TRANSCRIPT OF PROCEEDINGS

[2020] EWHC 193 (Comm)

Ref. CL-2020-000003

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL)

Rolls Building
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE HENSHAW

TANSY SHIPTRADE INC (Applicant)

- v -

ELEMENTO LIMITED (First Respondent)
RICHARD ROTHENBERG (Second Respondent)

MR N JACOBS QC and MR M DAVIDSON appeared on behalf of the Applicant
MR J COLLINS QC appeared on behalf of the Respondents

JUDGMENT
27th JANUARY 2020, 09.31-10.35
(AS APPROVED) (REISSUE1)

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MR JUSTICE HENSHAW

Introduction

1. I heard on Friday afternoon an urgent application by the first defendant, Elemento Limited, for consent for the sale of a cargo of crude oil from Venezuela, which is the subject of an injunction granted by His Honour Judge Pelling on 7 January and varied on 14 January. The cargo appears to be worth of the order of US$100,000,000 and is now at or off Singapore.

2. After hearing argument from counsel to both parties, I indicated that the application was refused. In order to accommodate counsels' availability, I agreed to defer giving my reasons until 9.30 am on Monday morning, ie, until now. I have decided to give a moderately full judgment, in case it is of assistance to the parties or any judge hearing further applications in this matter.

3. Elemento's application is for paragraphs 2 and 4 of the court's order of 14 January to be amended to allow Elemento to conclude a contract for the sale of the cargo currently on the MT Respect to Beaconsfield Commodities Trading AG, which I will call Beaconsfield, on the terms set out in the attached draft sale contract, and for amendment to the order to allow €12 million to be paid directly to the owners of the MT Respect, with the remainder to be paid into an escrow account or into court.

4. A form of draft sale contract appears not, in fact, to have been attached to the application notice. One version, I believe, was sent to the claimant's solicitors on 17 January, along with other offers for the cargo, but the terms were revised and the current version was provided to the claimant's solicitors, I believe, a day or two before the hearing on Friday. I will revert later to the court's 14 January order, which itself amended an order of 7 January, but the gist of it was to prevent any disposition of the cargo or related bills of lading without agreement or the court's approval.

Background facts

5. The claimant/applicant, Tansy Shiptrade Inc, whom I shall call Tansy, is a company incorporated in the Marshall Islands. Georgios Fournaris is the sole director of Tansy and is represented by his agent and former ship manager, Times Navigation Limited, of which Mr John Karageorgis is President

6. The first defendant/respondent, Elemento, is a company incorporated in Malta, with offices in Malta and London. It was the subject of a worldwide freezing order, granted by Teare J on 19 July 2019 and continued by Popplewell J on 10 August 2019, in the case *Delta Kanaris Special Maritime Enterprise and Delta Harmony Special Maritime Enterprise -v- Elemento Limited* [2019] EWHC 2875.

7. The second respondent/defendant, Mr Rothenberg, is an American citizen, resident in London, who is the chief financial officer of Elemento.

8. Mr Rothenberg gives some further detail about Elemento, explaining in his first affidavit that the company was incorporated in October 2016 and between then and February 2019 carried out trades as part of a joint venture with Castleton Commodities International (CCI), a major US commodities trader. Mr Rothenberg says that in February 2019, CCI had

to cease its involvement in Venezuelan trades, as a result of the implementation of US sanctions against Venezuela. He says that since incorporation, Elemento has done 38 oil trades, including current trades, of which 25 were carried out through the Elemento/CCI joint venture. Since that venture has been dissolved, he says Elemento has done 13 more trades on its own.

9. Elemento points out that Tansy itself is a paper company, with no substantial assets or experience of oil trading, although it is fair to add that its ultimate principal, Mr Karageorgis, appears to be experienced and established in the shipping business.

10. In his first affidavit, Mr Horn, the solicitor for Tansy, sets out Tansy's account of the background events leading up to the present application. He said that on 22 July 2019, which is shortly after the without notice freezing injunction was made against Elemento, Mr Alessandro Bazzoni, on behalf of Elemento, met with Mr Karageorgis and a Mr Donald McTaggart on behalf of Tansy, at their offices in Athens. On Tansy's case, the discussion went along the following lines.

11. The subject matter was the purchase of oil cargos from Petroleos de Venezuela SA (PDVSA), the Venezuelan state owned oil company, for onward sale for profit. Mr Bazzoni said Elemento was unable to lift further PDVSA cargos, because Elemento had already purchased many cargos from PDVSA, although further details were not given.

