself contained the obligation to repay, yet that is the very issue which arises in relation to clause 14.5 of the Contract. As to the second argument, the two contracts are self-evidently different, but why they are different is unknown. There is no evidence to explain the course of negotiations leading up to the Contract or to explain why a counterpart clause (an equivalent to clause 10.18) was not included – leaving aside for the moment the issue of whether such evidence would, in any event, be relevant or admissible to the question of construction. The reasons for the differences are not explained; this is a matter on which the Court cannot sensibly draw inferences, and the Court will not embark on speculation.

42. *Totsa* is indeed irrelevant to the resolution of this case. It must be put to one side. The Deputy Judge was correct to arrive at that conclusion.

Analysis

43. The Contract is a straightforward bargain for the sale of diesel, albeit one that is clumsily drafted in places, as the Deputy Judge observed.

44. Mr Kulkarni advances two main challenges to the Deputy Judge's construction of clause 14.5. The first is based on the language of the clause. The second relates to the wider commercial context in which the Contract is set. I am content to take Mr Kulkarni's arguments in the same order. The Deputy Judge took the arguments in a different order and for that Mr Kulkarni criticises him, but I see no merit in that criticism, noting that the unitary exercise described in *Wood v Capita* permits flexibility in the order in which these issues are approached.

Language of the clause

45. Mr Kulkarni focuses on the words "nothing herein shall impair", suggesting that they are words of preservation, not creation, that there is no other provision in the Contract which creates the right, so the right does not exist.

46. On a fair reading, and one which a reasonable and informed observer would adopt, the words "nothing herein shall impair" are not the operative words in this clause; they are merely an introduction to what follows, which are the words "the obligations by the Seller to repay to the Buyer the amount of the advance payment … in the event that the delivery of the Product is not made or only partially made due to Force Majeure Event". This is what clause 14.5 is all about, this is its purpose. These are words which confirm that the seller is under an obligation to repay the buyer in force majeure circumstances.

47. The introductory words, as I would characterise them, are not words of limitation at all, they are not intended to cut down or reduce what follows. To read them as words of limitation is unnatural and strained. The more natural reading of that clause is that it

creates and confirms that the seller is obliged to repay the Advance if the goods are not delivered in force majeure circumstances.

48. It follows that I do not consider the words "the obligations to repay…" to be surplusage. Those words are the key words in clause 14.5 and they carry an obvious and clear meaning. If there is any surplusage in the clause, it is in the words "nothing herein shall impair", which, as words of introduction, could have been left out or perhaps more clearly or appropriately worded. These introductory words are, in my judgment, one of several examples of clumsy wording in the Contract.

49. The larger point to be made on surplusage is that if Mr Kulkarni is right, the whole of clause 14.5 is surplus, and could be deleted in its entirety, because on his case its only function is to preserve a right which does not exist. That suggestion offends the presumption against surplusage on quite a grand scale. The Court would take some persuading that an entire clause, particularly one dealing with repayments in the event of force majeure preventing delivery, should be disregarded as redundant. I am not so persuaded in this case.

50. The repayment obligations in clause 14.5 would appear to be two-fold, both obligations arising in the event of non-delivery due to force majeure. They are: (1) to repay the Buyer the amount of the Advance, and (2) to repay any "Outstanding Advance Amount". The term "Outstanding Advance Amount" is not defined in the Contract. It finds some sort of echo in the Comfort Letter which refers at paragraph 5 to the "Outstanding Advance" – this is perhaps an intended cross-reference to the Comfort Letter and perhaps stands as another example of clumsy drafting. But whatever deficiencies there may be in relation to obligation (2), obligation (1) is clearly stated, and free from doubt on any natural, objective reading.

51. Clause 14.5 does not exist in isolation. It is part of a larger clause dealing with force majeure, the purpose of which, Mr Kulkarni submitted, was to 'draw a line' under further obligations in the event that force majeure prevented delivery. Mr Kulkarni emphasised clause 14.3 by which existing obligations to make payment remained enforceable even in the event of force majeure; so, he argued, costs of inspection, taxes and other costs which may already have accrued remained payable. On that analysis, as he accepted, the obligation to pay the Advance under clause 10.1 would also remain enforceable if the Advance was not already paid by the time a Force Majeure Event occurred. But still he maintained in that event there would be no right for the Buyer to recover the Advance. A reasonable person might expect very clear words to express such an uneven contract, and there are no such clear words in this Contract. Further, a reasonable person would surely say that rather than drawing a line, the purpose of the force majeure clause read as a whole is to return the parties to their original, pre-contract positions, so far as that was possible to do. That being the purpose of the clause, the buyer would expect to have the right to claim repayment of money paid by way of advance for goods which had not been delivered for force majeure reasons.

52. Mr Kulkarni's arguments find little support in the words of clause 14.5 or by reference to the purpose of clause 14. I turn then to the wider commercial context.

The wider commercial context

53. In the wider context of a contract for the sale of diesel or indeed for any goods, it would be surprising not to find a provision requiring repayment of money paid in advance, in the event that delivery of the diesel or other goods does not take place. This was the point which carried most weight with the Deputy Judge and which he expressed to be his starting point. Any reasonable and informed person coming to this Contract might well adopt the same starting point; the construction suggested by Mr Kulkarni is very surprising, when its commercial consequences are understood.

54. To answer that point, Mr Kulkarni invokes the Comfort Letter, suggesting that the repayment obligation in the event of non-delivery fell on the Refinery. Mr Levey's answer, which was accepted by the Deputy Judge, was that the Comfort Letter was of no real, commercial assistance to Nord Naphtha at all: it had expired by the date the Contract was terminated; but even when it was extant it was practically worthless given that it was revocable at will by the Refinery in the event that delivery or shipment could not be effected due to circumstances beyond the Refinery's or New Stream's control – which are precisely the circumstances which in fact arose. To this, Mr Kulkarni answers that whether or not the Comfort Letter was a good deal for Nord Naphtha is irrelevant to the construction question – even if it was not a good method of protection it was the agreed one.

55. Mr Kulkarni is right to say that parties have freedom to contract as they wish. But in my judgment, Mr Levey (and the Deputy Judge) are obviously right that the Comfort Letter offered no real comfort to Nord Naphtha in the event that delivery failed in force majeure circumstances. The Comfort Letter was commercially worthless, and obviously so.

56. So the focus returns to the Contract itself. It does not make any business sense for a buyer to enter into a contract which lacks a right of repayment of the advance in force majeure circumstances. It offends business common sense and ordinary common sense: no reasonable buyer would put the Advance at risk in that way.

Conclusion

57. I conclude that the reasonable person reading clause 14.5, armed with the information available to New Stream and Nord Naphtha as they entered the Contract, would have no real doubt that that clause provided Nord Naphtha with a right of repayment of the Advance in the event of non-delivery for force majeure reasons. The right is expressed by that clause, in words which are clear enough when read objectively.

58. I do not consider the clause is reasonably open to conflicting interpretations. But if I am wrong about that, then I am sure that the construction which is consistent with common sense and the wider commercial context is that advanced by Nord Naphtha, and upheld by the Deputy Judge.

59. I do not in the circumstances need to consider the alternative of an implied term.

60. I would dismiss this appeal.

Lord Justice Dingemans:

61. I agree.

Lord Justice Newey:

62. I also agree.