12. Mr Bazzoni said he had a pre-existing business relationship with PDVSA and was able to arrange the purchase of oil cargos from it. He was looking for partners who could buy such cargos. He asked whether Mr Karageorgis could supply an active company with a track record, which could be presented to PDVSA and approved by PDVSA as a future buyer of cargos on credit terms. Mr Karageorgis said he knew of a company, Tansy, which had previously been the owner of a vessel under the management of Times Navigation Limited and had established banking relationships. Mr Bazzoni proposed that Tansy could purchase cargos on credit from PDVSA and sell them on for profit.

13. On Tansy's case, it was agreed that Tansy and Elemento would share the profits equally. Mr Bazzoni said he would need all of Tansy's corporate documents in order to obtain PDVSA approval for the sale of cargos to Tansy. No written agreement was concluded.

14. Mr Bazzoni, in his first affidavit, sets out Elemento's version of the agreement reached, which differs from Tansy's in significant respects. He says the agreement would not have made commercial sense for Elemento, unless Tansy was providing capital for the transaction and/or shipping services. He says the agreement was that Mr Karageorgis and Elemento could and had authority to use Tansy individually to buy and sell oil, at their discretion. Tansy could also be used by Elemento and Mr Karageorgis for joint trades, in which case the profits would be split equally between them, on the basis of the amounts they had each put into the transaction.

15. Mr Bazzoni says that, on the basis of the agreement reached, he understood that he did not tell Mr Karageorgis or other Tansy representatives that Tansy was being used, if Tansy was not providing any of the finance or shipping services for the transaction, as was the case with the current cargo, ie, the MT Respect cargo. He said Mr Karageorgis told him to use

Tansy as if it were his own, and did not give any impression that Elemento had to seek further approval from Mr Karageorgis to use Tansy.

16. At any rate, on 23 July 2019, following that meeting, Times Navigation sent all of Tansy's corporate documentation to Mr Bazzoni, and Mr Horn says he has been told by Mr McTaggart that Mr McTaggart also personally delivered Tansy's original corporate documents to Mr Bazzoni in London at his request.

17. Continuing Mr Horn's account of events, he says on or around 23 December 2019 Messrs Karageorgis and McTaggart were notified by Tansy's agent in Venezuela of the existence of a blog post in the Spanish language. The translation provided in Mr Horn's evidence says:

> "The report tells how Nicolás Maduro's son, "Nicolacito", informed the president of [PDVSA] that the Tansy Trading company would send the MT Respect ship from Cape Town, South Africa, to the port of Jose, Venezuela, to load a VLCC tanker with two million barrels of Zuata 300 and Merey 16 crude. The Venezuelan president's son reported that Tansy Trading would pay in deferred open account, which generates internal reactions among uninformed officials, who demand full payment before loading the ship. Maduro's response was blunt, calling to order that the MT Respect ship be loaded immediately and that they forget the payment".

I should say that Elemento questions the reliability of that account.

18. After the information came to Tansy's attention on 23 December, it contacted its agent in Venezuela and was sent copies of three bills of lading in relation to the cargo on board the vessel, one of which showed the shipper as Tansy and the consignee as Swissoil Trading SA, and two of which showed PDVSA as the shipper and Tansy as the consignee. Mr Horn says this was the first time Tansy became aware of these shipments, not having previously been contacted by anyone on behalf of Elemento about it. He says Tansy became concerned that it had been named as shipper for such very large cargos of oil shipped from Venezuela and potentially faced liability to PDVSA for the cargos and to the vessel owner in respect of freight.

19. Investigations into Swissoil Trading SA, named as consignee in one of the bills, apparently revealed it to be associated with Elemento and Mr Rothenberg. Mr Horn says he was told by Mr McTaggart that Mr Rothenberg had said Swissoil was a company associated and/or controlled by Mr Bazzoni. That is disputed by Elemento. It is, I think, common ground that a Mr Philipp Apikian is a or the director of Swissoil Trading SA.

20. The vessel itself is a crude oil tanker owned by Skyline International Incorporation and commercially managed by NGM Energy SA.

21. Tansy contacted Mr Rothenberg on or around 23 December 2019 and the parties arranged to meet in Athens on 24 December. On 24 December, Mr Rothenberg, on behalf of Elemento, and various representatives of Tansy, including Mr Karageorgis, met in Athens to discuss and resolve the issue and Mr Horn says he participated in part of the meeting by telephone. At the meeting, an agreement was entered into in writing between Tansy and

Elemento and guaranteed, in part, by Mr Rothenberg. The text of the agreement is as follows:

> "MT RESPECT
>
> We refer to the cargo onboard the above vessel loaded on or about 25th November 2019 at Jose Offshore SPM and in respect of which bills of lading (the Issued Bills) were issued without your knowledge, permission or authority, naming you as consignee (the Cargo). We are the charterers of the vessel.
>
> Bills of Lading in which you have been named as the shipper of the cargo and which purport to name a third party as consignees have also been issued upon our request and signed by the master of the Vessel, but that these Bills of Lading (Further Bills) were also issued without your knowledge, permission or authority. You have accordingly threatened to take action against the ship and cargo in South Africa where she is due to call for bunkers and for samples to be taken.
>
> Accordingly, and in consideration of your agreeing not to take action against the Vessel and/or Cargo when she calls in South Africa resulting in her detention, we confirm:
>
> (1) That you have been named as consignee in the Issued Bills and are represented to be the legal owner of the Cargo;
>
> (2) The Further Bills are void and of no effect;
>
> (3) The only valid Bills relating to the cargo are the Issued Bills;
>
> (4) We will deliver to you all originals of the Further Bills at your address or to your nominated agent as soon as possible but not later than 29th December 2019. We will also provide copies of all the Issued Bills and Further Bills as soon as possible;
>
> (5) We undertake not to give any instructions to the Vessel without your consent and confirm that we will inform the owners and masters in copy to you of this;
>
> (6) We indemnify you and hold you harmless in respect of any and all consequences arising out the issue and existence of the Issued Bills and the Further Bills.

> We agree to try to resolve all disputes with you on or before the arrival of the vessel in Singapore and to remove you from the transactions relating to the Cargo.
>
> This agreement is governed by English Law and shall be subject to the exclusive jurisdiction of the High Court of Justice in England."

It is then signed by Mr Rothenberg on behalf of Elemento and Mr Rothenberg also signs as guarantor of paragraphs (1) to (5) of the agreement.

22. Shortly after the agreement, Mr Rothenberg sent an email to Mr Moundreas, who is understood by Tansy to be an employee of the managers of the vessel, indicating that the charterers, ie, Elemento, were in a dispute with Tansy and, without prejudice to Elemento's position in that dispute, the charterers would not give instructions to the vessel without their consent for the time being, whilst they took steps to resolve the dispute.

23. Mr Horn says that by Sunday 29 December, Tansy had not yet received original bills of lading as required by the 24 December agreement or copies of the bills of lading.

24. On 29 December 2019, Mr Horn received an email from Ms Tattersall of Holman Fenwick Willan, solicitors for Elemento, which, amongst other things, indicated that the cargo had been purchased by Tansy's agent for Elemento under a recap between Tansy and PDVSA; under that recap Tansy, as agent for Elemento, agreed to discharge the liability of PDVSA to a third party in exchange for the cargo; that liability had not yet been discharged, but would be discharged by Elemento shortly; and the email said bills of lading were issued naming Tansy as shipper and consigned to the order of Swissoil.

25. Ms Tattersall's email also included the statement that Elemento confirmed that PDVSA would confirm to Tansy in writing that the recap had been terminated, and would provide written confirmation that Tansy has no liability whatsoever to it in relation to the cargo or the recap. It was said that PDVSA had recently told Elemento that it was happy to reissue the bills of lading with no references to Tansy and that Swissoil would be the stated shipper and consignee. Further, PDVSA had said it would provide written confirmation to Tansy that the original bills of lading were null and void and had no legal effect, and that Tansy had no liability to it under them.

26. The email also included an assertion that the 24 December agreement had been entered into under duress, although that assertion has subsequently not been maintained. The email further indicated that the original bills of lading were currently being couriered to Elemento from Venezuela.

27. On 30 December, Mr Horn says he chased Holman Fenwick Willan for a response and, that in response, some further bills of lading were sent to Tansy. These included copies of three bills apparently signed by the Master, naming the shipper as Tansy and the consignee as Swissoil, relating to one cargo and a set of bills in relation to another portion of the cargo, again naming the shipper as Tansy and the consignee as Swissoil. In addition, there were copies of unsigned bills of lading in relation to portions of the cargo, naming PDVSA as shipper and Tansy as consignee.

28. Mr Horn replied on behalf of Tansy indicating, amongst other things, that Tansy did not accept that Elemento had title to the cargo, that the bills signed on behalf of the Master identified Tansy as consignees and that there was nothing to suggest that Tansy acted as Elemento's agents: on the face of the bills of lading, they were principals. Mr Horn asked for a copy of the recap or sale contract in which Tansy was named as the purchaser of the cargo; and Mr Horn's email also indicated that Tansy would require that PDVSA be paid the contractual purchase price for the cargo, in accordance with the terms of the Tansy contract, and that the agreements with them were otherwise honoured. That was, he said, the best way of dealing with potential liability to PDVSA, namely to ensure the contract was performed.

29. Ms Tattersall then emailed to Mr Horn copies of two recap contracts. The first one was dated 6 September and 4 October 2019, naming Tansy as the buyer, but addressed to Philipp Apikian, who, as I have noted, is a director of Swissoil Trading SA. The recap was expressed to be governed by Venezuelan law. There was also a second recap contract, also naming Tansy as buyer, but addressed to Mr Apikian, and then on 31 December a further bill of lading signed by the Master was sent to Tansy by its Venezuelan agent, naming as Tansy as shipper and made out to the order of Swissoil Trading as consignee.

30. The skeleton argument of counsel for Tansy includes a table listing the bills of lading that have been produced. These are four bills of lading of various dates and relating to various portions of the cargo, each naming Tansy as shipper and Swissoil as consignee. Those are the "further" bills of lading referred to in the 24 December agreement. In addition, there are two bills of lading relating to portions of the cargo, naming PDVSA as shipper and Tansy as consignee. Those are referred to as the "issued" bills in the 24 December agreement.

31. Mr Horn explains that on or around 2 January 2020, Mr McTaggart travelled to Venezuela to meet Tansy's Venezuelan lawyer, who had met with the vice-president of PDVSA in relation to the cargo. He had been informed that PDVSA expected payment from Tansy and that there was no way of releasing Tansy from its contractual obligation. The only possibility of altering the bills of lading, he had been told, would involve a procedure that would take at least four to six weeks. Tansy's Venezuelan lawyer was also told, according to this evidence, that Elemento had been blacklisted by PDVSA for not paying for cargo which had been lifted and that criminal charges had been brought in Venezuela against Elemento for its failure to pay for cargos. That evidence is strongly disputed by Elemento.

32. In his fourth witness statement, Mr Horn refers to another discussion with PDVSA. He refers to a meeting at PDVSA's offices at Caracas on 16 January and attaches an attendance note from a solicitor from his firm. The upshot of that meeting is said to have been that Tansy was considered to remain liable to PDVSA and that no new recaps had yet been issued. Tansy's representative says he was told or learned, from the PDVSA computer files in relation to the shipment, that those files contained no references to the cancellation of the recaps or the replacement or substitution of Tansy.

33. Mr Horn's first affidavit seeking injunctive relief from His Honour Judge Pelling expressed Tansy's concern that if relief were not granted, it was likely that Tansy would be deprived of its right to receive the cargo on board the vessel pursuant to the bills of lading, but would be left facing a claim from PDVSA in Venezuela and would not have received any of the sale proceeds to satisfy that claim.

34. Mr Horn also makes reference to the judgment of Popplewell J, to which I made reference earlier in this judgment, in the *Delta Kanaris* case. That was a claim by the owners of two Suezmax tankers which had been voyage chartered by Elemento to carry cargos of oil from Venezuela to a range of ports under charterparties. There was a claim against Elemento for demurrage and the main issue which Popplewell J considered was whether there was a risk of dissipation justifying the maintenance of a freezing order. The judge concluded that there was solid evidence of a real risk of dissipation, in the sense that Elemento would misuse corporate structures such that assets to which it was or became entitled may no longer be held in its own name when the owners sought to enforce a judgment.

35. Popplewell J reached that conclusion, because of the cumulative effect of a number of factors. The first was that, as he put it at paragraph 11 of his judgment, Elemento had not been straightforward with the owners or the court in relation to its failure to pay the demurrage which was admittedly due since mid-June. As part of the discussion of that issue, Popplewell J provided a little more detail about Elemento. He said, that according to Mr Rothenberg and Mr Bazzoni, the entire shareholding of Elemento was acquired in February 2017 by CISA Holdings Limited, another Maltese company, which they said was beneficially owned via a chain of intermediate companies and a Panamanian foundation, by a Mr Ricardo Cisneros, a member of what is said to be a wealthy Venezuelan family with extensive commercial interests. Their evidence was that since then, Mr Bazzoni had not been a director, manager or employee of Elemento, but rather a consultant who assisted sometimes because of his knowledge of the Venezuelan market. It is said, in that evidence, that the company's business was run from Caracas by a Mr Galindez who was, with Mr Rothenberg, one of the two directors of the company. Popplewell J added, at paragraph 14, that Elemento's only specifically identified business in the period since February 2017 had been four trading transactions buying and selling petroleum products. Elemento was, on its own evidence, a trading company without substantial fixed assets.

36. The second factor to which Popplewell J had regard was that, in his words, Elemento had not been straightforward with the owners or the court over disclosure of its assets. At paragraph 25, Popplewell J said there was real cause for concern that that lack of straightforwardness was the result of deliberate obfuscation and concealment.

37. The third factor was that Elemento had not been straightforward with the owners or the court in relation to its dealings with the cargos on board the owners' vessels that formed the subject matter of the dispute.

38. The fourth factor was that there was cogent evidence that Elemento personnel, including Mr Rothenberg, Mr Galindez and Mr Bazzoni, had shown a willingness in the past deliberately to misuse corporate structures to suit their commercial advantage. The judge referred to a transaction involving a company called Cinque Terre Financial Group and said that company's name was used without the knowledge or consent of its liquidator. As part of the discussion, Popplewell J referred to Mr Bazzoni as a man who clearly has the ability to conduct Elemento's affairs and has shown a willingness in the past deliberately to misuse corporate structures to suit their own commercial advantage.

39. Elemento's evidence in the present case makes the point that that injunction was later discharged after Elemento paid the full amount of demurrage in the sum of €12.6 million to which it related and liability for which it had never disputed.

40. Elemento's evidence as to the background to the present case includes the evidence in Mr Rothenberg's first affidavit that Elemento understood that it had Tansy's permission to "use" Tansy to enter into Venezuelan oil trades; and that PDVSA would not receive cash, but instead, the cargo was provided in exchange for payment by the buyer under the recaps of a debt which PDVSA owed to a third party (unidentified), payment to be made in Euros. That evidence is however disputed by Tansy, see the second affidavit of Mr Horn.

41. Mr Rothenberg also made the point that whilst Tansy is named as the buyer under the recaps, they are addressed to Mr Apikian of Swissoil, who Mr Rothenberg says are Elemento's brokers but not linked to Elemento. He says Elemento has been taking steps to have Tansy removed from the transaction, as agreed in the 24 December agreement.

42. Mr Rothenberg gives evidence that Tansy is not liable to PDVSA under the recaps for the oil price, because two performance bonds were provided, ostensibly on Tansy's behalf, by a Venezuelan insurance company, Zuma Seguros CA. He exhibits these in their original Spanish language. It appears the bonds are denominated partly in US dollars and partly in Venezuelan bolívar. Mr Rothenberg says those bonds were, in turn, guaranteed by Elemento itself under documents which he also exhibits in the Spanish language.

43. Finally, by way of background, Mr Rothenberg says that Tansy's principal, Mr Karageorgis, was reported to have been arrested for fraud in Greece in 2016, pursuant to an international arrest warrant issued by Dutch authorities. Tansy's evidence is that that warrant was withdrawn and that there are no pending charges or other proceedings against Mr Karageorgis.

44. On 7 January 2020, on a without notice application by Tansy, His Honour Judge Pelling granted an injunction requiring Elemento and Mr Rothenberg to deliver up to Tansy's solicitors all original bills of lading, to be held pending further order of the court and not without Tansy's consent to give any instructions to the master or owners of the vessel concerning the cargo, nor to use Tansy's name in any dealings.

45. Following an on notice hearing on 14 January, His Honour Judge Pelling made an order varying the 7 January order. The 14 January order recited that it was made upon hearing counsel for both parties and that it was pursuant to the 24 December agreement and the definitions of "Issued" and "Further" bills of lading referred to there. The order maintained in force the key provisions of the 7 January order, subject to variations. Paragraph 4 of the order provided that neither party should sell the cargo without the consent of the other, such consent not to be unreasonably withheld nor in breach of sanctions. Paragraph 4 went on to provide that the terms of any such sale shall provide that the sale proceeds are to be paid into the account of an escrow agent, the identity of whom shall be agreed by the parties or, failing such agreement, into the court funds office: save to the extent that the parties agree and provide joint instructions in writing that the buyer can discharge certain specified liabilities relating to the vessel. Further provisions were included for the working out of that order.

46. Turning to the current situation, the evidence from Elemento explains that Swissoil, as agent for Elemento, has received several offers for the cargo and sent them on to Tansy's solicitors, recommending the offer received from Beaconsfield. Mr Bazzoni, in his second affidavit, says the price, which is Brent minus $12.50 a barrel, is good and in line with an offer Tansy says it had received. Mr Bazzoni says Beaconsfield is willing to pay €12 million direct to the shipowner to part pay the freight. He says the cargo will be discharged into

floating storage with title transferred to Beaconsfield; that Beaconsfield will grant Swissoil a formal contractual lien over the cargo as security for the rest of the price and will agree the cargo will remain in the storage tanks until the full price has been paid. Beaconsfield will also offer a lien over another cargo of about one million barrels of oil on the MT Euroleader.

47. Mr Bazzoni says Beaconsfield is a respectable company, and provides details of cargos he says it has in transit, its corporate structure, accounts and audit report for the year ended 28 February 2018, though not the year ended 2019. Beaconsfield itself has net assets of only about 60,000 Swiss Francs, though its group as a whole, of which it is the head company, has net assets of about eight million Swiss Francs. It is not suggested, however, that Beaconsfield would be able to buy the cargo outright without third party financing.

48. Mr Bazzoni states that letters of credit can no longer be obtained for trades involving Venezuelan cargos or trades involving PDVSA due to US sanctions. Venezuelan oil transactions cannot be purchased in US dollars or pass through the US banking system, which, Mr Bazzoni says, curtails the availability of letters of credit. He states that trades of Venezuelan cargos, therefore, involve the discharge of the cargo and to the passing before most of the price is paid, with security in the form of a lien and/or the buyer's agreement not to sell the cargo until the price is paid.

49. Further information is given in the second witness statement of Vanessa Tattersall, a partner in Elemento's solicitors, Holman Fenwick Willan, dated 24 January, ie, the date of the hearing before me. That statement includes various points to which I shall refer shortly. One of these is that PDVSA has now sent to Tansy: (a) an email stating that it is exercising its right under Venezuelan law to terminate the recaps with Tansy; and (b) a letter from an external consultant, a Mr Roberto Layba, reportedly on behalf of PDVSA, stating that the Tansy/PDVSA sale receipts have been cancelled under Article 1168 of the Venezuelan Civil Code; and that:

> "PDVSA, due to the breach of the obligation in the negotiation, has been released, both upon the delivery of the product as of any other commitment and can issue a new recap to any company that comply with the requirements and conditions of the new sale".

Ms Tattersall adds that PDVSA has now sold the cargo to Swissoil under new sale recaps and issued provisional invoices to them for it.

Analysis

50. The starting point is that applying the *American Cyanamid* approach, when granting or continuing the injunction the court has to consider, first, whether the claim raises a serious question to be tried, in other words whether the claimant has a real prospect of succeeding at trial. His Honour Judge Pelling has already considered that issue, based on the evidence before him and, in any event, I consider there to be an arguable case that Elemento has, in breach of contract, exposed Tansy to liability and/or must account for a share of profits from the transaction. It is arguable that such agreement as was reached in July 2019 did not authorise Elemento to enter into transactions purportedly in Tansy's name without Tansy's approval or even informing Tansy at all. But it also seems arguable that in circumstances where Elemento has done so, it is open to Tansy to ratify the transaction and seek whatever share of profit, if any, as was agreed at the July meeting. That is, in itself, a matter of

disputed evidence, but it seems arguable that Tansy would have been unlikely to have allowed contracts to be made in its name without any form of remuneration, even if it did not make a financial contribution to the transaction in question.

51. Secondly, the court has to consider where the balance of convenience or balance of justice lies, including whether granting or withholding the proposed variation (in this case) to the existing injunction, is more likely to produce a just result, and generally which course appears likely to cause the least irredeemable prejudice to one party or the other. Here, His Honour Judge Pelling has to date concluded that the appropriate balance lies with preserving the cargo or its proceeds on the basis that it should not be released unless any proceeds are agreed to be paid into an escrow account or into court. Counsel for Elemento accepted in the hearing before me that it was important that the proceeds of any sale be paid into an escrow account.

52. Applying these considerations to the facts currently before me, Elemento first of all makes the point that as Tansy is seeking to enforce the 24 December agreement, which was for Tansy to be extricated from the transaction, it is inconsistent for Tansy to assert any right to sell or otherwise deal with the cargo.

53. However, even leaving aside Tansy's claim for a share of profits, Tansy may well still be exposed to liability for PDVSA and the shipowner as a result of Elemento's actions purportedly taken in Tansy's name. The existence of the two performance bonds backed by guarantees from Elemento and of the new recap agreements provide limited comfort, because: (a) the performance bond would not relieve Tansy of liability to PDVSA, but merely provide an alternative target; (b) the fact that they are issued by the Venezuelan insurance company and denominated partly in US dollars and partly in Venezuelan bolívar (which is said by Tansy at least to be a volatile currency) limits their real value; (c) even if new recaps have been issued between PDVSA and Swissoil, with PDVSA's authority, in the absence of an express release from PDVSA in favour of Tansy there must be real doubt about whether Tansy is relieved from liability: the evidence I have mentioned of Tansy's contacts with PDVSA suggests that, at least as at those recent dates, PDVSA considered Tansy to have a liability; and (d) the letter sent by Mr Layba, even if sent with PDVSA's authority, which is presently unclear, does not state in terms that Tansy is absolved of liability.

54. Elemento says Tansy or its principals have no real exposure because Tansy has no substantial assets. I do not accept that submission. From Tansy's point of view as a corporate entity, the exposure is real. From its principals' point of view, there is a risk of reputational damage, including to their creditworthiness in the shipping business in which they operate. In addition, that submission does not address Tansy's case for a profit share advanced in its amended claim form, albeit: (a) that has apparently not yet been served, and (b) it does not assert a claim to title to the cargo but only a share of any profit.

55. There is a concern about demurrage and other liabilities continuing to accrue. Elemento says demurrage accrues at $120,000 a day under the charterparty and amounts up to $600,000 to date, following the tender of notice of readiness on 19 January. That is the rate under the voyage charter between a company called Elisia and Elemento. Tansy's evidence calls into question the genuineness of that charter, making the point that the freight rate appears to be about double what an independent expert has indicated would be expected. Tansy says it has asked to see the head charter, but I was told that that request was refused by the shipowner, and it is not in evidence.

56. So far, therefore, I consider the balance of justice continues to lie with the approach taken by His Honour Judge Pelling in his order of 14 January, which envisages the cargo being released only against payment of the proceeds into an escrow account. The question is whether the terms of the proposed sale to which the court is invited to give its consent provide a reasonable basis for believing that it will result in the sale proceeds being paid into escrow, or whether in fact it creates a significant risk of both the cargo and its proceeds disappearing.

57. The terms of the latest draft sale contract differ somewhat from the draft previously provided to Tansy and include a number of features of concern, as follows.

58. First, the draft contract provides for the cargo to be delivered not to storage tanks, but "*STS Malaysia*", i.e. ship to ship. Elemento's counsel said that expression can also refer to transfers to floating storage, but what the court is asked to approve is the draft contract put forward, and the reference to STS would permit transfer of oil to another vessel or vessels, which could then set sail with the cargo.

59. Secondly, even if the cargo were put into storage tanks, the location proposed by Elemento in correspondence appears to be Beaconsfield's own tanks, ie, "*the buyer's floating storage facility in Malaysia*". In those circumstances, it is unclear what, if any, real practical effect any contractual lien would have. Beaconsfield would have title to the oil and control of it, before having paid.

60. Thirdly, the previous draft sale contract provided for risk and title to pass on completion of discharge. Risk and title are now to pass immediately before discharge. On either approach, Beaconsfield would obtain title to the oil before payment of the price.

61. Fourthly, the previous draft sale contract provided for payment on completion of discharge. The current version provides for payment within two days after completion of discharge. That would provide a clear window of opportunity for the cargo to be transported out of reach.

62. Fifthly, the clause on risk and title reads as follows:

> "Risk and title shall pass to the buyer at discharge port immediately before discharge. After title is transferred to the buyer, the buyer will ensure that it retains title to the cargo and that the cargo is charged in favour of the seller to support its obligation to pay the purchase price, with that charge only being released on the seller receiving payment for the cargo. Subject to change on basis of discharge arrangements and if applicable to be mutually agreed".

63. As a result:

(a) Beaconsfield is free, not only to obtain the cargo before paying the price, but to onsell it;

(b) the latest evidence from Elemento in Ms Tattersall's second witness statement says Beaconsfield has orally agreed, and been asked to confirm in writing, that it would not move the cargo from the storage tanks until April, but that forms no part of the

proposed contract terms currently before the court, and would be likely to be of little comfort as title would pass to Beaconsfield, which it is not a party to the proceedings;

(c) the security for the price would depend on Swissoil, as seller, which is a company not before the court, nor on Elemento's case controlled by Elemento, enforcing its rights against Beaconsfield;

(d) there would be the problem of how to avoid admixture, which might defeat any lien;

(e) if Beaconsfield were to onsell before paying the price to Swissoil, then the security would also depend on Beaconsfield choosing to enforce its retention of title rights against the purchaser, whose identity is as yet unknown, and Beaconsfield being successful in doing so and then returning the cargo or its proceeds into the custody of the escrow agent;

(f) all of this also potentially depends on both the contractual lien and the retention of title provision being legally binding, including complying with any necessary registration requirements; any retention of title provision seems likely to be governed by law other than English law;

(g) the provisions are, in any event, said to be subject to change and apparently could therefore be varied by agreement between Swissoil and Beaconsfield.

64. So far as concerns the proposed lien over the separate Euroleader cargo, at present there are no documents in evidence showing the existence, value, title to or encumbrances over the cargo and it is also unclear how Tansy could attempt to enforce any such lien. Moreover, the evidence of Mr Horn in his sixth witness statement, served on the day of the hearing before me in response to Ms Tattersall's second witness statement, is that Equasis reports indicate that the vessels Beaconsfield is said by Mr Bazzoni to have in transit are managed by Eurotankers. A director of Eurotankers, Mr Gupsis, has according to Mr Horn told Tansy's principal, Mr Karageorgis, that none of those vessels, including the Euroleader, is laden with cargo and that Beaconsfield has failed to pay the upfront rates due. That information, albeit hearsay, may cast some doubt on the reliability of Beaconsfield as a counterparty to the sale agreement.

65. As regards the proposed payment of freight direct to the shipowner, Ms Tattersall explains that Beaconsfield has provided written confirmation that it would make this payment, although that is not part of the draft contract terms currently proposed: albeit there may well be force in Elemento's point that unless the freight were paid, the cargo would not, in fact, be discharged. There is though some lack of clarity about the sums due to the shipowner, as opposed to the disponent owner, given that Tansy has been unable to see the terms of the head charter. I have already mentioned the point that the freight rate is, according to Tansy's evidence, suspiciously high.

66. As regards the question of sanctions, the parties have put forward evidence, including in Mr Horn's fifth and Ms Tattersall's second witness statement. Counsel for the parties broadly agreed before me that the sanctions issue is most critical at the next stage, in other words how to dispose of the sale proceeds once received, rather than in relation to the proposed sale itself.

67. Tansy has indicated that it considers a sale to Beaconsfield might properly be made, subject to any outstanding question over price, provided that the following three conditions were satisfied:

(a) that the cargo be discharged into identified storage tanks not owned or controlled by Beaconsfield;

(b) that the tanks are empty to begin with to avoid any admixture; and

(c) that the cargo is released, and title passes to Beaconsfield, only when payment has been made in full and joint authorisation has been received from Tansy, Elemento and Beaconsfield.

Those do not strike me as unreasonable proposals.

68. Finally, Elemento says Tansy has produced no realistic alternative offer to date, although Tansy's latest evidence indicates that it is working on another proposal. Elemento's preliminary investigations suggest that may be from an unsuitable counterparty. Elemento says if there is no better alternative, then the proposed sale to Beaconsfield should proceed. However, I am not satisfied on the present evidence that that stage has been reached.

69. Considering the overall balance, if this application is refused, further demurrage liabilities will accrue until an acceptable arrangement has been found. However, if it is granted, then in my judgment there is a risk of complete dissipation of the cargo and the sale proceeds. The proposed sale transaction is a very long way from a more conventional sale involving cash payment or a letter of credit in place; and I consider the risks involved in the current proposed transaction to be augmented by the doubts about Elemento arising from the manner in which this transaction was brought about, as I have described, as well as the judgment of Popplewell J in the *Delta Kanaris* case.

Conclusion

70. In conclusion, I refuse the application, because for the reasons I have given I am not satisfied that the terms of the proposed sale contract will ensure that the cargo sale proceeds are paid into the escrow account as envisaged by the 14 January order of His Honour Judge Pelling.

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

This transcript has been approved by the Judge